The Senate

Legal and Constitutional Affairs References Committee

Matter of a popular vote, in the form of a plebiscite or referendum, on the matter of marriage in Australia

September 2015

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Recommendation

Recommendation 1

4.1 The committee recommends that a bill to amend the definition of marriage in the *Marriage Act 1961* to allow for the marriage between two people regardless of their sex is introduced into the Parliament as a matter of urgency, with all parliamentarians being allowed a conscience vote.

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.

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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

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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

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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

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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.

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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.

Chapter 2

A referendum, a plebiscite or a parliamentary vote?

Introduction

2.1 The committee received submissions which ranged from strongly supporting a popular vote on the issue of marriage to outright opposition to a popular vote. In this chapter the committee outlines the arguments both in support and against the following options:

- a referendum;
- a plebiscite; and
- a parliamentary vote.

A referendum

2.2 Many submissions emphasised that a referendum is unnecessary as the High Court has already held that the Parliament has the constitutional power to pass legislation with respect to marriage, including same-sex marriage.[1]

2.3 Section 51(xxi) of the Commonwealth Constitution gives the Parliament the power to make laws with respect to 'marriage'. 'Marriage' is not defined in the Constitution but, as noted previously, is defined in the Marriage Act as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'.[2]

2.4 In December 2013, in its decision in *The Commonwealth of Australia v The Australian Capital Territory* (*Commonwealth v ACT*),[3] the High Court held that the marriage power in section 51(xxi) of the Constitution encompasses same-sex marriage.[4] The High Court stated:

> Under the Constitution and federal law as it now stands, whether same sex marriage should be provided for by law…is a matter for the federal Parliament.[5]

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1 See for example Law Council of Australia, *Submission 1*, p. 1; The University of Adelaide - Public Law & Policy Research Unit, *Submission 2*, p. 3; Professor Anne Twomey, *Submission 6*, p. 2; Liberty Victoria, *Submission 18*, p. 2; Centre for Comparative Constitutional Studies, *Submission 21*, p. 2; Australian Human Rights Commission, *Submission 22*, pp 1-2.

2 Section 5 of the *Marriage Act 1961*.

3 [2013] HCA 55.

4 [2013] HCA 55 at paragraph 38.

5 [2013] HCA 55 at paragraph 1.

2.5 Associate Professor Kristen Walker QC noted:

> There is thus no uncertainty about the scope of the Commonwealth legislative power in this regard. It is not necessary for a referendum to confirm the High Court's interpretation.[6]

2.6 However, a number of submitters argued in favour of a referendum on the issue of marriage. Mr Paul Hanrahan, Executive Director of Family Life International (Australia), outlined the reason he favoured a referendum:

> I would support a referendum over a plebiscite. I believe the matter has not been settled on the constitutionality of these proposed changes, despite the statement of the High Court in 2013[.][7]

2.7 The Australian Catholic Bishops Conference (ACBC), while stating that it did not have a view on how the issue of marriage should be decided, argued that there is a 'strong case' for a public vote on the issue of marriage.[8] The ACBC continued:

> Because of the importance of this matter for the future of our community a strong case can be made for deciding the matter by referendum rather than plebiscite or parliamentary vote, as this 'sets the bar high' in terms of informed public debate and consensus required (a majority of votes nationally and in a majority of states after a clear explanation of the arguments for and against).[9]

2.8 Submissions acknowledged the decision in *Commonwealth v ACT* is binding in relation to section 51(xxi) of the Constitution.[10] Despite this, Lawyers for the Preservation of Marriage, among others, criticised the decision of the High Court in *Commonwealth v ACT* to the extent that it dealt with the scope of the marriage power in the Constitution:

> The High Court's decision as to the breadth of the marriage power in s51(xxi) of the Constitution was made without the benefit of the contradictor. It was made, therefore without the benefit of full argument and was not necessary to decide the question which the Court faced, namely the validity of the [ACT legislation, the *Marriage Equality (Same Sex) Act 2013* (ACT),] and in the circumstances its status as a precedent in relation to the meaning of the marriage power in the Constitution is not beyond question.[11]

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6 *Submission 36*, p. 1.

7 *Committee Hansard*, 10 September 2015, p. 10.

8 *Submission 24*, pp 6-7.

9 *Submission 24*, p. 7.

