

Dissenting report by Government Senators

Introduction

1.1 The Australian Marriage Law Postal Survey (Marriage Survey) was a fulfilment of the government's election commitment to hold a popular vote on the issue of same-sex marriage. Given that the Australian Parliament had previously tried a number of times to resolve the issue of same-sex marriage without a clear resolution, the Government decided that the best course of action was for the Australian people to have their say first to inform any future legislative decisions.

1.2 The Government has always been clear that if a public vote were to result in a Yes vote, then it would facilitate parliamentary consideration of a Private member's Bill. As the Prime Minister said, "the consequence of a 'yes' vote in the plebiscite will be that same-sex marriage will be legal in Australia".¹

1.3 Following the 15 November 2017 announcement of an emphatic Yes result, the Government honoured its commitment to provide a free vote on a Private Members Bill to its Members and Senators. This allowed parliamentarians in both houses to work across party-lines to resolve details of legislative reforms, informed by the public results of the survey.

1.4 The Government gave precedence for this bill to be introduced in the Senate and debated ahead of Government legislative business and parliamentary hours were extended to allow the passage of the bill before the end of sittings in 2017. On 7 December 2017, the Marriage Amendment (Definitions and Religious Freedoms) Bill 2017, was passed by the House of Representatives, legalising same-sex marriage in Australia.²

1.5 As the Prime Minister, the Hon Malcolm Turnbull MP, stated following the passage of the bill, although the Labor Opposition has recently led criticism of the Marriage Survey process, the previous Rudd/Gillard Labor government had six years to make this legislative change and did nothing about it.³

1.6 Passage of legislative reform is a success that belongs to the whole parliament. But commentators have rightly observed that the parliamentary majority that legislated same-sex marriage was greater than could have been achieved if

1 Prime Minister the Hon Malcolm Turnbull MP, *House of Representatives Hansard*, 21 October 2015, p. 12007.

2 House of Representatives Votes and Proceedings, *No. 91–7 December 2017*, pp 1288. The bill had previously passed the Senate on 29 November 2017, see: Journals of the Senate, *No. 74–29 November 2017*, p. 2367.

3 Interview on 7.30 with Leigh Sales, 7 December 2017, available at: <https://www.pm.gov.au/media/television-interview-leigh-sales-730-abc> (accessed 9 February 2018).

members and Senators had not known the weight of public opinion in their respective electorates and states.⁴

1.7 Some parliamentarians who had personally voted against same-sex marriage in the survey, subsequently pledged to vote for the Private Members Bill in parliament out of respect for the views of their constituents.

The legitimacy and legality of a Postal Survey approach

1.8 Government Senators strongly reject the contention in the majority report that it was inappropriate to use a voluntary postal survey as a means to provide the Australian public with its say on the issue of same-sex marriage. The postal survey did not of course actually change the law, but it provided an unquestionable public mandate for change that allowed for the passage of legislation after successive previous bills had failed.

1.9 Unlike other forms of polling that are susceptible to error, this survey collected the views of all Australians who wanted a say on the matter and definitively revealed the geographic dispersion of support, down to an individual electorate level.

1.10 The idea of asking the Australian public for their view is one that, at different times, has had attraction to parliamentarians on both sides of the chamber. In 2013 prior to the federal election that year, future Labor Leader Bill Shorten told the Australian Christian Lobby that:

Personally speaking, I'm completely relaxed about having some form of plebiscite...in terms of a plebiscite, I would rather that the people of Australia could make their view clear on this than leaving this issue to 150 people.⁵

1.11 During the 2017 Marriage Survey Labor Senator Patrick Dodson expressed the view on radio that:

We've just spent \$122 million surveying people on the question of Same-Sex Marriage. Now that's a good thing to do and it's a necessary thing to do.⁶

1.12 In 2017 Australia celebrated the 50th anniversary of the 1967 referendum that removed two discriminatory references to Indigenous Australians in the Constitution. That referendum saw the highest 'Yes' vote ever recorded in a Federal referendum,

4 For example Jennifer Hewett, 'Same-sex marriage becomes reality', *Sydney Morning Herald*, 7 December 2017 <http://www.afr.com/opinion/columnists/through-the-minefield-of-coalition-tensions-samesex-marriage-becomes-reality-20171207-h00nbu> (accessed 9 February 2018).

