Submission on Popular Vote on the topic of Marriage
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I would like to make the following submission to the **Inquiry into** "**The matter of a popular vote, in the form of a plebiscite or referendum, on the matter of marriage in Australia".** I do so, of course, in my personal capacity and not as a representative of the University or School where I teach and research. Many of these comments have previously been posted at a blog that I write, but as they fall on the topic the Inquiry is investigating I thought that they might be of interest.

The debate on same sex marriage in Australia has changed dramatically in recent days. The current Liberal and National Party Coalition Government went into the last Federal election promising to maintain the definition of marriage as between a man and a woman. Subsequently some members of the Liberal Party indicated that they were personally in favour of recognizing same sex marriage. (As previously noted here, in Australia at the moment it is clear that change in this area will have to come either from the Federal Parliament or through change to the Commonwealth Constitution in some way, as the High Court of Australia has made it clear that States and Territories cannot over-ride the Federal law on the matter, and that court is not at all likely to find an "implied constitutional right" to same sex marriage as was done recently by the US Supreme Court in the *Obergefell* decision.)

In response to pressure from the members of his own party, the Prime Minister, Tony Abbott, who has long signaled his desire to maintain traditional marriage, called a meeting of the party room to discuss whether or not members of the Coalition should be given a "conscience vote" on the issue.

The result of the recent Coalition party meeting was that, by a 2/3 majority, the meeting voted to maintain support for traditional marriage as formal part of party policy.

Following the meeting, however, the Prime Minister announced that, at some stage in the future, the Coalition would undertake to hold a broad public vote to determine the extent of support for change in the Australian community. Some matters are still unclear, however. The timing of such a vote is uncertain: would it be prior to the next Federal election? Held at the same time? Following the election? In particular, there is ongoing debate over the legal form such a vote would take. The main choices seem to be between a referendum and a "plebiscite".

There are important differences between these two options. A **referendum** is the means by which the Australian Constitution is amended, under s 128. (As this excellent review piece by electoral commentator Anthony Green notes, the word "referendum" is not used in the Constitution, but the word, in the Federal sphere at least, has come to be applied to the s 128 process). Procedures for setting and arguing a referendum question are reasonably clear. Such a vote could only be successful if supported by a "double majority": an absolute majority of the voters, *and also* by a majority of voters in a majority of States. On the other hand, a **plebiscite** is a more generic term, which simply refers to a vote on an issue, which presumably (unless Parliament decided otherwise) would simply require a majority of voters to approve it. Anthony Green notes that historically there have been only three plebiscites held in Australia, two during World War I about conscription, and one to vote on a new national anthem.

What are the relevant issues that need to be resolved to choose between these options, should they proceed? (It should be said that the ALP has indicated that, if

they are returned at the next election, they will immediately put the matter to the Parliament. So there may not need to be such a vote in that case. On the other hand, if this happens before 2019, and given that there are some ALP members of Parliament who are known to support traditional marriage, the proposal might once again not succeed. In which case the national vote might come back onto the agenda!)

Jeremy Gans in a brilliant piece in the "Opinions on High" blog from Melbourne Law School does a great job of summarizing the options. Which one is preferred by any particular commentator will be partly affected by their view on the best outcome.

Referendum

There are at least two important questions about a referendum on this topic. Is it necessary? What would be the effect of the vote?

As to the ***necessity*** of a referendum, opinions differ. What is clear is that, in its decision in *Commonwealth v ACT* [2013] HCA 55 (12 Dec 2013) *(the Same Sex Marriage case)*, the 6 judges of the High Court of Australia who decided that case took the view that the word "marriage" in s 51(xxi) of the Constitution was broad enough to allow the Federal Parliament to enact a law conferring that status on a same sex couple. However, with respect to the court, I disagree, and I am not the only commentator to suggest that this aspect of the Court's decision is open to challenge (see articles by Professor Twomey, "Same-Sex Marriage and Constitutional Interpretation" (2014) 88 *Aust Law Jnl* 613- 616 and Professors Parkinson and Aroney, "The Territory of Marriage: Constitutional Law, Marriage Law and Family Policy in the ACT Same Sex Marriage Case" (2014) 28 Australian Journal of Family Law 160-192, noting at 165 ff that the *ex cathedra* pronouncement of the High Court on the issue could be criticized on a number of grounds.)