10 See for example Lawyers for the Preservation of the Definition of Marriage, *Submission 20*, pp 2-3; FamilyVoice Australia, *Submission 23*, p. 3.

11 *Submission 20*, p. 2. See also Associate Professor Neil Foster, *Submission 7*, pp 2-3.

2.9 FamilyVoice Australia argued that the High Court decision in *Commonwealth v ACT* on the issue of same-sex marriage could 'theoretically' be considered 'only persuasive'.[12]

2.10 Lawyers for the Preservation of the Definition of Marriage contended:

> A referendum will be the clearest way in which a question is put to the people, as it will define the exact changes to be made to the Constitution, and so, for all practical purposes fix (in constitutional and legislative terms) the meaning of marriage in Australia.[13]

2.11 However, the Australian Human Rights Commission (AHRC) stated that an amendment to section 51(xxi) of the Constitution is 'unlikely to resolve the substantive issue at hand'.[14] The AHRC set out the four possible scenarios that could result from a referendum to amend section 51(xxi) of the Constitution:

> 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. 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.[15]

2.12 Given these outcomes AHRC concluded:

> 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.[16]

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12 *Submission 23*, p. 3.

13 *Submission 20*, p. 5.

14 *Submission 22*, p. 2.

15 *Submission 22*, p. 2.

16 *Submission 22*, p. 2.

A plebiscite

2.13 The committee also received a limited number of submissions which strongly supported a plebiscite on the issue of marriage. For example, Professor Jim Allan explained that he believed social policy issues ought to be resolved by means of a democratic process, such as a plebiscite:

> Such processes have the great advantage of counting all electors as equal, so that a plumber or secretary's moral views count for as much as a lawyer's or someone working for some United Nations agency. This, in my view is the appropriate way of resolving all divisive social policy issues, even if they have been translated into the language of rights or of human rights. On issues such as euthanasia, abortion, same-sex marriage and the rest there is no special expertise that a law degree and a decade working at the Bar provides to someone. Nor does employment with the United Nations or expertise in the finer points of international law make one's preferences and opinions somehow superior. Nor is there any persuasive reason for thinking that Australians need to follow the dictates of the European Court of Human Rights or any other committee of unelected ex-lawyers.[17]

2.14 The Ambrose Centre for Religious Liberty also favoured a plebiscite arguing it would deliver a 'clear picture' of the belief of the Australian population on the question of marriage:

> Once such a view is obtained it is then a question for the Parliament to make (or restate) the law pursuant to the Marriage Act…
>
> The outcome [of a plebiscite] would inform the Parliament as to the wishes of the majority and allow the appropriate legislation to be adopted with the necessary consequential changes to the existing law.[18]

2.15 However, many submissions expressed concern that the nature of a plebiscite meant it was an inappropriate mechanism by which to conduct a popular vote on marriage. For example, the AHRC, noting that a plebiscite is non-binding on the Parliament, outlined its reservations about 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.[19]

2.16 Professor George Williams stated that the fact that a plebiscite had no legal effect made it 'no more than a formalised, national opinion poll'.[20]

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17 *Submission 19*, p. 1.

18 *Submission 35*, pp 4-5.

19 *Submission 22*, p. 3.

20 *Submission 32*, p. 2.

2.17 Australian Marriage Equality (AME) submitted that it would be 'an act of bad faith' to hold a plebiscite on a matter, and then have the outcome of the plebiscite 'treated as advisory and not final'.[21] However, AME continued:

> The non-binding nature of plebiscites also means parliament can ignore the result of a plebiscite or delay its implementation for as long as it wishes. We note it took seven years for the result of the 1977 national anthem plebiscite to be implemented.[22]

2.18 It was also argued that there was no rationale for singling out the issue of marriage in this particular context as a topic for a plebiscite when a number of other similarly controversial issues have been decided without a plebiscite. As The University of Adelaide – Public Law & Policy Research Unit explained:

> What is evident from the [examples] of the use of a plebiscite in Australia [previously] is that they do not yield any criteria or rationale for when or why the Executive or the Parliament designates to the electorate a decision wholly within their capacities. This can be contrasted with referendum mechanism which is clearly linked to the amendment of the *Constitution*. The list of other significant policy questions that have not been submitted to the people for consideration only highlights the fact that similar moral or highly charged questions remain with the traditional capacity of the Parliament. For example, decisions to declare war, enter into trade agreements, raise taxes or provide Medicare benefits for termination services are all issues that could equally be referred to the Australian people.[23]

