SUBMISSION OF LAWYERS FOR THE PRESERVATION OF THE DEFINITION OF MARRIAGE (LPDM) IN RELATION TO THE MATTER OF A POPULAR VOTE, IN THE FORM OF A PLEBISCITE OR REFERENDUM, ON THE MATTER OF MARRIAGE IN AUSTRALIA

INTRODUCTION

1. LPDM is a group of practising and academic lawyers who advocate for the retention of the definition of "marriage" as it currently is in the *Marriage Act 1961* (**MA**). LPDM initially came together because of a common concern that constitutional restraints were being ignored in the debate in relation to proposed Same Sex Marriage (**SSM**) Bills.
2. LPDM has made submissions and appeared, by invitation, before the House of Representatives Standing Committee on Social and Legal Affairs, the Senate Legal and Constitutional Affairs Committee, the Legislative Council in Tasmania, in committee, and the Legislative Council Committee on Social Issues in New South Wales in their respective inquiries in relation to the issue of SSM.
3. As a result LPDM has gained considerable expertise in relation to the issue of SSM, both constitutionally and a matter of policy. LPDM has kept abreast of developments overseas and has monitored the litigation which has been spawned by this issue.
4. LPDM respectfully submits that the Committee should find that there are good legal and policy grounds to recommend to the Senate that this issue should be dealt with by a referendum and that the *Marriage Equality Plebiscite Bill 2015* (**MEPB**) should be rejected.

THE TERMS OF REFERENCE

5. The terms of reference of this Inquiry are:
   - 5.1. That the following matter be referred to the Legal and Constitutional Affairs References Committee for inquiry and report by 16 September 2015:
     - 5.1.1. The matter of a popular vote, in the form of a plebiscite or referendum, on the matter of marriage in Australia, with particular reference to:
       - 5.1.1.1. a.an assessment of the content and implications of a question to be put to electors;
       - 5.1.1.2. 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;
       - 5.1.1.3. c.an assessment of the impact of the timing of such an activity, including the opportunity for it to coincide with a general election;
       - 5.1.1.4. d. whether such an activity is an appropriate method to address matters of equality and human rights;
       - 5.1.1.5. e. the terms of the MEPB currently before the Senate; and
       - 5.1.1.6. f. any other related matters.

THE QUESTION OF A POPULAR VOTE

6. The issue of whether the matter should proceed as a referendum requires a clear understanding of constitutional law in Australia.
7. LPDM has submitted:
   7.1. that there was a strong argument that the term "marriage' in s 51(xxi) of the *Constitution* did not give the Federal Parliament the power to legislate for SSM;
   7.2. that the proper way forward is for the question to be put to the Australian people in a referendum.[1]
8. In *Commonwealth v Australian Capital Territory* the High Court held, in the context of considering the validity of the ACT *Marriage Equality (Same Sex) Act 2013* (**ACT Act**), that:
   8.1. At Federation "the monogamous marriage of Christianity," would have been the "central type of 'marriage' with respect to which s 51 (xxi) conferred legislative power;
   8.2. However, though that may give the centre of the power, it does not give the circumference of the power;
   8.3. Because polygamous marriages may now be recognised for some purposes in Australia, the concept of marriage was not confined to a union which had the characteristics described in *Hyde v Hyde* (the voluntary union for life of one man and one woman, to the exclusion of all others);
   8.4. Rather, when considering the scope of the marriage power in s 51 (xxi) of the *Constitution*, "'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";
   8.5. That by the MA, including the 2004 amendments, the Commonwealth Parliament had legislated that marriage in Australia meant, and only meant, "the union between a man and a woman to the exclusion of all others, voluntarily entered into for life." The MA was a complete statement of the law in Australia in relation to what is marriage. It covered the whole domain of what is marriage, and contained a negative proposition that the only form of marriage which may be recognised or created in Australia is that which is defined by the MA;
   8.6. That the propositions which had been advanced by proponents of SSM, that the MA dealt with marriage between members of the opposite sex and it was open for the ACT to legislate in relation to marriage between those of the same sex was, "flawed and must be rejected."
9. The High Court decision applies to state and other territory legislatures. Accordingly, it is now settled law that the only Parliament in Australia which may legislate for SSM, is the Federal Parliament.
10. **Ramifications of the High Court's Decision**:
    10.1. The High Court's decision as to the breadth of the marriage power in s51(xxi) of the *Constitution* was made without the benefit of the contradictor. It was made, therefore without the benefit of full argument and was not necessary to decide the question which the Court faced, namely the validity of the ACT Act and in the circumstances its status as a precedent in relation to the meaning of the marriage power in the *Constitution* is not beyond question.[2] Nonetheless, it (unless