The problem is that the 2013 case was **not** in essence about the power of the Federal Parliament. The issue in that case was whether the ACT legislature could pass its own legislation recognizing same sex marriage, contrary to the clear words of the definition in s 5 of the Federal *Marriage Act* 1961 (Cth) providing that marriage is a relationship between a man and a woman. For reasons spelled out in an earlier paper I maintain that the Court's decision on this main point, that the ACT law was invalid in light of the Federal law, was correct; but that it was not necessary for that decision for the Court to rule on the wider point as to whether such a Federal law would be within power. I appreciate that the Court itself took the view that this issue was necessary to decide; I am simply not persuaded that they were correct.

In the paper I use a somewhat far-fetched example about "bankruptcy", mainly because it is also a specific head of Federal legislative power, and it is also a personal "status" which the law regulates, like "marriage'. I suggest that one might conclude that a State or Territory law declaring all red-headed persons to be "bankrupt" is invalid due to the "covering of the field" of bankruptcy by the Federal Parliament, without also needing to conclude that the Federal Parliament's power would entitle it in its turn to pass such a law. It may be that **no** legislature in Australia has the power to bankrupt persons on the basis of their hair colour. While such a result may seem odd for those committed to the most expansive possible definition of Parliamentary sovereignty, it seems consistent with the nature of our Federation that some matters may just not be capable of being legislated, at least as the Constitution currently stands.

Of course there is an ultimate sovereign Australian legislator who could enable such a law- it is the Australian people, acting through s 128 of the

Constitution, who could provide the Federal Parliament with all the hair-colour-based bankruptcy powers they need. And so with same sex marriage: a referendum altering s 51(xxi) could allow a law to be passed to recognize a same sex relationship as a "marriage".

In my view, **if** such a change were to be introduced into the Australian community, this is how it should be done. There is, after all, some lingering doubt as noted above that the comments of the High Court in the *Same Sex Marriage* case might be regarded as *obiter dicta,* which could be put to one side by a later bench squarely presented with the issue. (As I and others have pointed out, it is particularly unfortunate that these comments were made in a case where there was no "contradictor", because the Commonwealth, for whatever reason, effectively conceded the issue without real arguments, and neither party had come prepared to argue the point in any detail.)

Jeremy Gans notes some of the consequences of a successful referendum:

> One possibility is that the referendum will succeed, writing the view of six High Court judges in 2013 permanently into the Constitution. While that won't change the law, it will have the effect of barring a future High Court from disagreeing with that particular holding. Specifically, it would remove the power to decide from four future High Court judges, for instance stopping Gageler, Nettle and Gordon JJ (none of whom participated in the 2013 decision) from getting together with French CJ's successor sometime after 2017 to rule that the federal parliament lacks power to enact a same-sex marriage law (effectively putting the political ball in the court of state or territory parliaments.)

In other words, Gans concedes (though does not support) the possibility that at least 4 out of a future 7-member High Court bench might possibly conclude that the earlier decision was wrong. (Another possibility, of course, is that one of the members of the 2013 bench may be persuaded to change their mind.) For supporters of same sex marriage, that ought to encourage them to see the referendum as a positive step, especially if the statistic of 64% of the Australian people supporting same sex marriage is correct.

It is important, however, to spell out the ***consequences*** of a referendum either way.

1. A successful referendum changing the law

On the one hand, the referendum might succeed. But the result of such a vote would simply be to authorize the Federal Parliament to enact a law allowing same sex couples to marry. One may presume that a Government that had put the question to the people would, when confronted with a vote in favour, go ahead and implement the wishes of the people. (The current Prime Minister has given such an undertaking.) But there would be no mechanism requiring them to do so. Still, I think it can be assumed that even a Coalition Government faced with a successful referendum would enact a law on the topic.

However, one issue that has not been satisfactorily resolved is the question as to whether explicit protections are to be provided for religious freedom, once such a referendum had passed. A number of recent commentators, including the Human Rights Commissioner, Tim Wilson, a supporter of same sex marriage, have pointed out that such protection will be needed.

Interestingly, there is a precedent already for protection of competing rights to be provided for in a Constitutional referendum. Section 51(xxiiiA) was added to the Constitution in 1946, after World War 2, to allow the Commonwealth Government to continue to make payments of various pensions and benefits which it had been

previously been making, but which had been found to be not supported by an existing Commonwealth head of power. It provides that the Commonwealth Parliament has power to legislate for:

> "the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances".