2.19 In a similar vein, Professor Geoffrey Lindell AM noted that governments and Parliaments have been able to deal with controversial issues previously without requiring a plebiscite:

> It is true that two plebiscites were held during World War I on the question of conscription for military service overseas during that War. But this method of governing in Australia is comparatively rare. A number of important and controversial social and political issues have been decided by Parliaments and Governments without the holding of a popular vote as was the case with sending Australian troops to fight in the Vietnam and Iraq Wars. It is well known that the issue of euthanasia is a current controversial issue which has not been put to the people even though it has gained high levels of public approval. More to the point, no such vote was obtained to herald in the changes to our divorce laws which have had an equally important effect on changing the nature of the relationship of marriage.[24]

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21 *Submission 17*, pp 6-7.

22 *Submission 17*, p. 7. See also The University of Adelaide – Public Law & Policy Research Unit, *Submission 2*, p. 4.

23 *Submission 2*, p. 4.

24 *Submission 4*, p. 4.

2.20 Professor Lindell concluded:

> I do not believe that any special reason has been demonstrated for departing from the usual way of legislating by holding a plebiscite on the matter once a matter is clearly within legislative power. This is so even though sharply conflicting views have been expressed in the community on the question of same-sex marriage.[25]

2.21 At the public hearing the committee sought the view of witnesses on whether a successful vote at a plebiscite would bring the debate about marriage to a conclusion. Mr Rodney Croome, National Director, Australian Marriage Equality, explained that majority support for the question at a plebiscite would not provide an end to the debate:

> [B]ecause of course it has to return to parliament. Only a vote in parliament that amends the Marriage Act to allow all Australians to enter into a legally recognised, intimate, lifelong relationship called a marriage will end the debate—as it has in Britain and New Zealand and the United States and Canada and every other country where this has been achieved. That ends the debate.[26]

2.22 Mr William Leonard, Director of Gay and Lesbian Health Victoria, also described the concern amongst the lesbian, gay, bisexual and transgender (LGBT) community about the implications of an unsuccessful plebiscite:

> The assumption built into a plebiscite is that, if it were defeated, a popular vote could justifiably instate the moral objections of people against LGBT people—that it is actually legitimate within law to hold those things, because that is the consequence of a plebiscite if it does not get up. Many LGBT people in 2015 in Australia feel we should not be held to account by a popular vote. There is simply nothing to vote on.[27]

Parliamentary vote

2.23 The committee received many submissions which strongly argued that it was not appropriate to determine the issue of marriage with a popular vote, either in the form of a referendum or a plebiscite.[28] For example, Liberty Victoria roundly condemned a popular vote:

> To seek to put ordinary legislation to a popular vote, especially legislation about discrimination against one group long subject to a history of

25 *Submission 4*, pp 4-5.

26 *Committee Hansard*, 10 September 2015, p. 23. See also The Hon Penny Sharpe, MLC, NSW Parliamentary Working Group on Marriage Equality, *Committee Hansard*, 10 September 2015, p. 22.

27 *Committee Hansard*, 10 September 2015, p. 27.

28 See for example The University of Adelaide – Public Law & Policy Research Unit, *Submission 2*, p. 1; Gilbert+Tobin Centre of Public Law, *Submission 11*, pp 4-6; Castan Centre for Human Rights Law, *Submission 12*, pp 1-2; Rainbow Families Council, *Submission 13*, p. 4; Salt Shakers, *Submission 15*, p. 3; Australian Human Rights Centre, *Submission 25*, p. 1.