5 Dennis Shanahan 'Federal election 2016: Bill Shorten flips on gay marriage plebiscite', *The Australian*, 29 June 2016, available at: <https://www.theaustralian.com.au/federal-election-2016/federal-election-2016-bill-shorten-flips-on-gay-plebiscite/news-story/fd7f72809333817973db6448f554> (accessed on 13 February 2018).

6 ABC Radio National, AM interview with Sabra Lane, 'Rejection of Indigenous advisory a "kick in the guts": Patrick Dodson', available at: <http://www.abc.net.au/radio/programs/am/indigenous-advisory-rejection-a-kick-in-the-guts-dodson/9091474> (accessed on 13 February 2018).

with 90.77 per cent voting to give parliament the power to support better conditions for Indigenous Australians and to recognise Indigenous Australians in the census. This result was never taken for granted by those who supported the change. This resounding support for reform was the result of a very significant period of public discussion on the treatment of Indigenous Australians and active mobilisation of support in the community to build momentum towards a yes outcome.

1.13 Government Senators note that the government's preference was to have the issue of same-sex marriage decided by a compulsory attendance plebiscite. However, the Labor and Greens parties, rather than working with the Government, chose to be play politics and block the government's bills which would have provided for the conduct of a plebiscite under the auspices of the Australian Electoral Commission (AEC) and within the usual Electoral laws framework for plebiscites.

1.14 In the face of political obstruction, the Government opted for a voluntary postal survey, conducted by the Australian Bureau of Statistics (ABS) and funded through an Advance to the Finance Minister. It was Labor and the Greens' own actions which lead to the choice of a postal survey, and it is therefore difficult to take seriously their protestations about the appropriateness of the mechanism or their belated preference for the usual Electoral Laws framework. The majority report argues that a survey is not a substitute for an electoral process. Justice Edelman addressed this misconception during the High Court's hearing of two challenges to the legality of the survey process. He observed that:

It does not really matter, then, whether it is a vote or not because it may be possible that something could be characterised as both a vote and as being a collection of statistical information.⁷

1.15 The High Court unanimously agreed with the view that the postal survey had a dual character, concluding:

One strand of the [plaintiff's] argument sought to draw a dichotomy between a 'vote' or a 'plebiscite', on the one hand, and the collection of 'statistical information', on the other. The dichotomy is false.⁸

1.16 There is precedent for the ABS being tasked as the responsible agency by the executive arm of Government, to test public opinion on a policy question of national significance. In 1974 the Whitlam Government used the same constitutional powers and authority under relevant legislation to fund and conduct an ABS survey of 60,000 randomly selected Australians, to ask them about their opinion on whether Australia's National Anthem should be changed. This poll found that 51.4% of Australians surveyed expressed an opinion in favour of changing Australia's National Anthem to

7 *Wilkie & Ors v The Commonwealth of Australia & Ors; Australian Marriage Equality Ltd & Anor v Minister for Finance Mathias Cormann & Anor* [2017] HCATrans 174 (5 September 2017).

8 *Wilkie & Ors v The Commonwealth of Australia & Ors; Australian Marriage Equality Ltd & Anor v Minister for Finance Mathias Cormann & Anor*, [2017] HCA 40, paragraph 142, 28 September 2017, available at: <http://eresources.hcourt.gov.au/showCase/2017/HCA/40>.

