

Chapter 2

Process leading to the postal vote

Introduction

2.1 This chapter will outline the process leading to the announcement of the Australian Marriage Law Postal Survey (postal survey).

2.2 A timeline of key events in relation to the same-sex marriage postal survey is outlined below in Table 2.1. Key points on this timeline are discussed in greater detail later in this chapter.

Table 2.1—Timeline of key events leading to the postal survey on same-sex marriage

11 August 2015	Special joint Coalition partyroom meeting discussed same-sex marriage. Then Prime Minister Abbott announced that a compulsory plebiscite would be held on the issue.
15 September 2015	Hon Malcolm Turnbull replaced Hon Tony Abbott MP as Prime Minister.
14 September 2016	<i>Plebiscite (Same-Sex Marriage) Bill 2016</i> introduced into the House of Representatives for plebiscite to be held on 11 February 2017.
7 November 2016	<i>Plebiscite (Same-Sex Marriage) Bill 2016</i> negated in the Senate.
8 August 2017	Prime Minister Turnbull indicated that the government will seek to re-introduce the <i>Plebiscite (Same-Sex Marriage) Bill 2016</i> to the Senate notice paper. Prime Minister Turnbull indicated the government's intention to hold a voluntary postal survey on the matter if the bill is unsuccessful.
9 August 2017	Motion to restore the <i>Plebiscite (Same-Sex Marriage) Bill 2016</i> to the Senate notice paper is negated.
9 August 2017	Treasurer Morrison directed the Australian Bureau of Statistics (ABS) to conduct a voluntary postal survey on whether same-sex marriage should be legalised with results to be published on 15 November 2017. ¹
9 August 2017	The Finance Minister issued an advance of \$122 million under the <i>Appropriation Act (No. 1) 2017–18</i> to enable the ABS to undertake the postal survey.
16 August 2017	The directive to the ABS is modified to specify the type of data to be collected and published including breakdown of result by national, state/territory, and federal electorate.
7 September 2017	The High Court found that the advance to the Finance Minister is valid.
12 September 2017	Mailing of forms and collection process began.

1 Responsibility for the conduct of the postal survey was delegated to the Finance Minister.

13 September 2017	Legislation providing additional safeguards during the marriage law survey passed the Parliament. ²
7 November 2017	Postal survey closed.
15 November 2017	Results announced.
7 December 2017	Legislation legalising same-sex marriage passed the Parliament. ³

Amendments to the Marriage Act in 2004

2.3 On 16 August 2004, the Australian Parliament enacted the *Marriage Amendment Act 2004 (Cth)*. This Act inserted the following definition of marriage into subsection 5(1) of the *Marriage Act 1961 (Cth)* (Marriage Act):

'marriage' means the union of a man and woman to the exclusion of all others, voluntarily entered into for life.⁴

2.4 Section 88EA was also inserted to the Marriage Act to state that:

certain unions are not marriages. A union solemnised in a foreign country between:

A man and another man; or

A woman and another woman;

must not be recognised as marriage in Australia.⁵

2.5 These amendments meant that same-sex couples were unable to be legally married in Australia or have marriages performed overseas recognised in Australia.

2.6 Since this time, a number of private members bills seeking to repeal or modify the definition of marriage have been introduced into the parliament. None of these bills have passed the parliament.⁶

The origin of the plebiscite

2.7 Since these amendments were passed, the Liberal and National parties have had a policy to maintain this definition of marriage in the Marriage Act.

2.8 On 11 August 2015, the then Prime Minister, Hon Tony Abbott MP convened a special joint party room meeting of the Liberal and National parties to discuss the

2 *Journals of the Senate*, No. 62—13 September 2017, p. 1976. This legislation is the *Marriage Law Survey (Additional Safeguards) Act 2017*.

3 *Votes and Proceedings*, No. 91—7 December 2017, p. 1288. This legislation is the *Marriage Amendment (Definition and Religious Freedoms) Act 2017*.

4 Marriage Act 1961, ss. 5(1).

5 Marriage Act 1961, s. 88EA.

6 Dierdre McKeown, 'Chronology of same-sex marriage bills introduced into the federal parliament: a quick guide', Australian Parliamentary Library, 1 December 2017, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/Quick_Guides/SSMarriageBills (accessed 16 January 2018).

