

AUSTRALIAN MARRIAGE EQUALITY

SUBMISSION TO

THE SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

INQUIRY INTO

A POPULAR VOTE, IN THE FORM OF A PLEBISCITE OR REFERENDUM, ON THE MATTER OF MARRIAGE IN AUSTRALIA

1. Introduction

a) Who are we?

Australian Marriage Equality (AME) is a community-based organisation dedicated to removing those discriminatory provisions of the Australian *Marriage Act 1961* (Cth) (hereafter, “the Marriage Act”) which prevent same-sex partners entering legal marriages and which also prohibit the recognition of overseas same-sex marriages. AME’s work includes lobbying of decision-makers, public advocacy and community education. AME is governed by a nationally-representative board of directors. Our funding comes from community fund raising. For more on AME visit www.australianmarriageequality.org

b) What is marriage equality?

In a legal sense, marriage equality refers to the removal of legislative provisions which prevent same-sex partners from entering into marriages in Australia or from having their overseas marriages legally recognised in Australia.

More broadly, marriage equality is about treating marriage-like relationships with equal respect and dignity, regardless of the gender of the partners involved.

c) A note on terminology

In this submission we use the term “marriage equality” to describe the legislative reform necessary to ensure that same-sex couples have the right to marry under the *Marriage Act 1961*. We do not use the term “gay marriage” because this may suggest that the reform we seek is something special, lesser or different than marriage for different-sex couples. The term “marriage equality” makes it clear that once reform has occurred the rights, responsibilities and status of marriage will be exactly the same for different-sex and same-sex couples.

When it is necessary for us to distinguish between same-sex and different-sex couples or marriages, we use the term “same-sex” rather than “gay” because some same-sex partners may identify as bisexual or transgender. We acknowledge the term ‘same-sex’ appears to exclude intersex people who do not identify as male or female. When we use the term we do so in a way that includes all adults who cannot currently marry under the Marriage Act 1961.

When referring to a national vote on marriage equality by registered voters we use the term “public vote”, rather than “popular vote” or “vote of the people” because we believe it is the most appropriate term to describe the two main options, a referendum and a plebiscite. A referendum is technically not a popular or people’s vote because it cannot be carried by a simple majority (for more, see below).

d) Additional material

Our submission is accompanied by a legal opinion by barristers, Bret Walker SC and Perry Herzfeld, on whether it is necessary or desirable to have a referendum or plebiscite on marriage equality. The opinion was sought by Australian Marriage Equality. The Human Rights Law Centre briefed Mr Walker and Mr Herzfeld. The legal opinion is attached. It also informs are submission. The main points are as follows:

A referendum is not necessary because the High Court has already resolved the question of the Commonwealth's power to legislate for same-sex marriages. This decision was based on "orthodox reasoning" and was unanimous, so it is "fanciful" to believe it will be revisited by the Court.

A referendum is not desirable because

- it will limit the power of the Commonwealth to regulate marriage, for example casting doubt on the power of the Commonwealth to prohibit polygamous marriages
- it "would be a most oblique way of gauging the national view" because a referendum requires a double majority to pass, and because the Constitutional question of the Commonwealth's powers, as well as voter's caution about amendments to the Constitution, would "cloud" the substantive issue of allowing same-sex couples to marry
- the only reason for holding a referendum "is if it were thought desirable to maximize the chance that it would fail".

By contrast, a plebiscite is "apt to the purpose of determining the national view" on marriage equality.

Neither a plebiscite nor a referendum "would bind the Federal Parliament to act in accordance with the outcome of a vote". Parliament would still be required to act.

2. Is it appropriate to have a public vote on marriage equality?

Australian Marriage Equality is firmly of the view that it is unnecessary, inappropriate and damaging to have a public vote on marriage equality. By "public vote" we mean a non-binding indicative plebiscite and a referendum to amend the Constitution. We believe the issue should be resolved through a vote of the parliament. We outline our reasons below.

a) Rights, morality and hate campaigns

Marriage equality is about the fundamental and inalienable human rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) people and their family members. When

anyone is denied the right to marry the person of their choice their right to personal autonomy and equality are violated. Because human rights are fundamental to dignity and happiness, they are not an appropriate matter for a public vote. Because they are inalienable and immutable they are diminished simply by the act of being put to popular vote.

Marriage equality is also about the rights of a minority. A fundamental aspect of our democratic system is that the rights of minorities are respected, including unpopular minorities. This is a check against the tyranny of the majority. It sets a dangerous and anti-democratic precedent to put minority rights to a public vote.