"Advance Australia Fair" and the Whitlam Government then acted consistent with the public preference to change the National Anthem.⁹

1.17 The Marriage Survey used a more comprehensive data collection, to ensure reliable results at an electorate level. The head of the Marriage Survey Taskforce and Deputy Statistician Mr Jonathan Palmer explained that:

This is not really a sample survey. We're, effectively, conducting a census of people who are in that subpopulation of eligible voters. As I said, I had some discussions with our chief methodologist around the approach we're taking in this. If we tried to conduct it as a sample survey, in order to produce quality results at the individual electoral division level, we would need to have an extremely large sample in the millions. So, it's just not a viable approach.¹⁰

1.18 Contrary to suggestions in the majority report, the ABS was able to apply their relevant statistical methods and experience to the exercise:

The methodology used by the ABS for the survey was consistent with standard statistical processes for any collection. ... The statistical methodology that was applied was essentially the same as that used for the voluntary Religious Affiliation question asked in the Australian Census of Population and Housing. This question was not adjusted for non-response as the ABS was not confident that the characteristics of those who didn't respond were the same as those who did respond. For the same reason, the AMLPS was not adjusted for non-response. ... In total over 20,000 data fields were published by the ABS on 15 November 2017.¹¹

1.19 Government Senators also point out that the legal mechanisms providing for the conduct of the postal survey, namely the Treasurer's direction to the Australian Statistician, and appropriations allocated through the Advance to the Finance Minister, were upheld by the High Court as valid. The High Court challenge raised every theory that could be conceived, for arguing that the survey lacked legal legitimacy. But the High Court confirmed that the Government had both the constitutional power and appropriate statutory authority to commission the postal survey.¹²

9 Prime Minister Press Statement No 229, 18 April 1974, 'Australia's National Anthem', available at: <https://pmtranscripts.pmc.gov.au/sites/default/files/original/00003216.pdf> (accessed on 13 February 2018); Prime Minister, the Hon Gough Whitlam, Media release, 8 April 1974, 'Results of the National Anthem Poll', available at: <https://pmtranscripts.pmc.gov.au/sites/default/files/original/00003208.pdf> (accessed on 13 February 2018).

10 Senate Finance and Public Administration Committee public hearing, *Committee Hansard*, 17 August 2017, p. 11.

11 Australian Bureau of Statistics, *Report on the conduct of the Australian Marriage Law Postal Survey 2017*, 30 January 2018, p. 9, available at: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/1800.0Main+Features382017?OpenDocument> (accessed 9 February 2018).

12 See *Wilkie v The Commonwealth*; *Australian Marriage Equality Ltd v Minister for Finance* [2017] HCA 40.

1.20 Up to \$295 million had been made available by the parliament to the Government through *Appropriation Act (No. 1) 2017-18*, from which the Finance Minister could make appropriate commitments of money, using a non-disallowable instrument. The Advance to the Finance Minister is able to be used when there are urgent expenditure requirements that were either omitted or understated, or unforeseen at the time that the Budget was delivered.

1.21 Under the former Labor government, \$891 million has been dispensed using the Advance to the Finance Minister, through 32 Advances over the years from 2008-09 to 2012-13. These advances were used for a range of initiatives, ranging from new budget decisions, through to fixes for erroneous omissions in Budget papers. By contrast the current Government had made only one other Advance to the Finance Minister in four years before the Marriage Survey, which was to implement Senate voting reform in 2015-16 (\$101.2m to the AEC to implement systems changes).¹³ No one at that time questioned the validity or appropriateness of that advance of funds.

1.22 The High Court has now upheld the validity of funding for the Marriage Law Survey, ruling against every aspect of two legal challenges.

1.23 Although the Marriage Law Postal Survey was an unusual exercise held in special circumstances, it was a most appropriate solution given the need to test the public mandate for a major social change.

Conduct of the survey

1.24 Government Senators note that the ABS provided extensive evidence to the committee about the risk register for the postal survey.¹⁴ Risk management was an ongoing focus for the ABS as it responded to developments throughout the Marriage Survey period.¹⁵ Government Senators are of the view that the ABS's proactive approach to risk management significantly contributed to the success of the postal survey. In this context, Government Senators also note the ABS's *Report on the conduct of the Australian Marriage Law Postal Survey 2017*, which sets out the quality assurance measures, including risk management and issues management framework for the postal survey.¹⁶ In the view of Government Senators, the risk strategies adopted by the ABS were well-managed and comprehensive.