> discrimination, is to misunderstand the nature of representative democracy. Members of the public delegate their power to make laws to parliamentary representatives. It is the duty of [Members of Parliament] and Senators to act, to the best of their ability, without fear or favour, honestly and diligently, in carrying out the responsibility so delegated. They betray the people's trust if they shirk that responsibility. Putting marriage equality to a glorified opinion poll is just such a dereliction of duty.[29]

2.24 Similarly, Mr Christopher Puplick AM and Mr Larry Galbraith argued:

> We wish to start by stating as clearly as possible that we believe that the responsibility for determining the question of marriage equality is one which lies squarely at the feet of the Australian Parliament and that we see it as a gross derogation of its constitutional and legal responsibilities to seek to avoid resolving the question by the artificial device of reference of the matter to a referendum or plebiscite.[30]

2.25 In contrast, the ACBC stated that it had reservations about whether a parliamentary vote would be able to resolve the issue of marriage:

> Same-sex marriage continues to be a controversial issue in the Australian community. Both the Senate and the House of Representatives voted strongly in 2012 against changing the definition of marriage. Some groups continued campaigning to change the law. It may be that any bill to redefine marriage would fail again this year in the Australian Parliament if put to the test, or prevail in one house of parliament but not the other, or prevail by a narrow majority in both houses. Such parliamentary votes would be unlikely to resolve such a fundamental issue in our community and might only serve further to divide us. Polls suggest that three quarters of Australians want a popular vote on the issue of whether to redefine marriage and at least half want more time for an informed debate.[31]

2.26 Some submissions favouring a parliamentary vote argued that a public vote was not an appropriate means by which to address an issue of human rights. As the AHRC explained:

> 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 it is 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

29 *Submission 18*, pp 1-2.

30 *Submission 10*, p. 1.

31 *Submission 24*, p. 6.

> for the Australian population to vote on the legal standing of opposite-sex attracted Australians.[32]

2.27 The Centre for Comparative Constitutional Studies referred specifically to plebiscites as 'manifestly inappropriate in circumstances where minority rights, including the right to equality, are at issue'.[33]

2.28 Submissions also referred to the potential cost of a popular vote as a reason why this issue should be dealt with by the Parliament. The Australian Electoral Commission estimated that a popular vote held in conjunction with a federal election would cost an additional $44 million and a popular vote held as a stand-alone election issue would cost $158.4 million.[34]

2.29 Mr Puplick and Mr Galbraith observed that '[e]xpenditure of $100 million…to resolve a matter which Parliament could address without cost is utterly unjustified' and that 'there is no justification for such extravagance and waste of public money'.[35] Mr Puplick and Mr Galbraith also put the cost of a popular vote in a broader context, noting that if a plebiscite on marriage was not held in conjunction with the next election then it was possible it would not be held until 2018, after the proposed referendum on Indigenous recognition. Mr Puplick and Mr Galbraith described as 'scandalous' the expenditure of two lots of $100 million in one year.[36]

2.30 Liberty Victoria stated that the resources involved in holding a public vote would be significant and a diversion of resources that could be put to worthy uses.[37]

2.31 A number of submissions also expressed concern about the impact of a public vote on the lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) community. For example:

> In particular the [Rainbow Families] Council is extremely concerned about the impact of such a public debate on our children and young LGBTIQ people living in our communities.
>
> No matter what explanation is provided about the need for a 'people's vote' by way of a plebiscite or a referendum, no matter what assurances or agreements are made to ask that the debate be respectful or must stick to the topic of marriage equality between two adults, we strongly believe our

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32 *Submission 22*, p. 3. See also NSW Gay and Lesbian Rights Lobby, *Submission14*, p. 11.

33 *Submission 21*, p. 5. See also Castan Centre for Human Rights Law, *Submission 12*, p. 2.

34 *Submission 26*, p. 10. The Australian Electoral Commission noted that for the purposes of estimating cost it was assumed that the conduct of a compulsory attendance plebiscite or referendum would operate in a similar manner to that of a general federal election and that the proposed event would occur within the next twelve months and that no public funding would be provided to the Yes or No campaigns except in accordance with the instructions outlined in the Explanatory Memorandum to clause 6 of the Marriage Equality Plebiscite Bill 2015, see *Submission 26*, pp 9-10.

35 *Submission 10*, p. 3.

36 *Submission 10*, p. 2.

37 *Submission 18*, p. 2.

