



THE UNIVERSITY OF
MELBOURNE

Committee Secretary
Senate Legal and Constitutional Affairs References Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

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Dear Secretary

Thank you for the opportunity to make a submission to the Inquiry into the matter of a popular vote, in the form of a plebiscite or referendum, on the matter of marriage in Australia.

We make this submission in our capacity as members of the Centre for Comparative Constitutional Studies ('CCCS') and staff of the Melbourne Law School, University of Melbourne. We are solely responsible for its content.

This submission has been prepared on behalf of CCCS by the Director, Professor Adrienne Stone, and the Foundation Director, Laureate Professor Cheryl Saunders, with the assistance of Anna Saunders.

If you have any questions relating to the submission, or if we can be of any further assistance, please do not hesitate to contact us.

Yours sincerely

Professor Adrienne Stone
Director, Centre for Comparative Constitutional Studies

1. Introduction

The Centre for Comparative Constitutional Studies ('CCCS') is a research centre of Melbourne Law School at the University of Melbourne. CCCS undertakes research, teaching and engagement in relation to the Australian constitutional system as well as comparative constitutional law.

CCCS welcomes the opportunity to make a submission on the question of a popular vote on the matter of marriage equality in Australia.

This submission addresses the following terms of reference for the Inquiry by the Legal and Constitutional Affairs References Committee:

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;
- (d) whether such an activity is an appropriate method to address matters of equality and human rights; and
- (e) the terms of the Marriage Equality Plebiscite Bill 2015 currently before the Senate.

2. Summary of Submission

We make the following submissions:

- (i) That a popular vote in the form of a referendum is unnecessary and would create confusion;
- (ii) That a popular vote in the form of a plebiscite is impractical and has the potential to be divisive;
- (iii) That a popular vote in the form of a plebiscite is inappropriate to situations where minority rights are concerned; and
- (iv) That the question of whether to legislate for same-sex marriage should be decided by the Parliament with reference to the established mechanisms of representative and responsible government.

3. Popular Vote in the Form of a Referendum

In Australia, referendums are conducted for the purpose of changing the Constitution. Section 128 of the Constitution provides for constitutional amendment by the mechanism of referendum. This requires that a proposed change which has passed both houses of Parliament must be submitted directly to the electorate for their approval. Approval is required by a majority of electors and a majority of states.¹

CCCS considers that conducting a popular vote in the form of a referendum on the question of same-sex marriage is unnecessary, unduly complex and inappropriate.

First, a referendum on the question of same-sex marriage is unnecessary for the purpose of supporting a Commonwealth law which would alter the legal definition of marriage.

Section 51(xxi) of the Constitution gives the Commonwealth Parliament the power to make laws with respect to marriage, including same-sex marriage. As the High Court in *ACT v Commonwealth* made abundantly clear, the juristic concept of marriage contained in s 51(xxi) includes same-sex marriage.² There is thus no need to alter the wording of s 51(xxi) in order to enable the Parliament to pass a law which would permit marriage between persons of the same gender.

CCCS further considers that, for a number of reasons, a referendum on the question of same-sex marriage would generate unnecessary confusion and legal complexity.

First, as a referendum is not necessary in order to enable the Parliament to legislate for same-sex marriage, it would be particularly difficult to frame the question to be put to the electors. Ireland's 2015 referendum, which amended the Constitution to allow marriage between two persons regardless of gender, should not be viewed as a precedent which Australia might follow. The legal situation in Ireland prior to the referendum differed markedly from Australia. For one, there was uncertainty as to

¹ *Australian Constitution* s 128.

² *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, 462–3 [37]–[38].

whether the Oireachtas (the Irish legislature) had the power to legislate with respect to same-sex marriage. As already mentioned, it is clear from a recent High Court ruling that this is not the case in Australia.³

Secondly, the use of the mechanism of a referendum where no constitutional change is required is likely to produce confusion about the role of a referendum in the Australian constitutional system.

Thirdly, given the current meaning of the Constitution, it would be difficult to interpret the meaning of a 'no' vote in such a referendum. On one view, a 'no' vote could be taken simply to confirm the status quo; that the Commonwealth has a power over marriage (including same sex-marriage). It would say nothing one way or the other as to whether the Commonwealth should legislate for marriage equality.

The question of what implications may be drawn from a failed referendum was given significant attention by the High Court in the *WorkChoices Case*.⁴ In that case, five judges declined to view the electorate's rejection of a proposal to amend the constitution as confirming a particular view of the section's operation.⁵ In particular, the judgment suggests that it is difficult to infer, as a result of a failed referendum, that the meaning of a constitutional provision has changed.⁶ Since the High Court has already held that 'marriage' in the Constitution encompasses same-sex marriage,⁷ a failed referendum would thus, on the orthodox view, be unlikely to alter the meaning of the Constitution.⁸

Fourthly, a successful referendum would also create confusion about the institution of marriage itself. As the text of s 51(xxi) refers simply to marriage, any alteration of the text would require additional words to be inserted such as, for example, 'marriage, including same-sex marriage'. For the Australian Constitution to state that same-sex

³ *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, 463 [38].

⁴ *New South Wales v Commonwealth* (2006) 229 CLR 1 ('*WorkChoices Case*').

⁵ *WorkChoices Case* (2006) 229 CLR 1, 101 [132].

⁶ *WorkChoices Case* (2006) 229 CLR 1, 101 [133].

⁷ *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, 463 [38].