[1] See 2012 Submission of LPDM to Legal and Constitutional Affairs Legislation Committee re Marriage Equality Amendment Bill 2010.

[2] The issue in the case was whether the ACT Act conflicted with the MA. No party raised an issue with the extent of the Commonwealth marriage power. The Court raised that issue. To the extent the decision sought to lay down the parameters of the marriage power in the *Constitution* and to include SSM within

overruled by another High Court, or found by another High Court to be *obiter* dicta, and so not binding) now states the law in relation to s51(xxi);

10.2. The scope of the marriage power, according to the High Court, is an ability to legislate for marriage as a consensual union, between natural persons, which is intended to endure and which may be terminated only according to law.

10.3. Thus, according to the High Court, there are 4 essential characteristics which define the scope of the power. They are:

10.3.1. A consensual union;

10.3.2. Between natural persons;

10.3.3. Which is intended to endure; and

10.3.4. Which may be determined only according to law.

10.4. The High Court's exposition of the scope of the marriage power means there is no requirement that marriage must be a monogamous union. Indeed there is no limit to the amount of people who may be party to one marriage. Given that the expansive interpretation of the marriage power was predicated on the legal recognition, for some purposes, of polygamous marriages, the power must include the power to legislate for those and polyandrous and polyamorous unions as marriages.[3]

10.5. Further, the High Court's interpretation of the power:

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those parameter it is of dubious precedential value. This is because "[t]he Court has no business in determining issues upon which the parties agree…If a point is not in dispute in a case, the decision lays down no legal rule concerning that issue." per McHugh J in *Coleman v Power* (2004) 220 CLR 1, 44-45 Despite the Court's statement that if the Commonwealth did not have power to legislate to introduce same sex marriage it "might" mean that there was no inconsistency between the ACT Act and the MA there was no need for the scope of the marriage power in the *Constitution* to be considered to answer the issues before the Court because:

1 The MA was introduced in 1961 to cover the field of marriage. By setting out the celebrant's words it set out what was and what was not marriage in Australia;
2 The 2004 amendments made it even clearer that the Commonwealth was covering the field of marriage by defining marriage and specifically excluding the only class of same sex marriage then contemplated i.e. foreign same sex marriages;
3 No parties in the ACT case or otherwise have ever asserted any constitutional impropriety in the MA specifying what is and what is not marriage. No one has ever sought and no party in the case argued that the MA proscriptions on the recognition of foreign same sex marriages were invalid. The Commonwealth clearly has power to say what constitutes a valid marriage in Australia for the whole of Australia and what does not. The marriage power limited to traditional marriage does not mean that the MA does not cover the field of marriage throughout Australia because the marriage power and the incidental power clearly give power to the commonwealth to say that polygamy, same sex marriage, incestuous and underage marriages etc are invalid marriages in Australia. Doing so did not create any gap that a state or Territory might have filled by legislating for a proscribed form of marriage. See also Anne Twomey, "Same-Sex Marriage And Constitutional Interpretation" (2014) 88 ALJ 613

[3] There are no good reasons to expect that demands for recognition of polygamous marriage would not be the natural result of the introduction of same sex marriage in Australia Whilst there are no official figures for those in polygamous relationships in Australia (see Natalie O'Brien, "Probing polygamy" *The Australian*, June 26, 2008, http://www.theaustralian.com.au/news/probing-polygamy/story-e6frg8go-1111116736076) according to the SBS *Insight* programme "Although it's outlawed, polygamy is still practiced informally in Australia. Having more than one spouse is a long-standing and legitimate cultural norm in some Indigenous Australian, African and religious communities in Australia (SBS, "Polygamy" *Insight* http://www.sbs.com.au/insight/episode/overview/479/polygamy). According to the guests interviewed on that programme polygamy is common in at least one Lebanese Muslim community in Sydney and polygamy is a very normal part of life in the Sierra Leonean community in Australia.