> children and our families will always be dragged into the fray. ***Indeed there is evidence of this already occurring***.[38]

2.32 At the public hearing Ms Amelia Basset, Co-Convenor of the Rainbow Families Council, expanded on these concerns:

> It is our strong belief that a lengthy public campaign would be a particular risk because it is so much in the community. It is not watching a David and Goliath parliamentary battle from the stands, where you are somewhat distant from it. It brings the debate into the streets, the schools, the swimming pools, these sports clubs and neighbourhood houses—all the places and spaces where our children hang out. I think it would be impossible in this media-saturated age for parents to enforce any kind of a media blackout as a way of trying to minimise the exposure of their children, including young children, to a publicly funded no campaign.
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> …
>
> [W]e feel confident when we say that a public debate is going to be all encompassing and our children will be accessing it. It will say something very directly to them about the value and worth of their families. As other speakers have mentioned, our children are already vulnerable to discrimination and stigma. We know from research and anecdotally that that happens. A campaign run along these lines would amplify that, compound it. In fact, as a society we need to address that to remove it and end it. Those would be some of our major concerns.[39]

2.33 The Australian Psychological Society (APS) stated that 'a public vote is likely to present significant risks to the psychological health and wellbeing of those most affected'.[40] In its submission the APS explained:

> Recent evidence from a suite of studies confirms that the process of putting marriage equality to a public vote can be harmful to the psychological health of gender and sexual minorities. The findings highlight that lesbian, gay and bisexual people (LGB) not only have to contend with the possibility of having rights to marriage denied through a public vote but also the stress associated with the campaign itself.[41]

2.34 Although many submissions strongly supported a parliamentary vote and were not in favour of a popular vote, in the event of a popular vote being held, the preference appeared to be for a plebiscite held in conjunction with the next federal election. As Amnesty International, for example, stated in its submission:

> Amnesty International submits…that a popular vote on marriage equality is neither necessary nor appropriate, and that the Australian Parliament ought to legislate to enshrine marriage equality in Australia law as soon as

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38 *Submission 13*, p. 4, emphasis in original. See also NSW Parliamentary Working Group on Marriage Equality, *Submission 27*, pp 18-19.

39 *Committee Hansard*, 10 September 2015, p. 19.

40 *Submission 31*, p. 2.

41 *Submission 31*, p. 2.

> possible. Notwithstanding our view on a popular vote, Amnesty International holds that if one is to take place it ought to be a plebiscite at the next Federal election.[42]

2.35 However, at the public hearing, Mr Sean Mulcahy, Co-convenor of the Victorian Gay & Lesbian Rights Lobby, clarified:

> The plebiscite in our view is in no way a fallback position. We are strongly opposed to a plebiscite on this issue. Our submission simply sets out: if a plebiscite were to occur, what are the conditions of that? Again, I want to strongly affirm our view that a plebiscite is in no way an appropriate way of dealing with this issue.[43]

2.36 Although submissions did not necessarily support a popular vote, given that a plebiscite was the preferred method if such a vote were to occur, the next chapter of the report discusses the issues surrounding the conduct of a plebiscite and, in particular, the Marriage Equality Plebiscite Bill 2015.

42 *Submission 68*, p. 1.

43 *Committee Hansard*, 10 September 2015, p. 21.

Chapter 3

Discussion on a plebiscite

Introduction

3.1 This chapter sets out a more detailed discussion on a plebiscite on the issue of marriage, with specific reference to the Marriage Equality Plebiscite Bill 2015 (bill), including:

- options for the framework for the conduct of a plebiscite;
- content and implications of a question to be put to electors;
- the cost of a plebiscite; and
- the timing of a plebiscite.

Conduct of a plebiscite

3.2 At the public hearing Mr Tom Rogers, the Australian Electoral Commissioner, advised that in the case of a plebiscite, the legislative framework for the vote would be determined by the Parliament in the enabling legislation for the specific ballot.[1] Mr Rogers continued:

> [We] notice with the bill before us that it speaks of the plebiscite being conducted as a referendum. One would make some assumptions about that therefore looking like a referendum. It would look like an electoral event, with the same sorts of provisions and offences that would apply at an electoral event.[2]

3.3 Mr Paul Pirani, Chief Legal Officer, Australian Electoral Commission (AEC), confirmed that it is possible for a plebiscite to be held without the Parliament passing enabling legislation. Mr Pirani explained that the plebiscite would be conducted as a fee-for-service election pursuant to section 7A of the *Commonwealth Electoral Act 1918* (Electoral Act).[3]

3.4 Were a plebiscite to be held as a fee-for-service election, Mr Rogers informed the committee:

> I would presume that those provisions that we have been talking about in the [enabling] legislation would be outlined in a memorandum of understanding between [the AEC] and the department that is paying for the plebiscite, and we would follow the guidelines that are in that memorandum

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1 *Committee Hansard*, 10 September 2015, p. 39.