13 Department of Finance website, *Advance to the Finance Minister*, available at: https://www.finance.gov.au/publications/advance_to_the_finance_minister/ (accessed on 13 February 2018).

14 See Australian Bureau of Statistics (ABS), *Submission 1*, p. 13; Mr Jonathan Palmer, Deputy Australian Statistician, Census and Enabling Services Group, ABS, *Committee Hansard*, 17 August 2017, pp 4–5; ABS, answers to questions on notice, 17 August 2017, pp 1–3 (received 31 August 2017).

15 See: Mr Jonathan Palmer, Deputy Australian Statistician, Census and Enabling Services Group, ABS, *Committee Hansard*, 7 September 2017, p. 4.

16 Australian Bureau of Statistics (ABS), *Report on the conduct of the Australian Marriage Law Postal Survey 2017*, 30 January 2018, pp 42-51, available at: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/1800.0Main+Features382017?OpenDocument> (accessed 9 February 2018).

1.25 The majority report cites a small number of discrete examples from media articles of people alleging that Marriage Survey forms had been stolen. Government Senators agree with the conclusion of the majority that these examples appear to be isolated incidents and not indicative of any systemic issues.

1.26 The ABS had very effective arrangements in place to issue replacement forms and invalidate the barcodes for forms that had potentially been stolen or been sent to an incorrect address. Indeed the ABS immediately remedied the most significant incident cited in the majority report, after damaged envelopes were found at Mona Vale. The Survey Taskforce took all the damaged Mona Vale mail into their possession and sought contact with each affected voter, to issue new forms while invalidating old ones.¹⁷ Likewise abandoned mail found in Brunswick, referred to in the majority report, was also notified to the ABS, allowing for an effective intervention and remedy.¹⁸

1.27 The final ABS report on the survey observes that the number of perceived cases of mischief was effectively statistically insignificant:

Throughout the survey period, issues reported to the ABS accounted for fewer than 500 individual survey forms (less than 0.0032 per cent of over 16 million forms issued). These issues related to allegations of mail theft, attempts to offer survey forms for sale, persons attempting to influence the response of vulnerable people, and the intention to respond to the survey on another person's behalf without their authorisation to do so. **There are no known incidents of fraudulent responses being counted in the survey.**¹⁹ (Emphasis added)

1.28 The ABS went on to report that the subset of cases warranting referral for investigation was even smaller:

All allegations of fraud or criminal actions were investigated by the ABS and where appropriate referred to the relevant authorities for investigation. A total of 18 matters were referred to police for investigation.²⁰

1.29 These are very insubstantial numbers in the context of a survey open to 16 million eligible Australians.

17 Saimi Jeong, 'Same sex marriage survey envelopes found in bin of Mona Vale apartment block', *Sydney Morning Herald*, 22 September 2017, available at: <http://www.smh.com.au/national/samesex-marriage-survey-envelopes-found-in-bin-of-mona-vale-apartment-block-20170922-gymxlw.html> (accessed 12 February 2018).

18 'SSM: Same-Sex marriage surveys found 'dumped in Brunswick', security concerns raised', *ABC News Online*, 19 September 2017, available at: <http://www.abc.net.au/news/2017-09-19/ssm-surveys-dumped-in-brunswick-garden-raise-security-concerns/8961044> (accessed 9 February 2018)

19 ABS, *Report on the conduct of the Australian Marriage Law Postal Survey*, 30 January 2018, p. 45.

20 ABS, *Report on the conduct of the Australian Marriage Law Postal Survey*, 30 January 2018, p. 49.

Participation and enrolment

1.30 At the start of the survey process, some commentators cautiously suggested that there should be low expectations for the achievable turnout for the Marriage Survey. Psephologist Antony Green observed that Australia does have some experience of conducting voluntary elections by post and summarised the historic benchmarks. The 1997 Constitutional Convention election recorded a participation rate of 46.9%, while the most recent rounds of local government elections using voluntary postal voting had recorded average participation rates of 54.6% in Tasmania (2014), 32% in South Australia and 27.5% in Western Australia (2015).²¹