10.5.1. Does not require that the union be required to endure permanently. The way is open for legislation for term marriages; and

10.5.2. by referencing 'natural persons', as distinct from man or woman, removes any requirement of maturity, leaving it open to be interpreted as adult or child.

10.6. The reliance on what are recognised as marriages in other jurisdictions in interpreting s 51(xxi), means that s 51(xxi) may also be used to validly legislate for marriages between adults and children, as such marriages are recognised in other jurisdictions. This is not a theoretical issue as such marriages are alleged to have happened here, and are well known to happen in the United Kingdom.

10.7. The High Court's decision means that once there is a move away from the core of the power, as the High Court interpreted it, namely, "the monogamous marriage of Christianity," there is no longer a logical place to stop the power being exercised to its circumference, thus allowing for those unions described above, as well as same-sex unions, to be described as marriages.

10.8. As Chief Justice Roberts said in the recent decision of the United States Supreme Court in relation to same-sex marriage:

> "One immediate question invited by the majority's position is whether States may retain the definition of marriage as a union of two people. Although the majority randomly inserts the adjective 'two' in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one.
> **It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If '[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices,' ante, at 13, why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? If a same-sex couple has the constitutional right to marry because their children would otherwise 'suffer the stigma of knowing their families are somehow lesser,' ante, at 15, why wouldn't the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry 'serves to disrespect and subordinate' gay and lesbian couples, why wouldn't the same 'imposition of this disability,' ante, at 22, serve to disrespect and subordinate people who find fulfilment in polyamorous relations**hips?
>
> I do not mean to equate marriage between same-sex couples with plural marriages in all respects. There may well be relevant differences that compel different legal analysis. But if there are, petitioners have not pointed to any. When asked about a plural marital union at oral argument, petitioners asserted that a State 'doesn't have such an institution.' Tr. of Oral Arg. on Question 2, p. 6. But that is exactly the point: the States at issue here do not have an institution of same-sex marriage, either (emphasis added)."[4]

11. The consequences of the above essential characteristics of the High Court's interpretation of the marriage power if accepted as being binding, as distinct from obiter, will deprive the legal institution of marriage in Australia of any meaning or value.

12. **Reasons why Referendum should be Preferred:**

12.1. Accordingly there is a fundamental reason (quite separate from the issue of same-sex marriage) why the matter should be dealt with as a referendum, namely, that the marriage power be restricted to two people and to an intended lifelong union. That will prevent the development of issues as are being encountered now in the United States, where litigation has commenced for recognition of multiple person relationships as marriages;[5]

12.2. Further, as the High Court's decision was without the benefit of a contradictor, it has some fragility[6];

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[4] *Obergefell v Hodges* 576 U. S. ____ (2015) at 20-21.

[5] *Brown and Ors* v. *Buhman* No. 14-411 In the United States Court of Appeal For the Tenth Circuit; https://jonathanturley.files.wordpress.com/2015/08/brown-opening-brief-masterfiled.pdf accessed 3 September 2015.

[6] See n2 above

12.3. Finally, while subject to the concerns addressed in 10.1 above, a referendum may not be *necessary*, it is not *prohibited*. A referendum will be the clearest way in which a question is put to the people, as it will define the exact changes to be made to the *Constitution*, and so, for all practical purposes, fix (in constitutional and legislative terms) the meaning of marriage in Australia.

12.4. LPDM submits that it is to be preferred to a plesbicite, which does not normally have the benefit of putting to the people the precise wording of any proposed change. However that is not to say that a plebiscite question cannot be constructed to give some precision. We deal with this next.