Finally, marriage equality goes to the heart of intimate and family life, personal morality and religious conviction for many people who are in favour and against. These sensitive issues should be handled in a reflective and respectful manner. A public vote is not conducive to this. Indeed, a public vote provides a platform for those who would inflame fear, exaggerate difference and pander to prejudice. Many LGBTI people and their family members fear the hate campaigns that would be launched in the lead up to a public vote (for more on the impact of these campaigns see below). We assume many of those who oppose marriage equality also fear that a public vote will see their beliefs challenged and their integrity questioned more than ever before.

For all these reasons, a public vote is not the appropriate way to resolve the issue of marriage equality.

b) Law reform, parliamentary sovereignty, leadership and free votes

In Australia, public votes are not the appropriate method to resolve questions of law reform. There have only been three national plebiscites in our history, two on conscription and one on the national anthem. Plebiscites are not typically held on routine matters of law reform. Referenda are held to amend the Constitution. Again, they are not held to resolve matters of legislative reform (for more see part e, below). This is because in Australia parliament is the forum in which laws are made and amended.

There is an argument that Australia has inherited the British doctrine of the sovereignty of parliament. According to this doctrine, the authority to make and unmake laws lies exclusively with parliament, not the people. In Australia, the power of the Commonwealth Parliament is obviously limited by the constitutionally-recognised powers of state parliaments and the High Court. But an argument can be made that the Commonwealth Parliament has sovereign powers in the areas allocated to it. This is recognised by the fact that votes of the people on matters not related to the Constitution (i.e. plebiscites) are not binding on Parliament. For those who believe in the sovereignty of parliament, including many constitutional and social conservatives, plebiscites set a dangerous precedent at best, and at worst undermine our entire system of Government.

Many opponents of marriage equality make the case that allowing same-sex couples to marry is such a radical departure from traditional norms, and will have such a dramatic

effect on society, that it must be put to the people. There is something deeply hypocritical about this argument. For years opponents of marriage equality have said the reform is a low-priority issue, not important enough for parliament to debate. Yet now they say it is so important it must be put to a public vote. Our view is that marriage equality is not a radical reform. All it will do is remove damaging discrimination and prejudice from the law, and admit to marriage those same-sex partners who uphold the values of the institution. We also reject the proposition that there will be any negative consequences. We believe concerns about religious freedom being trampled, children being disadvantaged, and a slippery slope to the legitimisation of unconventional relationships, have no basis in the overseas experience, are far fetched and amount to scare mongering. We are happy to provide evidence to back this claim.

But even if marriage equality is the radical reform portrayed by its opponents, that is not reason enough to have a vote of the people. Exactly the same fears that are currently being expressed about marriage equality were expressed about the enactment of the Family Law Act, the divorce provisions of the current Marriage Act, the decriminalisation of homosexuality and the legal recognition of same-sex relationships¹. In some cases there were calls to put these law reforms to the people. Yet, this did not happen. Parliament rightly decided to resolve these issues itself. This was not only a matter of convention. It was also a matter of leadership. The nation's politicians accepted the responsibility they have as elected representatives to make hard decisions and resolve contentious matters. Equally, the current push to resolve marriage equality by a public vote can be seen as an abdication of responsibility and failure of leadership by our elected representatives.

In the case of marriage equality, as with the other contentious reforms just mentioned, good leadership means respecting the right of elected representatives to vote according to their consciences. In the Australian political system, a cross-party free vote, not a public vote, is how parliament typically and rightly deals with a contentious issue that raises moral or religious concerns, such as those mentioned above. The Coalition parties have a long tradition of allowing free votes on a wide range of issues including marriage law reform and homosexual law reform. This is consistent with their founding principle of individual freedom. It is deeply disappointing that the Coalition parties have disregarded their own traditions and principles by not allowing a free vote in parliament. Opting instead for a public vote does not release them from the duty to allow a free vote.

The final point to make about a parliamentary vote versus a public vote is that neither of the options for a public vote – a plebiscite or a referendum – can automatically result in marriage equality. In the event of a vote favouring marriage equality, parliament would still need to legislate before same-sex couples could marry. This is because a plebiscite is not binding and a referendum can only deal with the matter of the Federal Parliament's Constitutional powers, not the matter of legislation. Given that Parliament cannot ultimately abdicate its responsibility in regard to marriage equality, it should show leadership and act now.