1.31 According to the Australian Bureau of Statistics (ABS), 12,727,920 people, or 79.52 per cent of the eligible population, participated in the Marriage Survey. As the Australian Statistician noted in announcing the results of the survey, this is an exceptionally high rate of participation for a voluntary survey:

This high response rate far exceeds expectations and compares extremely favourably with other voluntary exercises conducted around the world thanks to the strong interest and engagement of eligible Australians in this topic.²²

1.32 The high participation rate in the Marriage Survey attests to the vast majority of Australians wanting to have their say on this matter. Moreover, given that awareness of the survey was almost universal at 99 per cent in tracking research conducted for the ABS, it could be reasonably presumed that most of the non-participants had consciously chosen not to express a view.²³

1.33 The 79.52% participation by Australian voters is a resounding endorsement of the Government's decision to give them their say. This is almost 20% higher than the Irish referendum on same-sex marriage (60.5%) and over 7% above the participation in the Brexit referendum (72.2%).

1.34 It is more than 10% higher than the last general election votes in the UK (68.8% in June 2017) and Canada (68.3% in October 2015). It is almost level with the recent New Zealand general election (79.8%). It is higher than Presidential votes in the US (60.2% in November 2016) and France (74.6% in May 2017). This is a remarkable performance, given that this was a single issue question.

1.35 The ABS and its partner agencies made extensive efforts to achieve the highest participation possible:

21 Anthony Green, 'Participation rates at Australian Voluntary Postal Ballot Elections', 9 August 2017, *ABC News Online*, available at: <http://www.abc.net.au/news/2017-08-09/participation-rates-at-australian-voluntary-postal-ballot-electi/9388940> (accessed 9 February 2018).

22 See Australian Bureau of Statistics, *Australia supports changing the law to allow same-sex couples to marry*, Media Release, 15 November 2017, available at: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/C2DA40601247126DCA25822400106775?OpenDocument> (accessed 9 February 2018).

23 ABS, *Report on the conduct of the Australian Marriage Law Postal Survey*, 30 January 2018, p. 32.

- Australia Post has handled over 28.6 million mail articles, delivering the survey forms to the public ahead of schedule.
- DHS ran an Information Line that answered 208,894 phone calls with an average answer time of seven seconds, providing members of the public clarity and confidence on the process.²⁴
- Some 34,447 Australians expressed their views online using a secure access code including Australians living overseas and people with disabilities. While all eligible Australians who were travelling or living overseas had the opportunity to use this mechanism, a very high proportion of those who were overseas at some point during the two month survey period chose to respond by post before or after their overseas travel.²⁵

1.36 Of those who expressed a view on the survey question, 99.7% provided a clear response, demonstrating that the Government and the ABS had implemented a very sound process for people to express their views in unambiguous terms. This clear result gave the parliament a strong mandate to give effect to legislation to decisively resolve the protracted policy debate.

1.37 The majority report focuses much attention on participation in remote areas, and in particular, the electorate of Lingiari. Government Senators note the evidence, cited in the majority report, from the Deputy Australian Statistician about the measures for the despatch of survey forms to rural and remote areas.²⁶

1.38 This included assistance from the ABS for 244 Aboriginal and Torres Strait Islander Communities and visits to 191 remote communities to help support participation.

1.39 While Government Senators support the recommendation in the majority report that the AEC actively engage remote communities and Indigenous peak bodies to increase the enrolment of people in remote electorates, it is also important to acknowledge that the ABS's inclusiveness strategy was well received by the broader public.

1.40 Government Senators particularly refer to the submission of the Federation of Ethnic Communities' Councils of Australia (FECCA):

FECCA was impressed with the seriousness and importance that the ABS placed on the ability for all Australians to be able to participate fully in the postal survey regardless of their background. It was gratifying to see the

24 ABS, *Report on the conduct of the Australian Marriage Law Postal Survey*, 30 January 2018, p. 21.

25 ABS, *Report on the conduct of the Australian Marriage Law Postal Survey*, 30 January 2018, p. 36.

26 Mr Jonathan Palmer, Deputy Australian Statistician, Census and Enabling Services Group, ABS, *Committee Hansard*, 15 September 2017, p. 2.

