



4 September 2015

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
By email: legcon.sen@aph.gov.au

Dear Committee Secretary,

Senate inquiry into the matter of a popular vote, in the form of a plebiscite or referendum, on the matter of marriage in Australia

Thank you for the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee on this matter.

The Commission has limited this submission to terms of reference (a) and (d).

The Commission is on record in support of same-sex couples being able to access civil marriage.¹ Article 26 of the International Covenant on Civil and Political Rights states that all people 'are equal before the law and are entitled without any discrimination to the equal protection of the law'.² The Commission reaffirms that equality before the law requires that if civil marriage is available, it must be available, without discrimination, to all couples, regardless of sex, sexual orientation or gender identity.

The Commission notes that achieving equality before the law should be balanced with the right to freedom of religion. Constitutionally, the Australian government must be secular with the purpose of preserving freedom of religion for all, including the freedom of those without religion. Freedom of religion is not an absolute right and can appropriately be limited in certain circumstances.³ The Commission recognises that a nuanced approach is required to balance these rights in competing circumstances.

Referenda in Australia are only required to amend the Constitution. Section 51 (xxi) of the Constitution provides that Federal Parliament has powers to legislate with respect to marriage. Parliament has been regulating marriage and the definition of marriage through the Marriage Act.⁴ The High Court in *The Commonwealth of Australia v The Australian Capital Territory*, ruled that Federal Parliament has the power under the Constitution to legislate in respect to same-sex marriage.⁵ There is

no legal impediment to the federal Parliament amending the Marriage Act under its existing constitutional powers. If the intention of the Parliament is to consider an amendment to section 51 (xxi) it is unlikely to resolve the substantive issue at hand. Broadly speaking, it appears that there are four possible scenarios:

1. A question is put to define marriage, for the purposes of section 51 (xxi), as a union of “two people (including two people of the same sex)” and is successful: the result would still leave the Parliament able to legislate marriage for same-sex couples.
2. A question is put to define marriage as a union of “two people” and is unsuccessful: the result would still leave the Parliament able to legislate under its existing constitutional powers marriage for same-sex couples.
3. A question is put to define marriage as a union between a “man and a woman” and is unsuccessful: the result would still leave the Parliament able to legislate under its existing constitutional powers marriage for same-sex couples.
4. A question is put to define marriage as a union between a “man and a woman” and is successful: the practical result would be less certain. State Parliaments would retain the constitutional power to legislate with respect to same-sex relationships. It would be arguable whether any State legislation relating to same-sex marriages would impair, alter or detract from the Commonwealth Marriage Act in its current form.⁶ States would be likely to have the power to legislate an equivalent status for same-sex couples, but a same-sex marriage would have a different legal status from a marriage under the Marriage Act.

In all scenarios a Parliament in Australia would be left with the Constitutional capacity to legislate marriage or an equivalent status for same-sex couples. And the fourth scenario would raise questions about recognition of those marriages between different jurisdictions.

Further, it is unlikely that any change to section 51(xxi) of the Constitution could appropriately reflect the balanced, nuanced approach required to ensure that freedom of religion is appropriately recognised in any marriage reform. This balancing is more appropriately achieved through legislation, and possibly delegated legislative instruments, to ensure sufficient flexibility to change arrangements should circumstances require it.

Without a balanced and nuanced legislative resolution there could be significant consequences for religious freedom from a Constitutional definition of marriage. A Constitutional definition could create inconsistencies between legal and religious definitions and impact on the freedom of religious institutions that receive public money to define their meaning of marriage.

The Commission does not support a referendum as it is an inappropriate method of addressing matters relating to marriage and risks compromising both equality before the law and freedom of religion for all Australians.

A national plebiscite is a non-binding popular vote. The Commission notes that any plebiscite proposal requires a bill to be passed by Parliament. As such Parliament has discretion with regards to the form and manner of a plebiscite.

The outcome of a plebiscite is limited in its ability to assist in the complex process of reforming the Marriage Act. The lack of regulation on the conduct and outcome of a plebiscite, raises concerns regarding the exact wording of any proposal and the threshold test for a vote to be considered a success. Without legal force a plebiscite is an unreliable method for establishing a clear mandate for legislative change.

In view of this, the Commission submits that a plebiscite is not an appropriate method of addressing matters relating to marriage.

Public votes are not an appropriate way to resolve issues of fundamental rights. It is not an appropriate instrument to resolve issues of equality before the law. Nor is it an appropriate instrument to resolve issues of religious freedom.

The Constitution gives the power to resolve these issues to the Parliament for a reason. On the substantive matter, it is not appropriate that the Australian population is given a vote on the legal standing of the relationships of same-sex attracted Australians any more than it would be for the Australian population to vote on the legal standing of opposite-sex attracted Australians.

Unless it is constitutionally required, Australia does not have a history of resolving issues of rights through public votes. The Constitution correctly gives the Parliament responsibility for these issues.

Issues of rights are not best resolved through a public vote. They are best resolved by responsible government.

The resolution to this debate should be through calm, considered, nuanced and reasoned consideration of the implications of the rights and freedoms of all Australians.

A public vote will do nothing to resolve the substantive issue in a way that unites Australians and takes the country forward together with a proper respect for the rights and freedoms of all.

I hope this submission assists in your consideration of this important issue.

Please do not hesitate to contact the Commission should you have any queries about this submission.

Yours sincerely

Tim Wilson
Human Rights Commissioner

¹ Australian Human Rights Commission, *Marriage equality in a changing world: Position Paper on Marriage Equality* (2012). At <https://www.humanrights.gov.au/lesbian-gay-bisexual-trans-and-intersex-equality-0> (viewed 31 August 2015).

² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

³ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity and Intersex Rights* (2015), p 12. At <https://www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/publications/resilient-individuals-sexual> (viewed 31 August 2015).

⁴ *Marriage Act 1961* (Cth); *Marriage Amendment Act 2004* (Cth).

⁵ *The Commonwealth of Australia v The Australian Capital Territory* [2013] HCA 55.

⁶ Arguably the decision of the High Court in *Commonwealth v Australian Capital Territory* supports the view that in this circumstance a State or Territory law allowing for same-sex marriage could operate concurrently with the Marriage Act: see paragraphs [9] and [56].