13. **The Content and Implications of a Question to be put to Electors:**

13.1. LPDM submits that the question that should be put to electors, whether by a referendum or a plebiscite should address the following issues;

13.1.1. Should marriage be only between a man and a woman or should marriage be between any two people regardless of sex;

13.1.2. Should marriage be limited to being between 2 people only;

13.1.3. Should marriage be intended to be for life, determinable only by law;

13.2. Accordingly LPDM suggests that the question should be as follows:

13.2.1. Should s 51(xxi) of the *Constitution* be amended to read "**Marriage, namely the union of two persons of the opposite or the same sex to the exclusion of all others voluntarily entered into for life and which is determinable only by law**" or should s. 5(1) of the MA be amended to read "**Marriage means a union of two persons of the opposite or the same sex to the exclusion of all others voluntarily entered into for life**";

13.2.2. Further, given the litigation that this issue may be spawned[7] (which is undesirable to retain respect between people of different views on this matter)[8] it may be useful to include a sub question to the effect that "**Nothing in the above amendment authorizes undue interference with the free exercise of conscience or religion by those asked to celebrate or provide creative support for the relevant ceremony and the existing right of the free exercise of conscience and religion is hereby preserved**."[9]

13.2.3. Examples of litigation which has been spawned by SSM are:

13.2.3.1. *Elane Photography v Vanessa Willcock*,[10] where a commercial wedding photographer that declined to photograph what was essentially a same-sex wedding was found to have unlawfully discriminated against the prospective customer, though no monetary relief was granted;

13.2.3.2. *Craig and Mullins v Masterpiece Cakeshop Inc and Anor*,[11] where a cake maker that declined to bake a cake celebrating an SSM was held to have acted unlawfully;

13.2.3.3. Challenge by a UK same sex couple to the Anglican Church's ban on SSM.[12]

13.2.3.4. *Arlene Flowers*[13] -Litigation in Washington State as a result of a florist refusing to prepare flowers for an SSM;

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[7] http://www.theaustralian.com.au/national-affairs/state-politics/same-sex-lobby-threatens-catholic-archbishop-over-christian-booklet/story-e6frgczx-1227427550649?sv=b840f59be6d3e16d7e6db7996c652823 accessed 3 September 2015 and see [x] below.

[8] http://tasmaniantimes.com/index.php/article/same-sex-marriage-debate-is-the-victim-card-being-played accessed 3 September 2015.

[9] LPDM is indebted to Associate Professor Neil Foster for the substantial terms of this proposed amendment.

[10] Supreme Court of New Mexico Docket No 33,687 22 August 2013.

[11] State of Colorado Administrative Court CR 2013-0008 6 December 2013.

[12] http://www.chelmsfordweeklynews.co.uk/news/10617202.Gay_dads_campaign_for_church_wedding/ accessed 8 February 2014.

[13] http://www.reuters.com/article/2013/04/19/us-usa-gaymarriage-washington-idUSBRE93I08820130419 accessed 10 February 2014; http://www.adflegal.org/detailspages/client-stories-details/barronelle-stutzman#Arlene%E2%80%99s+Flowers accessed 28 July 2015.

13.2.3.5. The Atlanta fire chief Kelvin Cochran lost his job because he wrote a book in his own time saying that "only in Christ can men be rescued from their fallen condition and fulfill their purpose as husbands and fathers," and incidentally said that SSM was wrong;[14]

14. **The Resources required to enact such an Activity, including the Question of the Contribution of Commonwealth funding to the 'Yes' and 'No' campaigns:**

