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3 September 2015

Committee Secretary  
Senate Legal and Constitutional Affairs Committees  
Parliament House  
Canberra ACT 2600

Dear Secretary

**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 on this subject and the Marriage Equality Plebiscite Bill 2015. A number of matters related to this inquiry are dealt with in my co-authored book *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010).

My view is that it is constitutionally unnecessary, and further unwise and a poor use of taxpayers' money, to hold a referendum or plebiscite on whether Australia should permit same-sex marriage.

**A referendum?**

The Republic of Ireland recently held a referendum on same-sex marriage. Not surprisingly, this has led to calls for a similar vote to be held in Australia. These are based on a misunderstanding of the Irish and Australian legal systems.

Ireland held a referendum because its Parliament could not pass a law in favour of same-sex marriage. This was due to its Constitution, which is embedded with a range of values antagonistic to the idea.

The Irish Constitution came into force in 1937, and reflects the thinking of the time. Article 41 'recognises the Family as the natural primary and fundamental unit group of Society'. It says that the state must 'protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation'.

Article 41 also mentions the role of a woman ‘within the home ... without which the common good cannot be achieved’ and that the state must ‘ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home’. Finally, the Constitution requires the state to ‘guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack’.

Such text led Ireland’s Minister for Justice and Equality, Alan Shatter, to state:

The clear position arising from case law in Ireland ... is that marriage is understood as being between one man and one woman, ideally for life. The Government considers that it would be constitutionally unsound to legislate for marriage between same-sex couples in the absence of a constitutional amendment.

The result was the referendum to change the Irish Constitution. The yes vote at that poll added the following words to the Constitution: ‘Marriage may be contracted in accordance with law by two persons without distinction as to their sex.’ It is important to note that the referendum did not by itself allow same-sex people to marry. The Irish Parliament must still enact enabling legislation.

The reasoning that produced the Irish referendum does not apply to Australia. Australia’s Constitution does not set out the importance of the family, or the role of women in society. While it mentions ‘marriage’ in section 51, it does so only by way of stating that the federal Parliament can pass laws on the subject.

There had been doubt about whether this federal power over marriage could be used to recognise same-sex marriage. It was arguable that it extended only to recognising the type of marriage that existed in 1901 when the Constitution came into force, that is, marriage between a man and a woman.

These doubts have now been quashed. In striking down the ACT’s recognition of same-sex marriage in 2013, the High Court held that the federal marriage power can authorise marriage between people of the same sex. The Court described marriage in gender neutral terms as being ‘a consensual union formed between natural persons in accordance with legally prescribed requirements’. This clarified that the federal Parliament can legislate for same-sex marriage. As a result, no referendum to change the Constitution is required.

Indeed, it is hard to see how a referendum on this could even be properly framed. This is because no change to the Constitution is required to either leave the definition of marriage as it is, or to legislate for same-sex marriage. The Constitution is well drafted in already providing flexibility to the legislature. Perhaps a referendum to change the Constitution in Australia might mandate the recognition of same-sex marriage, or prohibit this. However, neither would be appropriate, as the Constitution should instead facilitate the making of laws on the subject by Parliament.

### **A plebiscite?**

A plebiscite has no legal effect. It is no more than a formalised, national opinion poll. It would not bring about same-sex marriage, nor, constitutionally, could a bill providing for a plebiscite require Parliament to legislate for this.

At best, Parliament might enact a bill providing for same-sex marriage that includes that the Bill will not commence until the Australian people have voted yes at a plebiscite on the subject. In effect, Parliament would legislate for same-sex marriage, with this being contingent upon the outcome of a plebiscite.

In the absence of such a mechanism, parliamentarians with strong convictions against the recognition of same-sex marriage may well be minded to maintain these even if the Australian people indicate their support for same-sex marriage at the ballot box. After all, parliamentarians have maintained such a position despite a range of opinion polls consistently indicating majority community support for such a change.

It may be that some parliamentarians opposed to same-sex marriage indicate that they will change their vote if the idea is supported by the Australian people voting in a plebiscite. This could enable such a vote to bring about a shift in parliamentary support for the idea, and so enable the enactment of a law that has popular support, but otherwise lacks a majority in Parliament. Whether or not this actually occurred could not be determined until after the result of the plebiscite was known. For example, a parliamentarian might not be prepared to shift their vote to same-sex marriage if the plebiscite was decided by a small number of votes. The result would be considerable, ongoing uncertainty.

More fundamentally, a plebiscite on the subject is inappropriate because it would amount to an abdication of responsibility by parliamentarians. Australia has adopted a system of representative government, not one based upon direct democracy. A shift of this kind towards direct democracy would be a radical alteration in the democratic process.

This should not be approached in an ad hoc basis, but in a more considered way. A plebiscite of this kind would establish an important precedent. If it is held, the argument for a like vote on other subjects would become strong. For example, a plebiscite should soon be held on the introduction of voluntary euthanasia, which also has majority support in opinion polls, but as yet has not been enacted by Parliament.

An additional concern is that a plebiscite is not desirable on this subject. A person's basic human rights should not be the subject of a national vote unless, as in the Irish case, it is the only means of achieving change. Fundamental individual rights, which may well be those of a minority, should not be made subject to majoritarian concerns. A vote on such subjects can also be fraught. In putting a yes/no proposition to the community, such votes necessarily polarise debate. As a result, they can leave bitterness and division in their wake.

Finally, it is hard to see how the cost of a plebiscite can be justified. In the current fiscal climate, the expenditure of many tens of millions of dollars on a non-binding vote on a subject over which Parliament already has power could not be described as a prudent and sensible use of taxpayers' money.

Yours sincerely

George Williams