¹ Finnane, M., "A plebiscite on marriage? Robert Menzies didn't need it", *The Conversation*, 27.08.2015, <https://theconversation.com/a-plebiscite-on-marriage-robert-menzies-didnt-need-it-46547>

c) Cost to taxpayers and unnecessary delays

A public vote on marriage equality will be a great expense to the taxpayer. It will also delay a reform that is already overdue and could be resolved by a vote in parliament much sooner.

The cost of a public vote would vary depending on whether it was held at the same time as an election, and whether, in the case of a plebiscite, there is public funding for the “yes” and “no” cases. The referendum on a republic in 1999 cost the equivalent of \$105 million in today’s money. We believe this level of expense is unwarranted for resolving a matter that should be dealt with in parliament, especially at a time of fiscal restraint.

A public vote on marriage equality is unlikely to be held for several months, and may take much longer. As mentioned above, a public vote would not automatically lead to marriage equality and may take much longer for Parliament to act on. Meanwhile, we believe the reform could be passed by parliament if a free vote is allowed. With a Coalition free vote there is majority support for marriage equality in the Senate and near to a majority in the House of Representatives.

Seen this way, a public vote simply puts off what could occur right now. This delay matters. Here are just some of the reasons marriage equality is urgent: Australia’s reputation for a fair go and inclusion is suffering from being the last developed English-speaking country not to allow same-sex couples to marry. In turn, our poor image hampers our capacity to attract skilled migrants and investment. Just as important is the human toll of further delays. The longer this issue remains unresolved, the more elderly and ill same-sex partners miss out on the dignity and respect that comes with being able to marry, the more children grow up without the affirmation and sense of security that can come with having married parents, and the more young same-sex attracted people suffer the stigma and hopelessness that comes from being told they cannot marry.

d) Problems specific to a marriage equality plebiscite

There have only been three national plebiscites in Australian history, two on conscription and one on the national anthem. The rules regulating them are not well established and their purpose is not widely understood. This creates a number of problems when it comes to using plebiscites to resolve law reform matters.

Unlike a referendum, the terms of a plebiscite, including the voting system, funding, timing and question, can be set by the Government without the need for legislation. This means it is possible for the terms of plebiscite to be set without parliamentary oversight or bipartisan agreement. Instead, they can effectively be set by the Prime Minister to advantage his or her preferred side.

Unlike a referendum, the outcome of a plebiscite is not binding. This means the matter must still ultimately return to Parliament to be voted on. It is an act of bad faith to send a

matter to the people for their verdict but for this verdict then to be treated as advisory and not final. 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.

Unlike a referendum or a general election, voting in a plebiscite is not compulsory. This will mean fewer voters than usual will engage and the result may not accurately represent the sentiment of the Australian voting population. For example, many younger voters have never experienced a plebiscite and may not understand its significance. Many voters will also be conflicted or unhappy about voting on marriage equality if they believe parliament should resolve the matter, and/or if they know the non-binding nature of a plebiscite means the matter ultimately be resolved by parliament regardless of how they vote.

See section 3 for the solutions we propose to these problems.

e) Problems specific to a marriage equality referendum

Like many Australians we are surprised and deeply concerned by the proposal for a referendum on marriage equality.

The purpose of a referendum would be to determine the power of the Federal Parliament in relation to making laws for marriages between two people of the same sex. Specifically, the question would ask if the word “marriage” in the Constitution extends to such marriages.

As argued by Mr Walker and Mr Herzfeld in the attached opinion, this constitutional question was conclusively resolved by the High Court in the 2013 case which saw the ACT’s Marriage Equality Act struck down. The Court found the meaning of “marriage” can change over time and the word can encompass same-sex relationships. Consequently it found the Federal Parliament has the power to legislate for marriages between same-sex couples.

We cannot see why it is necessary to revisit this issue by asking the Australian people their view. No argument has been made for why, in this particular case, the Court’s decision is not valid. As Mr Walker and Mr Herzfeld note, the Court’s reasoning was “orthodox” and its finding unanimous. So it “fanciful” to suggest it will be revisited by the Court. Some people may not agree with the High Court’s decision, but this would be the case with many of the Court’s decisions and is not in itself a reason to hold a referendum. In the absence of a reason for holding a referendum on a question the Court has resolved, such a proposal is a direct challenge to the role of the Court and to our system of government.