Coalition's policy position on marriage, in particular, towards same-sex marriage. This meeting determined that the Coalition's official position on marriage had not changed, and that Coalition members would continue to be bound to support this view as policy.⁷

2.9 Late that night, the then Prime Minister announced that the Coalition would hold a plebiscite or referendum on whether same-sex marriage should be legislated or not.⁸

2.10 Little more than a month later, Mr Abbott was replaced as Prime Minister by the Hon Malcolm Turnbull MP.⁹ Shortly after the 2016 federal election, the Prime Minister signalled the government's intention to hold a plebiscite towards the end of 2016.¹⁰

Plebiscite to postal survey

2.11 Shortly after the 2016 federal election, the then Special Minister of State, Senator the Hon Scott Ryan announced, pursuant to the government's election commitment, that the government intended to hold a compulsory plebiscite on whether to legalise same-sex marriage on 11 February 2017.¹¹

2.12 The *Plebiscite (Same-Sex Marriage) Bill 2016* was introduced into the House of Representatives in September 2016 to 'establish the legislative framework for a compulsory in-person vote in a national plebiscite' and was passed through the House of Representatives in October 2016. On 7 November 2016, this legislation was introduced into the Senate and negatived at the second reading stage.¹²

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- 7 Judith Ireland, 'Same-sex marriage showdown: Tony Abbott calls special meeting of Coalition MPs to debate free vote', *The Sydney Morning Herald*, 11 August 2015, <http://www.smh.com.au/federal-politics/political-news/samesex-marriage-tony-abbott-calls-special-meeting-of-coalition-mps-to-debate-free-vote-20150811-giwhi5.html> (accessed 29 November 2017).
- 8 Judith Ireland, 'Tony Abbott flags plebiscite on same-sex marriage in bid to defuse anger', *The Sydney Morning Herald*, 12 August 2015, <http://www.smh.com.au/federal-politics/political-news/tony-abbott-flags-plebiscite-on-samesex-marriage-in-bid-to-defuse-anger-20150811-giwyg1.html> (accessed 29 November 2017).
- 9 Australian Parliament, 'Senators and Members: Hon Malcolm Turnbull MP', https://www.aph.gov.au/Senators_and_Members/Parliamentarian?MPID=885 (accessed 29 November 2017).
- 10 Prime Minister Hon Malcolm Turnbull, 'Interview with Leigh Sales', *ABC 7.30 Program*, 18 July 2016, <https://www.pm.gov.au/media/interview-leigh-sales-abc-730-program> (accessed 15 January 2018).
- 11 Senator the Hon Scott Ryan, Special Minister of State, 'Plebiscite paves way for choice on same sex marriage', *Media Release*, 13 September 2016, <http://scottryan.com.au/media/media-release-plebiscite-paves-way-for-choice-on-same-sex-marriage> (accessed 29 November 2017).
- 12 Australian Parliament, 'Plebiscite (Same-Sex Marriage) Bill 2016', https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5728 (accessed 29 November 2017).

2.13 At the time, the Opposition and interest groups have argued that holding the plebiscite may have adverse consequences on lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) members of the community. The Opposition also argued that the estimated cost of \$170 million to hold the plebiscite was unnecessary and that a direct vote in Parliament was a more appropriate mechanism to amend the Marriage Act.¹³

2.14 On 8 August 2017, Prime Minister Turnbull indicated that the government would seek to reintroduce the *Plebiscite (Same-Sex Marriage) Bill 2016* to the Senate notice paper. In the event that this plebiscite was not supported by the Senate the government signalled it would hold a voluntary postal survey on the matter.¹⁴

2.15 The following day, the government's motion to restore the *Plebiscite (Same-Sex Marriage) Bill 2016* to the Senate notice paper was negated.¹⁵

Directive to conduct the Australian Marriage Law Postal Survey

2.16 Following the government's failure to establish a plebiscite, the Treasurer, Hon Scott Morrison MP issued the *Census and Statistics (Statistical Information) Direction 2017*—a directive to the Australian Bureau of Statistics (ABS) to collect statistical information from 'participating electors...about whether the law should be changed to allow same-sex couples to marry' and publish this information 'on or before 15 November 2017'.¹⁶ This process would be known as the 'Australian Marriage Law Postal Survey'.

2.17 Problems with the drafting of the directive lead to confusion regarding whether 16 and 17 year olds and prisoners would be permitted to participate.¹⁷ The directive was accordingly amended a week later by the Finance Minister, Senator the Hon Mathias Cormann (under authority from the Treasurer) to specify what information would be gathered and published on the matter.¹⁸ This specific