ABS put into practice the solutions to access and equity challenges which face many Australians from migrant and refugee communities.

...

FECCA would like to commend the ABS for their role in ensuring that Australians from [culturally and linguistically diverse] backgrounds were able to fully participate meaningfully in what has been a historic process.²⁷

1.41 Further, Government Senators believe that the majority report has failed to acknowledge that the Marriage Survey has, in fact, had a very positive effect on electoral enrolment.

1.42 Over 3.3 million people visited the AEC website in the two weeks leading up to the close of rolls, compared to an average fortnight of around 90,000 visitors. The Electoral Roll closed 15 days after the Government announced the Marriage Survey, and for comparison purposes, for a federal election, the period before the close of rolls is 7 days from the issuing of the writs.

1.43 The Government spent over \$5 million in a first phase of advertising, primarily to inform the public about the importance of being on the Electoral Roll and the opportunity to get address details up-to-date on the Roll. The Department of Foreign Affairs and Trade also assisted by promoting enrolment information on their communication channels for Australians overseas.

1.44 Mr Jeff Pope, Deputy Electoral Commissioner, AEC, advised the committee that the electoral roll is "in the best shape it's ever been in since Federation" as a result of the postal survey.²⁸ The Electoral Roll increased by over 98,000 people between 8 August and the end of 24 August. We have seen largest electoral enrolment event in Australian history with a total of 933,592 electoral roll updates (including updates to addresses). This was a historic record and was 36% higher than the approximately 687,000 enrolment transactions during the close of rolls period for the 2016 federal election. At the Senate Finance and Public Administration Legislation Committee's Supplementary Estimates hearings in October 2017, Mr Tom Rogers, Australian Electoral Commissioner, informed the committee that the roll was 96.3 per cent complete.²⁹

27 Federation of Ethnic Communities' Councils of Australia, *Submission 25*, pp 1–2.

28 Mr Jeff Pope, Deputy Electoral Commissioner, Australian Electoral Commission, *Committee Hansard*, 7 September 2017, p. 10.

29 Mr Tom Rogers, Australian Electoral Commissioner, Australian Electoral Commission, *Senate Finance and Public Administration Legislation Committee Estimates Hansard*, 24 October 2017, p. 181.

1.45 Mr Rogers and Mr Pope explained that, at that time, the AEC was working with ABS on a protocol to determine whether postal survey envelopes marked 'Return to Sender' and sent to the ABS could be used to further 'cleanse the roll'.³⁰

Marriage Law Survey (Additional Safeguards) Act 2017

1.46 Australia's constitutional democracy means that people are entitled to their views on major social change, as long as they operate within our legal framework. The Government did not accept the proposition that Australians were unable to have a civil debate on same-sex marriage, or that it was impossible to add appropriate additional safeguards to complement existing legal protections.

1.47 Spreading material or information that undermines Australia's cohesive society, including ideologies that encourage violence or discrimination on the basis of sexuality, is unacceptable and a strong framework was already in place for the prevention incitement to violence, including under state and federal laws.

1.48 The Government consulted across party lines and with other interested parties on further temporary legislated protections that would be appropriate to ensure the process was fair and that Australians got the opportunity to hear differing views in an appropriate environment. The views of other parties helped determine what detail was included in a safeguards bill and when debate on that bill commenced in the parliament. Government Senators disagree with the majority report's characterisation that the *Marriage Law Survey (Additional Safeguards) Act 2017* (Safeguards Act) was "insufficient to curb much of the offensive material distributed by mail and throughout social media".³¹ This partisan comment does not accord with the constructive and bipartisan spirit of the safeguards legislation.

