

Chapter 1

Introduction and background

Referral

1.1 On 20 August 2015, the Senate referred the following matter to the Senate Legal and Constitutional Affairs References Committee (committee) for inquiry and report by 16 September 2015:

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:

- a) an assessment of the content and implications of a question to be put to electors;
- 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;
- c) an assessment of the impact of the timing of such an activity, including the opportunity for it to coincide with a general election;
- d) whether such an activity is an appropriate method to address matters of equality and human rights;
- e) the terms of the Marriage Equality Plebiscite Bill 2015 currently before the Senate; and
- f) any other related matters.¹

Conduct of the inquiry

1.2 Details of the inquiry were placed on the committee's website at: www.aph.gov.au/senate_legalcon.

1.3 The committee also directly contacted a number of relevant organisations to notify them of the inquiry and invite submissions by 4 September 2015. The committee received 77 submissions and these are listed at Appendix 1. The committee resolved not to publish form or campaign letters.

1.4 The committee held a public hearing at Parliament House in Canberra on 10 September 2015. A list of witnesses who appeared at the public hearing is listed in Appendix 2.

Background

1.5 The *Marriage Act 1961* (Cth) defines marriage as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'.² This definition was inserted into the Marriage Act in 2004.

1 *Journals of the Senate*, No. 110 – 20 August 2015, p. 3010.

2 Section 5 of the *Marriage Act 1961*.

1.6 Since the introduction of the current definition of marriage into the Marriage Act in 2004, there have been numerous bills introduced into Parliament to amend the definition. A research paper by the Parliamentary Library provides the following summary:

Since the 2004 amendment to the [Marriage Act] which inserted the current definition of marriage, 17 bills dealing with marriage equality or the recognition of overseas same-sex marriages have been introduced into the federal Parliament. Not all bills have come to a vote and no bill has progressed past the second reading stage. Consequently no bill has been debated by the second chamber. To date, the bills have been introduced by members of parliament representing the Australian Democrats, Australian Greens, Australian Labor Party, Liberal Democratic Party, Liberal Party of Australia and by Independents.³

1.7 Some of those bills have been the subject of inquiries by parliamentary committees, including this committee.⁴

1.8 More recently, the focus has moved from a parliamentary vote on the issue of marriage to a debate about the potential of a popular vote on the issue. Specifically, on 12 August 2015, the then Prime Minister, the Hon Tony Abbott MP, stated:

[T]he only way to successfully and satisfactorily settle this matter [of same-sex marriage], given that it is so personal and given that so many people have strong feelings on either side of this, the only way to settle it with the least rancour, if you like, is to ask the people to make a choice because all of us are instinctive democrats. We don't always get what we want but we accept in our country that the people's vote settles things.⁵

1.9 In terms of the mechanisms for a 'popular vote', the options are for a referendum or a plebiscite. Professor Anne Twomey, Professor of Constitutional Law, The University of Sydney, explained the two types of vote:

In Australia, the term 'referendum' is used to describe a formal vote by the people to authorise the amendment of the Commonwealth Constitution or a State Constitution. The only choice is a Yes/No choice as to whether to approve the proposed constitutional amendments. If the proposed changes are approved by a majority of electors overall and by majorities in a majority of States (four out of six states) then the Governor-General gives assent to the proposed changes and they take effect upon the relevant

3 Deirdre McKeown, *Chronology of same-sex marriage bills introduced into the federal parliament: a quick guide*, Research Paper Series 2015-16, updated 24 August 2015, p. 1.

4 See for example Senate Legal and Constitutional Affairs Legislation Committee, *Marriage Equality Amendment Bill 2010*, 25 June 2012; and House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012*, 18 June 2012.

5 The Hon Tony Abbott MP, Prime Minister, *Joint Doorstop Interview, Queanbeyan*, 12 August 2015, available at: www.pm.gov.au/media/2015-08-12/joint-doorstop-interview-queanbeyan (accessed 3 September 2015).

commencement date. There is no need for any further action by Parliament to give them effect.

The term plebiscite is used to describe a vote of the people on any subject, which indicates to the relevant government the view of the people on a particular question. It may involve choosing from amongst a range of options...or it may involve a Yes/No choice, such as whether to approve daylight saving. The criteria for the passing of a plebiscite would normally be approved by a simple majority of voters (although this could be changed by legislation).⁶

Procedure for a referendum

1.10 The mechanism for a referendum is set out in the Constitution, as the Australian Electoral Commission (AEC) website explains:

Section 128 of the Constitution provides that any proposed amendment to the Constitution must be passed by an absolute majority in both Houses of the Commonwealth Parliament.

...

At the referendum the proposed alteration must be approved by a 'double majority'. That is:

- a national majority of voters in the states and territories
- a majority of voters in a majority of the states (i.e. at least four out of six states).⁷

1.11 In a joint opinion, Mr Bret Walker SC and Mr Perry Herzfeld, explained the implications of a successful referendum:

If a referendum is carried, subject to Royal assent, the Constitution is amended accordingly. But a referendum does not, of itself, enact, repeal or amend any legislation. In particular, if an amendment to the Constitution confers additional legislative power on the Federal Parliament, it remains for the Parliament to decide whether or not to exercise that power.⁸

1.12 Voting in referendums is compulsory for enrolled voters. The rules governing referendums are set out in the *Referendum (Machinery Provisions) Act 1984* (Referendum Act).⁹

Procedure for a plebiscite

1.13 The AEC noted that a 'plebiscite' is not defined in the Constitution, the *Commonwealth Electoral Act 1918* or the Referendum Act.¹⁰ The Centre for

6 *Submission 6*, p. 1.