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- 13 Hon Bill Shorten MP, Leader of the Opposition, 'Now it's time for a free vote, Mr Turnbull', *Media Release*, 8 November 2016, http://www.billshorten.com.au/now_it_s_time_for_a_free_vote_mr_turnbull_tuesday_8_november_2016 (accessed 29 November 2017). See also: Senator Janet Rice, 'Expensive, unnecessary and now defeated plebiscite bill relegated to the graveyard of bad ideas', *Media Release*, 8 November 2016, <https://greensmps.org.au/articles/expensive-unnecessary-and-now-defeated-plebiscite-bill-relegated-graveyard-bad-ideas> (accessed 29 November 2017).
- 14 Hon Malcolm Turnbull MP, Prime Minister of Australia, 'Press conference with Senator the Hon. Mathias Cormann, Acting Special Minister of State', *Press Conference*, 8 August 2017, <https://www.pm.gov.au/media/press-conference-senator-hon-mathias-cormann-acting-special-minister-state> (accessed 29 November 2017).
- 15 *Journals of the Senate*, No. 50—9 August 2017, pp 1620–21.
- 16 *Census and Statistics (Statistical Information) Direction 2017*, ss 3(1) & ss 3(3). See also: Australian Bureau of Statistics, *Submission 1*, p. 2.
- 17 See Joe Kelly and Chris Merritt, 'Younger teenagers not invited to ballot party', *Weekend Australian*, 12 August 2017, p. 4; and Michael Koziol and Michaela Whitbourn, 'Survey risks excluding 113,000 voters', *Sydney Morning Herald*, 12 August 2017, p. 4.
- 18 Australian Bureau of Statistics, *Submission 1*, p. 2.

information included 'information about participating electors at the national level, at the level of each state and territory, and at the level of each electoral division'.¹⁹

2.18 In its submission, the ABS noted that it would receive support to deliver the postal survey from a number of 'other government departments and agencies' including 'Australia Post, Department of Human Services, Treasury, Finance, [and] Australian Government Solicitor'.²⁰

Funding the Australian Marriage Law Postal Survey

2.19 In announcing the survey, the Finance Minister stated that that the survey would cost \$122 million. This compared to the government's estimate of \$170 million for a full compulsory plebiscite.²¹

Advance to the Finance Minister

2.20 On 9 August 2017, the *Advance to the Finance Minister Determination (No. 1 of 2017–18)* (advance) was made by the Finance Minister. This advance provided an additional \$122 million to the departmental item for the ABS in the *Appropriation Act (No. 1) 2017–18* for the purposes of undertaking a voluntary postal survey.²²

2.21 The Department of Finance defines an advance to the Finance Minister as 'provisions in the annual Appropriation Acts which enable the [Finance Minister] to provide additional appropriation to agencies throughout the financial year'.²³ Furthermore:

An advance may only be issued by the Finance Minister / responsible Presiding Officer if satisfied that there is an urgent need for expenditure that is either not provided for or has been insufficiently provided for in the existing appropriations of the agency. The additional appropriation is provided by means of a determination.²⁴

2.22 The advance stated that the government decision to hold a postal survey was not made until after the *Appropriation Bill (No. 1) 2017–18* was 'introduced into the

19 Australian Bureau of Statistics, *Submission 1*, p. 2. See also: *Census and Statistics (Statistical Information) Direction 2017*, ss 3(1) & ss 3(3).

20 Australian Bureau of Statistics, *Submission 1*, p. 2.

21 Hon Malcolm Turnbull MP, Prime Minister of Australia, 'Press conference with Senator the Hon. Mathias Cormann, Acting Special Minister of State', *Press Conference*, 8 August 2017, <https://www.pm.gov.au/media/press-conference-senator-hon-mathias-cormann-acting-special-minister-state> (accessed 29 November 2017).

22 *Advance to the Finance Minister Determination (No. 1 of 2017–18)*.

23 Department of Finance, 'Advance to the Finance Minister', July 2017, https://www.finance.gov.au/publications/advance_to_the_finance_minister/ (accessed 4 December 2017).

24 Department of Finance, 'Advance to the Finance Minister', July 2017, https://www.finance.gov.au/publications/advance_to_the_finance_minister/ (accessed 4 December 2017). See also: *Appropriation Act (No. 1) 2017–18*, para. 10(1)(b).

House of Representatives on Tuesday 9 May 2017'.²⁵ As such, the advance also stated that the expenditure was 'urgent because it was unforeseen'.²⁶

High Court challenge to the advance

2.23 The validity of the Advance to the Finance Minister was challenged by a number of plaintiffs in the High Court of Australia.²⁷ On 7 September 2017, the High Court ruled that the Advance to the Finance Minister was valid.²⁸

25 *Advance to the Finance Minister Determination (No. 1 of 2017–18)*.

26 *Advance to the Finance Minister Determination (No. 1 of 2017–18)*.

27 *Wilkie v The Commonwealth & Australian Marriage Equality Ltd v Cormann* [2017] HCA 40, pp 16–17.

28 *Wilkie v The Commonwealth & Australian Marriage Equality Ltd v Cormann* [2017] HCA 40, p. 2.