A POPULAR VOTE ON THE MATTER OF MARRIAGE IN AUSTRALIA

JOINT OPINION

Introduction

1 We have been briefed by the Human Rights Law Centre, on behalf of Australian Marriage Equality Inc, to provide an opinion as to whether it is necessary or desirable for there to be a referendum — as opposed to a plebiscite — on the matter of marriage in Australia.

2 For the following reasons, our view is that a referendum is neither necessary nor desirable.

The distinction between a referendum and a plebiscite

3 In ordinary language, the words "referendum" and "plebiscite" may be used largely interchangeably.[1] However, in modern Australian legal and political discourse, the words usually have more precise, and distinct, meanings.[2]

4 A "referendum" is the process by which the *Constitution* may be amended in accordance with s 128.[3] It relevantly provides:

> This Constitution shall not be altered except in the following manner:
>
> The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives.

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1 Brown (ed), *The New Shorter Oxford English Dictionary* (1993), vol 2, p 2248 defines "plebiscite" as: "A direct vote of the whole electorate of a State etc to decide a question of public importance, e.g. a proposed change in the constitution, union with another State, acceptance of a government programme, etc. (cf. REFERENDUM). Also, a public expression (with or without binding force) of the wishes or opinion of a community." Page 2520 defines "referendum" as: "The process or principle of referring an important political question, e.g. a proposed constitutional change, to the entire electorate to be decided by a general vote; a vote taken by referendum. Cf. PLEBISCITE".

2 We confine our comments to national referenda and plebiscites. There have been similar votes at State level since Federation as well: see Orr, *The Conduct of Referenda and Plebiscites in Australia: A Legal Perspective* (2000) 11 *Public Law Review* 117 at 119–121.

3 See *Referendum (Constitution Alteration) Act 1906* (Cth), s 3; *Referendum (Machinery Provisions) Act 1984* (Cth), s 3(1).

...

> And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

...

5 It will be seen that s 128 requires that an amendment to the *Constitution* be approved by the Federal Parliament and then by a majority of the electors throughout Australia and a majority of the electors in a majority of the States. Accordingly, a simple majority of the electors throughout Australia is insufficient: there must be a majority within four or more States as well. There must be a "double majority". Thus, a proposal put to the electors in May 1977 to ensure that Senate elections were held at the same time as House of Representative elections failed, though more than 62% of the electors throughout Australia voted in its favour, because among the States there were majorities in only New South Wales, Victoria and South Australia.[4]

6 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.

7 The *Constitution* makes no provision for the submission of a question to electors unrelated to the amendment of the *Constitution*, for the purpose of determining, without legally binding consequence, the view of a majority of electors. However, since Federation, there have been three occasions on which such a question has been put to electors: there were votes on conscription in 1916[5] and 1917,[6] and a vote on a "National Song" in 1977.[7]

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4 http://www.aec.gov.au/Elections/referendums/Referendum_Dates_and_Results.htm. Four other referenda have failed for the same reason: one in March 1937, two in September 1946 and one in December 1984.

5 *Military Service Referendum Act 1916* (Cth).

6 *War Precautions (Military Service Referendum) Regulations 1917* (Cth) made under the *War Precautions Act 1914* (Cth).

7 *Referendum (Constitution Alteration) Modification Act 1977* (Cth), s 3.

8 It is this kind of vote which is usually referred to in modern Australian legal and political discourse as a "plebiscite".[8] Unlike a referendum, a plebiscite is "carried" simply by majority, ie a majority of electors throughout Australia. But also unlike 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. A plebiscite is more flexible than a referendum, in at least two respects. *First*, the question to be asked need have nothing to do with an amendment to the *Constitution*. *Secondly*, the question need not be framed as requiring a "yes" or "no" answer: the electors may be presented with multiple options, among which they are asked to express their preferences, as occurred in the 1977 plebiscite on the National Song.

A referendum or a plebiscite on the matter of marriage in Australia

9 The Federal Parliament has power under the *Constitution* to make laws only with respect to certain specified subject matters. Among those subject matters, s 51(xxi) of the *Constitution* specifies "marriage". Thus, s 51(xxi) confers upon the Federal Parliament power to make laws "with respect to … marriage".