Another area of concern for us is that the stakes in a referendum are so unbalanced. A vote against defining “marriage” to include same-sex couples doesn’t just send a message to the Federal Parliament that it shouldn’t allow same-sex marriages. It means the Federal

Government is deprived of the power to enact this reform for the foreseeable future. This means a future government elected with a mandate to enact marriage equality will not be able to. Binding parliament's hands in this way is a direct challenge to the doctrine of parliamentary sovereignty and to the popular will. On the other hand a vote for defining "marriage" to include same-sex couples does nothing but confirm the existing situation as established by the High Court. It does not lead directly to the enactment of marriage equality legislation. As with a plebiscite, legislative action on a pro-marriage equality result does not flow from that result and could be delayed indefinitely. We cannot accept a public vote where one side stands to gain so much and the other so little.

Our concerns about an uneven playing field deepen when we look more closely at the possible outcomes in a referendum, especially when we take into account the fact that a double majority is required for a referendum pass, that is, a majority of voters in a majority of states. The question could be framed in the negative, that is "do you believe marriage in the Constitution should be limited to opposite-sex couples?" or something to that effect. With support for marriage equality running at about 70% it's very hard to see how such a proposition could secure a double majority. The alternative, positively-framed question would be something like "do you believe marriage in the Constitution should include same-sex couples?". Polls show there is majority support for such a proposition. It is possible, but less certain, that it has the support of a double majority. If a positively-framed question did not secure a double majority the High Court's 2013 decision would stand and the Federal Parliament's would retain the power to enact marriage equality. But the referendum would still fail. This outcome would be seen as a rejection of marriage equality even if a majority of voters backed it. Not only is there virtually no gain for marriage equality from a referendum. The chances of a loss are much higher than in a plebiscite. In a constitutional referendum on marriage equality the deck is stacked against reform.

Mr Walker and Mr Herzfeld concur with our concerns. They argue that a referendum "would be a most oblique way of gauging the national view" because it requires a double majority to pass, and because the Constitutional question of the Commonwealth's powers, as well as voter's caution about amendments to the Constitution, would "cloud" the substantive issue of allowing same-sex couples to marry. They believe the only reason for holding a referendum "is if it were thought desirable to maximize the chance that it would fail".

They also believe a referendum is undesirable because of its unintended consequences. If a same-sex marriage referendum further defines or limits the Commonwealth's power to make marriage laws, the Commonwealth may lose its power to regulate other marriages. Mr Walker and Mr Herzfeld argue that,

"The narrower the power in s 51 (xxi) the weaker the ability of the Federal Parliament to regulate whether relationships should or should not be afforded the status of 'marriage' in Australia. So, for example, an amendment to s 51(xxi) of the kind referred to in paragraph 13 above might cast doubt on whether the Federal parliament has the power to prohibit polygamous marriages (our emphasis). We do not say that an argument to

that effect would necessarily succeed....But at present the argument is not available at all."

Such unintended consequences are of deep concern to AME. For this, and for all the reasons outlined here, we oppose a constitutional referendum under any and all circumstances.

f) The human toll of public votes on marriage equality

Australian Marriage Equality is deeply concerned about the human toll of a public vote on marriage equality. On a day-to-day basis LGBTI people are subject to extra stress and anxiety thanks to prejudice and discrimination. As recently highlighted by Beyond Blue and the Public Health Association of Australia, this is exacerbated by the absence of marriage equality². In a public vote the stress will be exceptionally high. In the lead up to a public vote there will inevitably be campaigns against marriage equality which cause deep offense to same-sex attracted people and their families. There may also be hate campaigns which threaten the psychological and physical safety of LGBTI people. But even just the incessant day-to-day public discussion about the intimate aspects of the lives of LGBTI people will create stress. We ask heterosexual Australians to imagine what it would be like to have your intimate and personal and family lives debated at length. It would feel like you were always on show, that you or your loved ones may be challenged or attacked at any moment from any direction, that nothing about your life was private, that you could never relax and be yourself. It would result in near-constant state of anxiety. Now imagine what this would be like for a group of Australians who already live with the threat of prejudice and attack on a daily basis? The levels of anxiety would be almost unbearable.