The meaning of the bracketed words, "but not so as to authorize any form of civil conscription", has been the subject of some debate in subsequent decisions of the High Court (see *British Medical Association v Commonwealth* [1949] HCA 44; (1949) 79 CLR 201 (7 October 1949); *General Practitioners Society v Commonwealth* [1980] HCA 30; (1980) 145 CLR 532 (2 September 1980); *Wong v Commonwealth of Australia; Selim v Lele, Tan and Rivett constituting the Professional Services Review Committee No 309* [2009] HCA 3 (2 February 2009)). However, at the very least they provide protection to doctors and dentists from being "drafted" into government service against their will.

If a referendum were to add a specific provision allowing same sex marriage, it would seem to be wise to include some such words of protection for religious freedom and conscientious objection. Such protection is required, in the face of increasing evidence from other parts of the world where same sex marriage has been introduced, that "wedding support" businesses are being penalized where the business owners object to being "conscripted" into celebration of unions which they find, for deeply held reasons of religion or conscience, unable to support. (See previous posts here and here dealing with some of these cases.) Perhaps some such wording as the following would be suitable for an amended s 51(xxi):

> "(xxi) Marriage, including marriage of persons of the same sex (but in that case not so as to authorize undue interference with the free exercise of religion or belief by those asked to celebrate or provide creative support for the relevant ceremony)."

The reference to "creative support" here is intended to cover those who are asked to devote artistic talents to a ceremony, such as wedding cake makers, florists or wedding photographers, but not to include those simply asked to provide ordinary commercial services such as the provision of food or the hiring of secular premises. (The only danger of including such a specific provision is that it might be said that this precludes recognition of other circumstances where religious freedom ought to be recognised, but it should be made clear in the enacting law that this is not the intention. Where s 116 of the Constitution would generally require protection of "free exercise" of religion in other circumstances, it should continue to do so, in addition to the protections proposed here.)

2. A referendum which fails to change the law

Suppose, on the other hand, that a referendum were unsuccessful? In that case presumably the Government of the day would feel free not to proceed with proposals to change the law. But then what would happen should that Government be replaced by another with the Parliamentary power to enact same sex marriage legislation? Would the failure of the referendum mean that legislation could not be enacted?

It seems fairly clear that this would not be the case. In other words, even if a referendum to introduce same sex marriage were to fail, there would be nothing to

stop a later Parliament from enacting a law, based on a view that the comments in the 2013 High Court decision in the *Same Sex Marriage case* were correct.

Jeremy Gans puts it this way:

> But what about the other possibility (one presumably hoped for by many of the referendum's current proponents), that the referendum will fail (either by failing to attract a majority of Australian voters, or failing to attract a majority of voters in at least four states)? That would leave the Constitution unchanged, but could it affect a future High Court's willingness to revisit its earlier rulings (e.g. on the basis that the referendum signals that the Australian people disagree with the 2013 ruling?) In a 1997 case on whether territory governments could acquire property without just terms, Gaudron J and Kirby J split on whether the fact that a majority of ACT residents voted against a 1988 referendum on this issue could be taken into account. In 2006, a majority of the High Court firmly rejected relying on failed referenda in the decision upholding the Howard government's workplace relations law... {quoting that case}.
>
> Assuming a future court agrees, this ruling implies that a failed referendum on same-sex marriage would have no legal effect at all on how that issue is eventually resolved. Of course, the referendum could well have a political effect, not only on politicians, but also, perhaps, on the willingness of Australia's judges to issue holdings that differ from a clearly expressed public vote.

So the failure of a referendum, while one might think that it should send a signal to politicians that the Australian people as a whole disagree with the change, might not mean that the change could not be attempted; and in those circumstances, the High Court would simply have to interpret the Constitution as it stands.

A plebiscite?

Would a plebiscite give any more certainty? Fairly clearly it would not. Even after a successful plebiscite on the issue, Parliament would not be *obliged* to pass such a law (though the political pressure would be strong.) And similarly, should the plebiscite fail, supporters of same sex marriage could, if they could command a majority in both Houses of Parliament on the issue, pass a same sex marriage law.

That is not to say that such a vote would not be useful. It would provide some resolution to the perpetual debate over polls, which seem to offer widely differing results, depending on the question which is asked. "Do you favour marriage equality?", for example, seems to be bound to receive a positive answer. "Do you think a child should wherever possible be raised by their biological mother and father?" is likely to also receive a positive answer, even if the person being surveyed does not realize that a positive answer to question 1, may preclude, or at least impact on, a positive answer to question 2. The framing of a plebiscite question is likely to be one of the most contentious debates in the area.