2 *Committee Hansard*, 10 September 2015, p. 39.

3 *Committee Hansard*, 10 September 2015, p. 42. The AEC has conducted a fee-for-service election in the form of a plebiscite in 2007 in Queensland for the purposes of council amalgamations. The plebiscite used a voluntary postal vote methodology, see AEC, *Submission 26*, p. 6.

> of understanding. It is essentially a commercial election for [the AEC] if it is run on that basis.[4]

Framework in the Marriage Equality Plebiscite Bill 2015

3.5 In its submission, the AEC commented on the application of the *Referendum (Machinery Provisions) Act 1984* (Referendum Act) to the conduct of the plebiscite proposed in the bill:

> Clause 8 of the Bill states that the provisions of the Referendum Act would apply "to the submission of the question…and the scrutiny of the result of the plebiscite with such modifications as are necessary to allow the submission of the question and scrutiny of the result on the same basis as a referendum under that Act". As there are a range of specific provisions in the Referendum Act that regulate the conduct of a referendum, it is not clear from the terms of the Bill whether this clause has the legal effect of requiring the operation of all the necessary Referendum Act requirements.[5]

3.6 The AEC recommended that any bill proposing a plebiscite should specify which, if any provisions of the Referendum Act and the Electoral Act are to apply.[6]

Compulsory voting

3.7 A note to clause 8 of the bill, which applies the provisions of the Referendum Act to the conduct of the plebiscite proposed in the bill, states that voting is compulsory under the Referendum Act.

3.8 A number of submissions and witnesses supported compulsory voting if a plebiscite was held on the issue of marriage.[7] Australian Marriage Equality outlined the following concerns in relation to a plebiscite with non-compulsory voting:

> This will means fewer voters than usual will engage and the result may not accurately represent the sentiment of the Australian voting population. For example, many younger voters have never experienced a plebiscite and may not understand its significance. Many voters will also be conflicted or unhappy about voting on marriage equality if they believe parliament should resolve the matter, and/or if they know the non-binding nature of a

4 *Committee Hansard*, 10 September 2015, p. 42.

5 *Submission 26*, p. 5.

6 *Submission 26*, p. 5.

7 See for example, Australian Catholic Bishops Conference, *Submission 24*, p. 7; NSW Parliamentary Working Group on Marriage Equality, *Submission 27*, p. 12; Australian Marriage Equality, *Submission 17*, p. 12; Victorian Gay & Lesbian Rights Lobby, *Submission 29*, p. 8; Mr Rocco Mimmo, Founder and Chairman, Ambrose Centre for Religious Liberty, *Committee Hansard*, 10 September 2015, p. 2; Mr Lyle Shelton, Managing Director, Australian Christian Lobby, *Committee Hansard*, 10 September 2015, p. 9; Ms Toni Kelleher, Victorian President, Australian Family Association, *Committee Hansard*, 10 September 2015, p. 10.

> plebiscite means the matter ultimately be resolved by parliament regardless of how they vote.[8]

Content and implication of a question to be put to electors

3.9 A number of submissions expressed a preference for consultation on the framing of the question. For example, the Gilbert+Tobin Centre for Public Law noted that '[a]s a matter of good practice, the wording of the question should be tested for clarity and fairness through public research'.[9]

3.10 Professor Geoffrey Lindell AM indicated he supported a process of having the form of the question for a plebiscite agreed to by the Parliament:

> This would help to minimise the chances of the wording being distorted by one or other sides to the debate on the issue in the hope of unfairly influencing the result of the popular vote.[10]

3.11 Professor Anne Twomey agreed that the question should be approved by the Parliament, but also that it should be first tested by an independent body to ensure that it does not give rise to ambiguity or confusion.[11]

3.12 The New South Wales Parliamentary Working Group on Marriage Equality (NSW Parliamentary Working Group) supported a question 'in simple plain English'.[12] Further:

> The question should also be respectful and inclusive of all people, regardless of their sex or gender identity. It should ensure that a 'yes' vote is supportive of marriage equality, and not set up different categories or requirements for marriage.[13]

The question in the bill

3.13 As discussed in Chapter 1, the bill proposes that the question to be put to electors at the plebiscite be:

> Do you support Australia allowing marriage between 2 people regardless of their gender?[14]

3.14 The NSW Parliamentary Working Group considered the use of the term 'gender' in the bill anomalous;

> [T]he question posed in the Bill, may, in the Working Group's view, raise unnecessary confusion through the use of the term "gender" as opposed to "sex".