10 Pursuant to this power, the Federal Parliament has enacted the *Marriage Act 1961* (Cth). That Act currently defines "marriage" to mean "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life" (s 5(1)).

11 It has been proposed that this definition should be amended by the Federal Parliament so as to refer, not to the union of "a man and a woman" to the exclusion of all others, but to the union of "two persons" to the exclusion of all others, and thus to permit marriage between persons of the same sex.

12 Whether or not there should be a popular poll before the Federal Parliament makes such an amendment, putting to electors the question whether the definition of marriage in Australia should be so altered, is a political issue on which we express no view.

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[8] Each of the 1916 and 1917 votes was referred to at the time as a referendum. But neither was a referendum within the meaning explained above and both have been referred to subsequently as plebiscites: see eg *Wong v The Commonwealth* (2009) 236 CLR 573 at 583–584 [27]–[30] per French CJ and Gummow J.

13 However, as explained further in paragraphs 30 to 34 below, a referendum is not apt to ask electors a question of this kind. A referendum is a process to amend the *Constitution*. In a referendum, what is put to electors is the proposed amendment to the *Constitution*. The referendum on the matter of marriage in Australia which is apparently contemplated is a referendum which proposes an amendment to s 51(xxi) of the *Constitution*. The proposed amendment would, we assume, propose that the Federal Parliament be given power to make laws "with respect to … marriage including between persons of the same sex" or some similar formulation.

14 For the following reasons, such a referendum is neither necessary nor desirable.

A referendum on the matter of marriage in Australia is not necessary

15 An amendment to s 51(xxi) of the *Constitution* of the kind mentioned above would not, of itself, cause the definition of "marriage" in the *Marriage Act* to be amended. That can occur only as a result of legislation made by the Federal Parliament. As with a plebiscite, the Federal Parliament would not be bound to amend the definition of "marriage" in the *Marriage Act* following a referendum to amend s 51(xxi) of the *Constitution*.

16 The only reason that a referendum on the matter of marriage in Australia might be legally necessary is if there were doubt as to whether the word "marriage" in s 51(xxi) of the *Constitution* encompasses marriages between persons of the same sex. If there were such doubt, it might be thought legally necessary to make clear, by amending s 51(xxi), that the Federal Parliament had power to make laws with respect to marriage of persons of the same sex.

17 However, as a result of the decision of the High Court in *The Commonwealth v Australian Capital Territory*,[9] there is no doubt on this point. The High Court unanimously held that the word "marriage" in s 51(xxi) "is a term which includes a marriage between persons of the same sex".[10]

18 Accordingly, as s 51(xxi) presently stands, the Federal Parliament has power to legislate to amend the definition of marriage in the *Marriage Act* so as to permit marriages

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[9] (2013) 250 CLR 441.

[10] (2013) 250 CLR 441 at 463 [38] per *curiam*.

between persons of the same sex. There is no need for there to be a referendum to amend s 51(xxi) of the *Constitution* to make this clear.

19 It is true that the High Court is not bound by its previous decisions. However, there is no prospect that the High Court would overrule its decision in *The Commonwealth v Australian Capital Territory*.

20 The decision is a recent, unanimous decision. It applied an orthodox approach to the interpretation of the *Constitution*. It involved a broad construction of Federal legislative power. Again, this is orthodox. So far as we are aware, there is no previous unanimous decision of the High Court adopting a broad construction of Federal legislative power which has subsequently been overruled by the Court in favour of narrower construction.

21 Given these matters, the prospect that the decision might be subsequently overruled, by the High Court adopting the narrower view that "marriage" in s 51(xxi) of the *Constitution* does not include marriages between persons of the same sex, is fanciful.

22 Accordingly, a referendum — as opposed to a plebiscite — on the matter of marriage in Australia is not necessary.

A referendum on the matter of marriage in Australia is not desirable

23 In addition to being unnecessary, we consider that a referendum on the matter of marriage in Australia is undesirable.