1.49 In announcing the introduction of the Australian Law Survey (Additional Safeguards) Bill 2017 to Parliament, the Minister for Finance, Senator the Hon Mathias Cormann noted the purpose of the legislation:

We have been exploring in good faith how we can complement existing legal protections under current laws further – principally by ensuring that all of the usual relevant safeguards under our Electoral Laws apply to this process as appropriate.

This includes provisions to ensure relevant authorisations on advertisements, reasonable opportunity to have opposing views broadcast, offences against bribery and threats and the prohibition of misleading and deceptive conduct in relation to the completion of survey forms....

30 Mr Tom Rogers, Australian Electoral Commissioner, Australian Electoral Commission, and Mr Jeff Pope, Deputy Electoral Commissioner, Australian Electoral Commission *Senate Finance and Public Administration Legislation Committee Estimates Hansard*, 24 October 2017, p. 181; and Australian Electoral Commission, answer to question on notice no. 48, Senate Finance and Public Administration Legislation Committee, Supplementary Budget Estimates hearings 2017–18.

31 See: Chapter 4 of the majority report.

This Bill will also propose a further safeguard against vilification, intimidation and threats to cause harm because of the views expressed or believed to be held in relation to the Survey, or because of the religious conviction, sexual orientation or gender identity or intersex status of a particular person or group.³²

1.50 The Safeguards Act was passed with cross-party support.

1.51 The Safeguards Act contained provisions for a person to apply for a civil penalty order with the consent of the Attorney-General, to ensure that claims of vilification are not brought frivolously or otherwise without substance.³³ Both the Yes and No campaigns designated legal organisations as a 'notifying person' under the Safeguards Act, to refer any vilification complaints to the Attorney-General for his consideration. However as the majority report notes, in October 2017, the then Attorney-General advised that no requests for consent had been received.³⁴ The apparent absence of such formal complaints suggests that those who doubted Australians could have a respectful debate about the issue of same-sex marriage without widespread vilification were ultimately mistaken.

1.52 The majority report favourably quotes a suggestion that the Safeguards Act should have allowed for legal action on a public-funded basis, to avoid potential costs to members of the community who cannot afford the risk of costs being awarded against them. The Safeguards Act was in fact designed to allow the Commonwealth to carry the substantial costs of pursuing a matter in the courts, where appropriate. Section 23 specifically allows the Attorney General to intervene in proceedings for an injunction and the Attorney-General may also institute an appeal.

1.53 The Safeguards Act contains meaningful penalties, including criminal sanctions, to deter those who might consider doing the wrong thing. Some of the more serious offences proscribed in the Safeguards Act attract a maximum penalty of 120 penalty units (\$25,200), consistent with Electoral law. The maximum penalty for other offences in the Act is 60 penalty units (\$12,600).

1.54 The majority report concludes that the survey provided an excuse for people to ventilate views that may be regarded as objectionable, or even be intended to cause offence. This claim ignores the historic fact that debate about same-sex marriage had been prominent and sustained over several years before the survey. The debate was indeed one of the dominant political issues through most of 2017, ahead of the Government's final decision on the approach for giving the Australian public a say on the matter.

32 Senator the Hon Mathias Cormann, Minister for Finance, 'Additional Safeguards to facilitate the Australian Marriage Law Postal Survey', *MC 56/17*, 12 September 2017, available at: <https://www.financeminister.gov.au/media-release/2017/09/12/additional-safeguards-facilitate-australian-marriage-law-postal-survey> (accessed 9 February 2018).

33 Sections 15 and 19, *Marriage Law Survey (Additional Safeguards) Act 2017*.

34 Senate Legal and Constitutional Affairs Legislation Committee, *Estimates Official Hansard*, 24 October 2017, pp. 176-177.

1.55 By resolving an already heated debate through the Marriage Survey and by enacting the Safeguards Act, the Government was able to ensure that a debate that had effectively already been under way for some time could come to its conclusion in an appropriate environment of legal protections.

1.56 While Government Senators acknowledge that there were instances of people disseminating offensive material, it is our view that in overwhelming numbers, Australians who participated in the debate did so in a courteous and respectful manner.