Referendum or plebiscite?

Finally, to come to the question being considered by the Inquiry, which is preferable? My own personal view is that same sex marriage will be bad for the community, and so I would be opposing the change in any vote, and would continue to argue against such a change whatever the outcome.

But I maintain that I still have a right to have a view on the *process* to be followed, ***if*** such a change is to be made. And my view on balance is that a referendum is preferable. The cynical may suggest that this is because I know that referenda in Australia rarely succeed. But even if that were not so, I believe that a foundational and fundamental societal change of this sort ought not to be made

without providing a clear basis for it in the document which forms the *grundnorm* of the Australian legal system. As noted previously, if there is no such change the question of the validity of Federal legislation on the topic will remain in some, even if slight, doubt. In addition, a binding referendum can provide, if framed as I suggest above, religious freedom protections that are carved into the bedrock of the change, rather than being subject to the winds of Parliamentary change.

Specific questions being considered by the Inquiry

a) an assessment of the content and implications of a question to be put to electors;

See above.

b) an examination of the resources required to enact such an activity, including the question of the contribution of Commonwealth funding to the 'yes' and 'no' campaigns;

I am not qualified to comment from an expert basis on the issue of resources, but I believe that as what is proposed is indeed a fundamental and important change to the law of Australia, adequate resources should be provided to allow a sensible consideration of the issue by Australian voters. Resources of an order resembling those that have been directed to recent referenda, including that on a republic, should be made available.

c) an assessment of the impact of the timing of such an activity, including the opportunity for it to coincide with a general election;

I have no strong views on this issue, but combining it with a general election would seem to offer some resource savings and would probably be sensible.

d) whether such an activity is an appropriate method to address matters of equality and human rights;

This is an entirely appropriate procedure to amend a foundational element of Australian society. I do not believe the language of "equality" is appropriately applied to this debate, for reasons set out at more length here. The proposals for same sex marriage are not a matter of making equally available to all persons a benefit denied to them previously on irrelevant grounds. They involve a redefinition of a status which has historically *always* been differentially gendered, because one of the most important reasons for the institution of marriage has been to provide a long lasting relationship for children born of a sexual union between a man and a woman.

Nor is the debate helpfully framed in terms of "human rights".

The European Court of Human Rights, in its examination of the issues, has said on a couple of occasions that there is no "right to same sex marriage" in the current major human rights instruments. This was clearly set out in *Schalk and Kopf v. Austria*, no. 30141/04, ECHR 2010, where the Court held that the European Convention on Human Rights did not require European countries to allow same sex couples to marry.

In the more recent decision in *Hämäläinen v. Finland* [GC], no. 37359/09, § 62, ECHR 2014, the Court held that while it is true that some Contracting States have extended marriage to same-sex partners, Article 12 cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples.

In the most recent case where these issues were considered, *Case of Oliari and others v. Italy* http://hudoc.echr.coe.int/eng?i=001-156265 *(Applications*

nos. 18766/11 and 36030/11) (21 July 2015) the ECHR 4th section held that Italy was in breach of human rights provisions governing "respect for family life" because it had not provided *either* same sex marriage *or* a "civil union" law providing similar protections. Again, though, this was not a finding that same sex marriage was necessary as a human right. At most it would require treatment of same sex couples in ancillary areas like inheritance, visitation, etc in the same way as married couples are treated, and allowing them a way to register their relationship. Australian law already does this.
So there is no international consensus that providing a right to same sex marriage is required by human rights principles.

e) the terms of the Marriage Equality Plebiscite Bill 2015 currently before the Senate;

As noted above, I disagree with the idea of a plebiscite; I believe the matter needs to be determined by a referendum.

f) and

any other related matters.

As noted above, a key "related matter" is protection of religious freedom for members of the Australian community whose deep-seated religious convictions, informed by millennia of teaching, are that homosexual relationships are not God's good design for human beings. Such a view can be held without a person being guilty of "hatred" or "homophobia". Any change, whether by referendum, plebiscite or by ordinary legislation, needs to given appropriate weight to these religious convictions, which are indeed protected in numerous international human rights instruments, such as art 18 of the UDHR and art 18 of the ICCPR.

I would of course be happy to be contacted by the Inquiry should further clarification of this submission be required.

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