24 The construction of the word "marriage" in s 51(xxi) of the *Constitution* adopted by the High Court in *The Commonwealth v Australian Capital Territory* is broad. That gives to the Federal Parliament great flexibility in determining what relationships should and should not be afforded the status of "marriage" in Australia. Among other things, it is clear that the Federal Parliament may prohibit persons in certain relationships from being validly married in Australia and from being recognised in Australia as validly married if the marriage takes place overseas.

25 If an amendment to s 51(xxi) of the kind referred to in paragraph 13 above were to be made, this broad legislative power may be thrown into doubt. The express inclusion of marriages between persons of the same sex in s 51(xxi) might be argued implicitly to suggest

that the word "marriage" in that provision otherwise has the meaning it had in 1901, when the *Constitution* came into force, on the basis that, if that were not so, the express inclusion of same-sex marriages would be unnecessary.

26 However, an implied narrowing of the meaning of the word "marriage" in s 51(xxi) would have adverse consequences. In particular, the ability of the Federal Parliament to regulate whether relationships falling outside that narrow meaning may be afforded the status of marriage in Australia might be compromised.

27 Thus, in *The Commonwealth v Australian Capital Territory*,[11] the High Court said that if the word "marriage" in s 51(xxi) had not included marriage between persons of the same sex, the Federal Parliament would probably not have had power to regulate such marriages and hence would probably not have been able to preclude the Australian Capital Territory from enacting a regime for same-sex marriage.

28 The narrower the power in s 51(xxi) the weaker the ability of the Federal Parliament to regulate whether relationships should or should not be afforded the status of "marriage" in Australia. So, for example, an amendment to s 51(xxi) of the kind referred to in paragraph 13 above might cast doubt on whether the Federal Parliament has power to prohibit polygamous marriages.

29 We do not say that an argument to this effect would necessarily succeed. There would be cogent arguments to the contrary. But at present the argument is not available at all. It would be undesirable to give a foothold to such an argument by seeking to amend s 51(xxi) of the *Constitution*, given that such an amendment is unnecessary.

A referendum or a plebiscite to determine the "national view"

30 Neither a plebiscite nor an amendment would bind the Federal Parliament to act in accordance with the outcome of the vote. In each case, whether the definition of "marriage" in the *Marriage Act* is amended would remain a question for the Federal Parliament. The purpose of a popular vote appears to be to determine the "national view" on the question of same-sex marriage.

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[11] (2013) 250 CLR 441 at 454 [9] per *curiam*.

31 A plebiscite is apt to the purpose of determining the national view. At a plebiscite, a question can be put to electors whether the definition of marriage in the *Marriage Act* should be amended to extend to marriages between persons of the same sex. As noted in paragraph 13, such a question could not be put at a referendum. All that could be put is a proposed amendment to s 51(xxi) of the *Constitution* which, for the reasons above, is not necessary.

32 A referendum would be a most oblique way of gauging the national view on whether the *Marriage Act* should be amended. Electors would not be asked the question on which it is sought to gauge the national view — whether a legislative amendment should be made to the *Marriage Act* — but an entirely different question — whether an amendment should be made to the *Constitution*. At best, this is likely to confuse. Moreover, it is likely to inject into any debate about whether same-sex marriage should be permitted, a wholly unnecessary dimension concerning amendment of the *Constitution*. The question of same-sex marriage would in this way be clouded by a general, and correct, conservatism about amendment of the *Constitution*. Further, the question would be subjected to the "double majority" requirement for referenda explained in paragraph 5 above. A vote which indicated a national majority view in favour of permitting same-sex marriage, which would succeed as a plebiscite, could nevertheless fail as a referendum because of this requirement.

33 In this light, it seems at least arguable that the only reason it could be thought desirable to hold a referendum on marriage, rather than a plebiscite, is if it were thought desirable to maximise the chance that it would fail.

34 If the purpose of a popular poll is determination of the national view on the question of same-sex marriage, a referendum is entirely unsuitable. It is neither necessary nor desirable for this purpose. Far from revealing the national view, a referendum is apt to obscure it.

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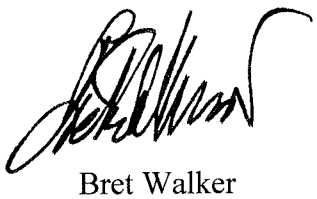

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