7 Australian Electoral Commission website, *Types of referendums: Constitutional referendums*, available at: www.aec.gov.au/Elections/referendums/types.htm (accessed 24 August 2015).

8 Australian Marriage Equality, *Submission 17, Attachment 1*, p. 2.

9 Australian Electoral Commission website, *Types of referendums: Constitutional referendums*.

10 *Submission 26*, p. 5.

Comparative Constitutional Studies described a plebiscite as a 'national vote on questions that do not involve constitutional change'.¹¹

1.14 Mr Walker and Mr Herzfeld explained the implications where a plebiscite is 'carried' by a majority:

[U]nlike a referendum, the vote does not, of its own force, cause an amendment of the Constitution. Its purpose is to determine the 'national view' on a question, as the foundation for action by the Federal Parliament.¹²

1.15 As a number of submissions noted, the outcome of a plebiscite does not bind the Parliament.¹³

1.16 As Professor Twomey explained, the mechanism for a plebiscite does not need to be as 'strict' as the provisions for a referendum:

If a plebiscite were to be held, then the Parliament would need to legislate to set the rules for it. Questions to consider would include the criterion for approval (eg a simple majority or a special majority), whether or not voting is compulsory or voluntary, when it was to be held, the method for holding it, whether a Yes/No case is necessary or appropriate and whether Commonwealth funding should be given to either side of the question and whether limits should be imposed upon campaign expenditure. The strict rules in [section] 128 of the Constitution would not apply to a plebiscite and there may be reason for altering other rules given that no constitutional amendment is involved. For example, as there are no technical constitutional changes that need an explanation, it is arguable that there is no need for a formal Yes or No case.¹⁴

1.17 The AEC explained that it could also conduct a plebiscite as a fee-for-service election:

[W]ith the AEC entering into 'an agreement, on behalf of the Commonwealth, for the supply of goods or services to a person or body'. The rules for a plebiscite or fee-for-service election are normally contained in the terms of the agreement between the AEC and the person funding the election.¹⁵

1.18 Submissions noted that there have been three national plebiscites. In 1916 and 1917, plebiscites were held on the question of conscription, both of which were

11 *Submission 21*, p. 4.

12 *Submission 17, Attachment 1*, p. 3.

13 See Professor Geoffrey Lindell, *Submission 4*, p. 1; Gilbert+Tobin Centre of Public Law, *Submission 11*, p. 6; Australian Marriage Equality, *Submission 17*, p. 11.

14 *Submission 6*, p. 3.

15 *Submission 26*, p. 6.

defeated. In 1977, a plebiscite was held so that voters could express a preference on a National Song.¹⁶

Marriage Equality Plebiscite Bill 2015

1.19 The Marriage Equality Plebiscite Bill 2015 (the bill) is a private senators' bill, sponsored by Senators Rice, Lazarus, Leyonhelm, Lambie, Muir and Xenophon, introduced into the Senate on 19 August 2015.¹⁷ The bill provides for a national plebiscite on the issue of same-sex marriage, to be conducted at the next general election.¹⁸ The question to be put at the plebiscite is:

Do you support Australia allowing marriage between 2 people regardless of their gender?¹⁹

1.20 If the majority of electors respond in the affirmative to the question at the plebiscite, the bill states that it is the intention of Parliament to pass the necessary legislation to allow marriage between two people regardless of their gender, within six months of the result of the plebiscite.²⁰

1.21 The bill provides for the Referendum Act to apply to the submission of the question and the scrutiny of the result for the plebiscite.²¹ Specifically, the bill provides that Commonwealth funding for the 'yes' and 'no' cases will be provided as set out in the Referendum Act:

This means only the basic materials containing arguments in favour of and opposed to the proposed question would be distributed to electors.²²

1.22 The bill also contains a note that voting under the Referendum Act is compulsory.²³

Structure of the report

1.23 Chapter 2 of the report outlines the merits and drawbacks of a referendum, a plebiscite and a parliamentary vote. Chapter 3 contains a discussion on the conduct of a plebiscite, including issues in relation to the bill. Chapter 4 sets out the committee view and recommendations.

16 See Australian Marriage Equality, *Submission 17, Attachment 1*, p. 3; Centre for Comparative Constitutional Studies, *Submission 21*, p. 4.

17 *Journals of the Senate*, No. 109 – 19 August 2015, p. 2994.

18 Senator Janet Rice, Second Reading Speech, *Senate Hansard*, 19 August 2015, p. 62.

19 Clause 6 of the Marriage Equality Plebiscite Bill 2015.

20 See clause 3 of the Marriage Equality Plebiscite Bill 2015.

21 Subclause 8(1) of the Marriage Equality Plebiscite Bill 2015.

22 Senator Janet Rice, Second Reading Speech, *Senate Hansard*, 19 August 2015, p. 62.

23 See the note to subclause 8(1) of the Marriage Equality Plebiscite Bill 2015.