These predications are backed up by research. In 2010, Dr Mark Hatzenbuehler from Columbia University released an analysis of the US National Health Institute's mental health survey³. It found a 37% increase in mood disorders, a 42% increase in alcohol-use disorders, and a 248% increase in generalised anxiety disorders among LGBTI people in states that had passed referenda entrenching the exclusion of same-sex couples from marriage. Keep in mind, this is from a baseline that is already much higher than the general population because of the effects of everyday prejudice. To be sure the referendum was the cause, Hatzenbuehler compared LGBTI people in states with referenda to those in states without. In the latter there was no increase. Referenda are the "X factor", according to Hatzenbuehler. Those he interviewed "...reported multiple stressors during that period. They reported seeing negative media portrayals, anti-gay graffiti. They talked about experiencing a loss of safety and really feeling like these

² Beyond Blue issued a statement in support of marriage equality on September 1st 2015. It can be found here: <https://www.beyondblue.org.au/media/media-releases/media-releases/statement-from-beyondblue-board-in-support-of-marriage-equality>, The Public Health Association's statement was issued on September 2nd 2015. It can be found here: <http://www.phaa.net.au/advocacy-policy/media-releases/media-releases>

³ Hatzenbuehler, M., et al, "The Impact of Institutional Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual Populations: A Prospective Study", *American Journal of Public Health*, 2010 March; 100(3): 452–459, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2820062/>

amendments and these policies were really treating them as second-class citizens”⁴.

Australian studies about the impact of discriminatory legislation and negative public debate back up these awful US statistics. An analysis by Melbourne clinical psychologist, Dr Ben Callegari, found a sudden increase in mental health problems among LGBTI Australians after same-sex marriage was banned in 2004. According to his analysis of data collected by the Australian Institute of Health and Welfare there was,

*“...a startling and disturbing potential increase in psychiatric illness in Australia following the 2004 amendment to the Marriage Act banning same-sex marriage. It also suggests an improvement in mental health outcomes should same-sex marriage in Australia be allowed into law and a concomitant decrease in economic burden.”*⁵

A subsequent study by Dr Fiona Barlow from the University of Queensland dug deeper into why this might have been the case. In controlled experiments she exposed same-sex-attracted and different-sex-attracted people to articles in support of and opposed to same-sex marriage. Different-sex attracted participants had a response to the latter which was generally negative. But the response of the same-sex-attracted participants was far worse. They reported feeling depressed, lonely, powerless, hopeless about the future, failed in life and more fearful of assault. The researchers concluded,

*“...that opposition to same-sex marriage has a direct, immediate, and negative effect on the health and wellbeing of the people to whom marriage is denied. If we extrapolate from our current results, it is possible that the Government’s current stance on same-sex marriage may have a marked and harmful effect on the health and happiness of sexual minority individuals at large.”*⁶

Clearly, negative, prejudice-based campaigning against marriage equality has a deleterious impact on the mental health of LGBTI people. Negative campaigning would reach a peak in the lead up to a marriage equality public vote and is likely to be greater than it would be in the lead up to a vote in parliament. Those most vulnerable to the prejudice, stress and hate a public vote is likely to prompt are those our society should be doing most to protect. Here we are referring to LGBTI young people, LGBTI people who have not disclosed their sexual orientation, gender identity or intersex status, children being raised by same-sex couples, and elderly parents of LGBTI people. We know members of the first two groups are more likely to attempt suicide than their heterosexual peers because of prejudice and stigma. Insofar as these risk factors will increase exponentially during the campaign leading up to a public vote, we can expect a public vote to lead directly to young and closeted LGBTI people taking their own lives.

⁴ Vendantam, S., “Bans Of Same-Sex Marriage Can Take A Psychological Toll”, *NPR*, 20.5.2013, <http://www.npr.org/2013/05/20/184829036/bans-of-same-sex-marriage-can-take-a-psychological-toll>

⁵ Callegari, B., “Psychologists for Marriage Equality, Submission to the Senate inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012”

⁶ Barlow, F.K., Dane, S.K., Techakesari, P., & Stork-Brett, K. (2012), “The psychology of same- sex marriage opposition: A preliminary findings report”, School of Psychology. The University of Queensland

Conclusion and recommendation

A public vote on marriage equality undermines our system of government, incurs unnecessary costs and delays, is not the appropriate way to deal with human rights and will exact a human toll. Plebiscites are non-binding and not properly regulated. A referendum is unnecessary, may have unintended consequences, and creates an uneven playing field. We believe marriage equality should be resolved through a free vote of the parliament.

3. If there has to be a public vote what form should it take?

It will be clear from the case outlined above that Australian Marriage Equality believes marriage equality should be resolved in parliament and that a public vote is unnecessary.