⁸ See Michael Coper, 'Judicial Review and the Politics of Constitutional Amendment' in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 50.

marriage is additional and different to traditional marriage is to undermine any symbolic equality that might otherwise be achieved.⁹

For these reasons, CCCS considers that a referendum is not an appropriate mechanism for measuring public opinion on the issue of marriage equality.

4. Popular Vote in the Form of a Plebiscite

A plebiscite is a national vote on questions that do not involve constitutional change. In the history of Australia, only three national plebiscites have been held; two on the question of forced conscription during World War I, in 1916 and 1917, and one on the question of the national song, coinciding with the 1977 federal election.¹⁰

CCCS considers that a plebiscite is an inappropriate mechanism for determining whether the Parliament should legislate for marriage equality.

First, holding a plebiscite on the question of same-sex marriage sets an undesirable precedent for future legislative change. This is a matter that could be determined by elected representatives, using the familiar mechanism of a free vote if that is thought appropriate. It is not obvious why, in a system of representative democracy, this issue should be singled out as requiring direct recourse to the views of the voters. It thus would set an odd precedent for future legislative change.

Secondly, a plebiscite on the question of same-sex marriage has the potential to encourage the airing of extremist views. Rather than encouraging national consensus on the question, a plebiscite is likely to be highly divisive and hurtful to groups of Australians. CCCS considers that this would be detrimental to substantive debate on the question and to the cohesion of Australian society.

⁹ In the United States, Justice Ruth Bader Ginsburg has stated of the separate legislative scheme for same-sex marriage in the *Defense of Marriage Act* that it creates ‘two kinds of marriage: the full marriage, and then this sort of skim-milk marriage’. *United States v Windsor* 570 US 12 (Ginsburg J) (during argument).

¹⁰ *Parliamentary Handbook of the Commonwealth of Australia* (32nd edition, 2011).

Thirdly, in a related point, CCCS considers that plebiscites are manifestly inappropriate in circumstances where minority rights, including the right to equality, are at issue.

In certain situations, a majority vote organised by principles of equal voting, such as a plebiscite, will be inadequate to ensure that minority views are represented.¹¹ An example of the inadequacy of direct democracy under these circumstances is the 2009 Swiss referendum on the prohibition of the construction of minarets. The initiative was proposed largely by members of the anti-immigration Swiss Popular Party, and resulted in the adoption of a prohibition on minarets.¹² The initiative, which restricted the constitutionally entrenched rights to freedom of religion and freedom from discrimination, succeeded despite opposition by the government and a majority of political parties.¹³

It has long been observed that with direct participation in decision-making ‘measures are too often decided, not according to the rule of justice and the rights of the minor party but by the superior force of an interested and overbearing majority’.¹⁴ CCCS accepts that direct democracy through public participation may be beneficial under certain circumstances. However, as demonstrated in examples such as the 2009 Swiss referendum, there is significant tension between the principle of popular sovereignty (underlying direct democracy mechanisms) and minority rights.¹⁵

As the European Commission for Democracy through Law (‘Venice Commission’) has recently remarked, instruments of direct democracy such as plebiscites should be viewed as a complement to representative democracy.¹⁶ In the case of minority rights,

¹¹ See the remarks by the Office of the High Commissioner of National Minorities at [5], as well as [28]–[38]: Venice Commission, ‘The Protection of National Minorities and Elections’, Study Number 387/2006, CDL-EL(2008)002rev (16 May 2008).

¹² *Bundesverfassung/Constitution Fédérale* (Swiss Federal Constitution), Art 72(3).

¹³ See Anne Peters, ‘The Swiss Referendum on the Prohibition of Minarets’, *EJIL:Talk!* (2 December 2009) <www.ejiltalk.org/the-swiss-referendum-on-the-prohibition-of-minarets/>.

¹⁴ James Madison, Federalist Papers No 10, <http://avalon.law.yale.edu/18th_century/fed10.asp>.

¹⁵ See, eg, Daniel Moeckli, ‘Of Minarets and Foreign Criminals: Swiss Direct Democracy and Human Rights’ (2011) 11 *Human Rights Law Review* 774, 793.

¹⁶ European Commission for Democracy through Law (‘Venice Commission’), ‘Opinion on the Citizen’s Bill on the Regulation of Public Participation, Citizen’s Bills, Referendums, and

alternative mechanisms which do not involve a direct majority vote are generally more appropriate to ensuring that these rights are protected.¹⁷ The fact that a majority vote may not be appropriate is not inconsistent with democratic principles such as equal suffrage.¹⁸ Rather, it is the result of reconciling these principles with the principles of equality and the rule of law.

For these reasons, CCCS considers that the question of whether the Parliament should exercise its existing power to legislate for marriage equality is best decided by the elected representatives of the public, in accordance with the established mechanisms of representative and responsible government.

Popular Initiatives and Amendments to the Provincial Electoral Law of the Autonomous Province of Trento (Italy)', Opinion No 797/2014, CDL-AD(2015)009 (23 June 2015).

¹⁷ See also Venice Commission, 'Report on Electoral Rules and Affirmative Action for National Minorities' Participation in Decision-Making Process in European Countries', Study No 307/2004, CDL-AD(2005)009 (15 March 2005) [10]–[11].

¹⁸ See, eg, Venice Commission, 'Code of Good Practice on Referendums', Study No 371/2006, CDL-AD(2007)008 (19 March 2007) 16.