1.57 Care should be taken in accepting assertions that there was widespread inappropriate conduct that went beyond the pale. A number of regulators had responsibility for considering and acting on reports of wrongdoing, so the complaints they received provide an objective evidence base for testing assertions about the tenor of overall debate or debate at the extremities. The Committee heard from the regulators that much of the public contact with them during the survey process involved inquiries about lower level matters, in particular complaints about the due form for authorisations. But the AEC found that a number of complaints on authorisations were without substance - for instance complaints that text messages or sky writing had not been compliant with the law. In relation to websites, the AEC had nearly a 100 per cent success rate in having authorisation details added after contacting webpage owners.³⁵

Conclusion

1.58 Government Senators believe that the majority report raises no substantive issues in relation to the conduct of the Marriage Survey. Importantly, the majority report recognises the excellent work of the ABS and Government Senators commend the leadership of the ABS and the Taskforce staff from all the government agencies involved who contributed to the success of the postal survey.

1.59 The ABS and its partner agencies have received insufficient acknowledgment for their accomplishment in delivering the survey substantially under the project budget, at a final cost of \$80.5 million, or two-thirds of what was estimated.³⁶ The Committee observed nothing short of dedication and professionalism from all the officials they interviewed.

1.60 Government Senators do not agree with the characterisation of the survey which is implicit in Recommendation 1 of the majority report. Public debate can be healthy, constructive and help the community come to terms with changes in social mores.

1.61 In relation to Recommendation 2 of the majority report, Government Senators support and recognise the importance of ongoing funding for mental health treatment

35 Mr Paul Pirani, Chief Legal Officer, Australian Electoral Commission, *Estimates Official Hansard*, 24 October 2017, p. 177-178.

36 2017-18 Mid-Year Economic and Fiscal Outlook, p. 185. http://www.budget.gov.au/2017-18/content/myefo/download/09_Appendix_A.pdf.

for all Australians. Government Senators note the funding that this government has provided significant funding to mental health treatment programs, including a boost to funding in the 2017 Federal Budget.³⁷ Commonwealth funding already includes support to the National LGBTI Health Alliance, for a number of programs specific to the ongoing mental health needs of lesbian, gay, bisexual, transgender and intersex people.

1.62 As noted above, Government Senators support, in principle Recommendation 3 of the majority report. We agree with that governments should always make the strongest endeavours to assist our most disadvantaged communities in having a say in electoral processes and we recognise the importance of making a targeted effort in Indigenous communities to overcome language barriers and other obstacles to civic participation.

1.63 The majority report correctly identifies that there is a long-standing participation challenge in the Division of Lingiari in particular, as evident in successive federal elections.

1.64 The AEC established the Indigenous Electoral Participation Program in 2010, to help close the gap in Indigenous electoral participation. The AEC works with communities to improve enrolment, turnout and formality in electoral events.³⁸ Government Senators consider this is an appropriate model to build upon, in driving any future efforts to enhance political participation in Indigenous communities, especially in remote areas.

1.65 During the Marriage Survey the Government advertised across Indigenous media in remote areas, to ensure awareness of the survey. The ABS produced materials translated into a number of Aboriginal and Torres Strait Islander languages which were distributed through existing networks and available at a large number of pick up locations. Although the ABS made a focussed effort to support Indigenous participation, assisted by a range of partner agencies at federal, state and local government level, the Marriage Survey experience demonstrates that the challenges remain very significant. There is no simple set of solutions and these challenges continue to demand our best efforts.

Senator James Paterson
Deputy Chair

Senator David Fawcett
Senator for South Australia

37 See National Mental Health Commission, *2017-18 Federal Budget: Mental health proves to be a priority*, 10 May 2017, available at: <http://www.mentalhealthcommission.gov.au/media-centre/news/2017-18-federal-budget-mental-health-proves-to-be-a-priority.aspx> (accessed 9 February 2018).

38 Australian Electoral Commission, *Indigenous Electoral Participation Program*, available at: <http://www.aec.gov.au/Indigenous/iepp.htm> (accessed 12 February 2018).