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8 *Submission 17*, p. 7.

9 *Submission 11*, p. 2.

10 *Submission 4*, p. 5.

11 *Submission 6*, p. 4.

12 *Submission 27*, p. 15.

13 *Submission 27*, p. 15.

14 Clause 6 of the Marriage Equality Plebiscite Bill 2015.

…

> [T]he definition introduced into the [*Marriage Act 1961*] in 2004 sought to codify the then existing expectation, that being that two people of differing, or opposite, sex were entitled to marry. The amendment that is now sought to be made to the Marriage Act 1961 is one that addresses the sex of the parties to the marriage, not their gender.[15]

3.15 The NSW Parliamentary Working Group indicated a preference for the following question:

> Do you agree that Australia should allow marriage between two adult people regardless of their sex?[16]

3.16 Professor Lindell stated his preference for a different question:

> Do you approve of an alteration to the law for the purpose of recognising marriages between two persons of the same-sex whether entered into in Australia or elsewhere?[17]

3.17 Professor Lindell noted that putting this question would make more explicit the recognition of same-sex marriages entered into both in Australia and overseas.[18]

3.18 Mr Christopher Puplick AM and Mr Larry Galbraith noted:

> A critical issue for many people who would nominally support marriage equality is that such legislation should provide for protection for people or organisations who have genuine religious or doctrinal objections. Almost all supporters of marriage equality support this proposition which should be reflected in the question.[19]

3.19 Mr Puplick and Mr Galbraith put forward the following alternative to the question in the bill:

> The question should be for the simple approval/rejection (yes/no vote) of a specific piece of legislation passed by the Parliament which has already dealt with all matters of definition and religious exemptions.[20]

3.20 In contrast to other proposals, Salt Shakers were of the view that the question to be put to the people should affirm the status quo and should not propose the acceptance of same-sex marriage. Salt Shakers suggested the following wording:

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15 *Submission 27*, pp 14-15. The submission by the NSW Parliamentary Working Group explained: 'sex' refers to biological differences; chromosomes, hormonal profiles, internal and external sex organs; 'gender' describes the characteristics that a society or culture delineates as masculine or feminine, see *Submission 27*, p. 14. See also Mr Christopher Puplick AM and Mr Larry Galbraith, *Submission 10*, p. 6.

16 *Submission 27*, p. 15.

17 *Submission 4*, p. 5.

18 *Submission 4*, p. 5.

19 *Submission 10*, p. 7.

20 *Submission 10*, p. 7.

> Do you agree/believe that Australia's Marriage Act should continue to define marriage as between "one man and one woman"?[21]

Implications of a popular vote

3.21 As noted in Chapter 2, one of the key concerns in relation to a plebiscite, was that it was non-binding. Mr Puplick and Mr Galbraith commented specifically on subclause 3(2) of the bill, which provides that 'Parliament will pass any legislation necessary to allow marriage between 2 people regardless of their gender':

> This is to all intents and purposes meaningless since it invokes or establishes no recognised mechanism for giving it effect. In the first instance Parliament could in effect just ignore the provisions and there is no means of enforcing the Parliament to act; or the Parliament could pass an Act to repeal the provisions. No sanctions are provided for non-compliance nor are there any constitutionally available.
>
> …
>
> The term "any" legislation is equally meaningless since it implies, for instance, that this could be subject to all sorts of qualifications – for example, that both parties be over the age of 50; that neither having ever been married previously; that both be Australian citizens. Such qualifications would meet the requirement of "marriage between two people regardless of their gender" and would be "any" legislation as envisaged by the terms of the Bill.[22]

3.22 In its submission, the Gilbert+Tobin Centre of Public Law agreed that the bill had no legal implications:

> [P]lebiscites "are in effect giant opinion polls to test the public mood on an issue". Consistently with this, no legal implications whatsoever follow from the proposal, enshrined in this Bill, to put this question to electors.
>
> The only legal implications of the Bill are procedural and concern the obligations placed upon the Electoral Commissioner and the Minister by [clause] 7 [which deals with the Minister informing Parliament of the results of the plebiscite].[23]