14.1. LPDM submits that just as it is generally recognised that there should be proper and equal funding for the proposed Indigenous Recognition referendum, so there should be adequate and equal funding for both sides of the argument.[15] It is important that any vote on this issue is preceded by a process which fully informs the Australian people of the reasons for and against change. This did not take place in the United States where the *Obergefell* decision of the US Supreme Court resolved the issue. Following that decision, a number of surveys have shown that support for same sex marriage in the United States has declined to well below 50% and that support for religious protections for business owners with a conscientious objection to State recognition of such non-traditional marriages has increased to almost 60%:[16] The declining support for same sex marriage in the United States, following the *Obergefell* decision confirms the validity of the concerns expressed by Chief Justice Roberts, one of the 4 dissenting judges. Roberts CJ warned that the decision of the majority of that Court to impose their vision of marriage as a fundamental right on America was "stealing the issue from the people" and making a "dramatic social change…much more difficult to accept." As he put it "there will be consequences to shutting down the political process on an issue of such profound public significance. Closing the debate tends to close minds." Justice Alito similarly observed that the 5 majority judges were imposing their views of marriage and facilitating "the marginalization of the many Americans who have traditional ideas…But if that sentiment prevails, the Nation will experience bitter and lasting wounds." The declining support for SSM in the United States and the observations by these learned judges show that it is no one's interest for changes to such key institutions as marriage to be made without informed debate and calm, rational consideration of all of the implications. A process by which the for and against case are equally funded is one means of seeking to ensure this particularly in a context in which some media outlets appear unwilling to carry materials in support of the status quo.

14.2. It is also important that there be carefully thought out legislative protections to prevent the issues which have brought criticism to the Irish referendum.[17]

15. **The Impact of the Timing of such an Activity, including the Opportunity for it to coincide with a General Election:**

15.1. LPDM submits that it would be unwise for this issue to be included in a general election campaign. The matter is of such import, that electors deserve the opportunity to consider it as a stand-alone proposal rather than have to consider it with all the "noise' of a general election.

16. **An Appropriate method to Address Matters of Equality and Human Rights**:

16.1. LPDM respectfully submits that it is an error to consider this issue as a matter of equality and human rights;

16.2. There is no equality issue here as there is no question of discrimination. The assertion that the MA is itself discriminatory in relation to Australians was argued and rejected in *Margan v President,*

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[14] http://www.adflegal.org/detailspages/case-details/cochran-v.-city-of-atlanta -accessed 28 July 2015.
[15] http://www.afr.com/business/legal/funding-rules-need-to-be-set-before-indigenous-referendum-20150521-gh6p73 accessed 3 September 2015.
[16] http://www.christianpost.com/news/3-recent-polls-show-support-for-same-sex-marriage-declining-141820/.
[17] http://www.theaustralian.com.au/news/features/marriage-equality-chuck-feeney-funds-paved-way-for-irish-yes/story-e6frg6z6-1227427599452?sv=5422ccefaa030eef3c0397a8bcb215e6 accessed 3 September 2015.

Australian Human Rights Commission,[18] the Court finding that the MA did not discriminate in any proscribed way. That is the position at law in Australia.

16.3. It is also the position under the *Universal Declaration of Human Rights* (**UDHR**) and the *International Covenant on Civil and Political Rights* (*ICCP*R). In *Schalk v Kopf* [19] and *Gas and Dubois v France*[20] the European Court of Human Rights, considering the European Charter of Human Rights, which is substantially the same as the UDHR and the ICCPR, held that for a state to only permit marriage between a man and a woman, was not discriminatory.

16.4. Those decisions have been recently affirmed by the European Court of Human Rights Grand Chamber in *Hämäläinen v. Finland*.[21]

16.5. There is no discrimination for same-sex relationships to be accorded legal recognition other than by marriage (as if between a man and a woman), as Australia has progressively done since the 1970s up to recent times.

16.6. The issue is really one of public policy; i.e. is this change a good public policy change or not? That must be debated on the merits and not by clothing one side of the argument with the erroneous cloak of equality.

17. **The terms of the MEPB***:*

17.1. For the reasons set out above, the Bill does not adequately treat the issues here involved.

CONCLUSION

18. LPDM is grateful for the opportunity to make a submission in relation to this important area of legal and public life. We are ready to appear before the Committee to give oral evidence, if required.

Dated 4 September 2015

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[18] [2013] FCS 109.
[19] Application No 30141/04 Judgment 24 June 2010.
[20] Application No 2591/07) Judgment 15 March 2012.
[21] Application no. 37359/09, 16 July 2014; see also *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)

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