However, we have also actively engaged in debate on what form a public vote should take. This is because we accept the relatively high level of support for a public vote on marriage equality in the community and the Government means it is a real possibility. We also believe the cost, delay and damage caused by a public vote can be significantly mitigated in certain circumstances. We have no doubt a fairly-framed and timely public vote on marriage equality will result in support for the reform. This is based on a decade of opinion polls which consistently show there is majority support for marriage equality and that this support is rising over time. Below, we outline our preferred option for a public vote if such a vote is to occur.

a) Type of public vote

As outlined above, a referendum is unnecessary and undesirable. We oppose a referendum outright. If there is to be a public vote it should be a plebiscite to ascertain the views of the community and provide elected representatives with a stronger mandate to act. We concur with Mr Walker and Mr Herzfeld that a plebiscite is more apt than a referendum in determining public sentiment.

b) Oversight by parliament

As noted above, the terms of a plebiscite can be set by the Government to its advantage. To ensure this does not happen we believe Parliament should authorise a plebiscite through the enactment of legislation such as the Marriage Equality Plebiscite Bill 2015. Such legislation should set the plebiscite's timing, voting system, funding, question and other relevant matters. To ensure the public has full confidence in the plebiscite process, legislation for a plebiscite should have bipartisan support, or at least the support of the leaders of both the Government and the Opposition.

c) Timing

To ensure the least delay and the least cost to taxpayers, a plebiscite should be held at the next federal election. Again, this will provide whichever government is elected at the election with a stronger mandate to act.

d) Public funding

We believe there should be equal public funding for both the “yes” and “no” cases in a plebiscite. In the 1999 republic referendum the “yes” and “no” cases cost the equivalent \$26 million. We do not support that level of expenditure. Marriage equality has been debated in Australia for over a decade. There is already a significant amount of quality information available to the public. The cases for and against can be prepared and distributed for less than the amount spent in 1999.

e) Voting system

Unlike elections and referenda, voting in plebiscites is not compulsory. We believe it is important that voting practises are consistent across all these different expressions of public sentiment. We also want maximum voter engagement with the issue. As noted above, there are a number of factors related to plebiscites which mitigate against this engagement. Having a voluntary-voting plebiscite at the same time as a general election partly alleviates the problem of voluntary voting. But we believe compulsory voting for the plebiscite itself is the only real solution.

f) Question

We believe there should be a single question that is plain, simple, neutral and should directly address and describe the issue at hand.

We oppose multiple questions. In the past, some national and state plebiscites have offered voters a range of choices. But that is not necessary in the case of marriage equality. The issue is clear and straight forward. There is no need to ask about the powers of the Federal Parliament in regard to laws for same-sex marriages because this has been resolved by the High Court. There is no need to ask about protections for religious celebrants because all parties in the marriage equality debate agree religious celebrants should not have to celebrate marriages they object to. There is no mandate to ask about civil unions because they are a matter of state jurisdiction. Issues that arise incidentally to marriage equality, such as the breadth of exemptions for religious organisations, or exemptions for civil celebrants, are too complex to put to a public vote. These issues should be dealt with by parliament if and when it comes to implement the result of a plebiscite result that favours marriage equality. Legislation before parliament and public discussion are exclusively focussed on whether same-sex couples should be allowed to marry. A plebiscite should be too.

We oppose a question that asks voters their view on a piece of proposed legislation. Legislation can take different forms. For example, it could propose to separate same-sex

marriages from different-sex marriages, or civil marriages from religious marriages. It could also propose unnecessarily broad faith-based exemptions from anti-discrimination laws. Such proposals are unlikely to be favoured by supporters of marriage equality and will split the vote in favour of marriage equality. We do not want to see a repeat of the republican referendum where those in favour of a republic were split between two different republic models.

We also oppose a question that is not neutral. We note some opponents of marriage equality have suggested questions like “do you support traditional marriage”, or “do you agree with same-sex marriage”. Terms such as traditional marriage and same-sex marriage do not accurately describe the issue at hand. The first is unclear and weighted with moral connotations. The second suggests same-sex couples aspire to an institution called same-sex marriage when in fact they simply aspire to be married.

In principle, we endorse the question included in the Marriage Equality Plebiscite Bill 2015:

“Do you support Australia allowing marriage between 2 people regardless of their gender?”

This question meets the criteria of neutrality and directness. There is an argument that “sex” may be a clearer term than “gender”. There may also be concern that “sex” is exclusive of intersex people who do not identify as male or female. We defer to intersex advocates and legal academics on this question.

Conclusion and recommendation

If there is to be a public vote on marriage equality it should be a plebiscite at the next election with the terms of the plebiscite set by legislation. These terms should include compulsory voting, public funding and a single, neutral question. The Marriage Equality Plebiscite Bill 2015 satisfies many of these requirements. We encourage the Committee to offer its views on how the Bill could be improved to ensure a public vote is as fair and transparent as possible.