3.23 Both Professor Anne Twomey and Professor George Williams suggested a mechanism by which a successful plebiscite may automatically amend the Marriage Act. As Professor Twomey explained in her submission:

> It would be possible, however, for Parliament to pass a law in advance that would give effect to a successful outcome of the plebiscite (eg to enact a law authorising same-sex marriage), but to place as a condition of the commencement of that Act that it is approved by the people in a plebiscite within six months. This would mean that the passage of the plebiscite

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21 *Submission 15*, p. 2.

22 *Submission 10*, pp 5-6.

23 *Submission 11*, pp 1-2.

> would have the effect of causing the commencement of a change to the law. Failure of the plebiscite would mean the Act would not commence.[24]

Cost of a plebiscite

3.24 In its submission, the AEC stated that it estimated that if a plebiscite were to be conducted as if it were a referendum alongside the next general federal election, the additional cost would be $44.0 million.[25] The AEC indicated that the major items contributing to that additional cost would be:

> i. additional temporary staff to manage the throughput of electors in polling places, noting the extra time required for an additional ballot paper (three instead of two) to be issued and completed;
>
> ii. additional paper and storage requirements to manage an additional ballot paper;
>
> iii. the design, production and delivery to households of a pamphlet containing arguments for and against;
>
> iv. education and promotion materials to inform electors in regard to the plebiscite.[26]

3.25 If a plebiscite were conducted as a referendum and as a stand-alone event, that is, not in conjunction with an election, the AEC estimated that the total cost would be $158.4 million.[27]

3.26 At the public hearing, Mr Rogers, the Australian Electoral Commissioner summarised:

> The costs of a stand-alone event are very comparable to a normal federal election. We have made some assumptions there that it would be a compulsory voting event. That would mean we would have run a similar number of polling places and similar processes, so it would be a similar cost involved in that event. If we were running a plebiscite, referendum or a plebiscite that looks like a referendum at the time of an election, we would still have to do additional things. There would have to be additional staff to assist us with the increased load. Clearly, there are more printing costs and there are a range of other factors that would make a standard election more expensive.[28]

3.27 However, Mr Rogers cautioned that the costs outlined by the AEC were only indicative:

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24 *Submission 6*, pp 1-2. See also Professor George Williams, *Committee Hansard*, 10 September 2015, p. 33.

25 *Submission 26*, p. 10.

26 *Submission 26*, p. 10.

27 *Submission 26*, p. 10.

28 *Committee Hansard*, 10 September 2015, p. 38.

> Actual cost and other matters would need to be confirmed once the specific parameters of any ballot were finalised.[29]

3.28 Professor Twomey suggested the possibility of reducing the cost of the plebiscite through the use of postal or electronic voting:

> It would be appropriate to consider whether or not the vote could be held as a postal vote, as was the vote for candidates to the 1998 Constitutional Convention, so as to exclude the cost of hiring polling booths and staff for the day. New Zealand currently proposes to hold two plebiscites in December 2015 and April 2016 in relation to a choice of a new flag, both of which will be postal votes run over a three week period.
>
> It could also be used as a trial for electronic voting, given that New South Wales has already undertaken significant work in this area at the most recent NSW State election where 283,669 people voted using 'iVote'. People could be given the choice between a postal vote and an electronic vote. Any postal ballots could be marked in a machine-readable form (rather than hand-writing Yes or No), so that the ballots could be counted efficiently and accurately.[30]

3.29 On the issue of postal votes, Mr Rogers noted that the AEC had deliberately not provided costings on a postal vote as this was not an option that was canvassed in the bill. Mr Rogers indicated that there were many variables in the conduct of an election using a postal vote methodology, and referred to previous postal vote elections to illustrate this point:

> [T]here are many variables in a postal vote. With the [election of delegates to the] Constitutional Convention [in 1997], for example, I think…the return rate on the postal vote was something like 47 per cent, and that is a factor in the cost itself. The legislation determines whether it is compulsory or non-compulsory and how much those costs would be.
>
> With the plebiscite in Queensland [for the council amalgamations] I think we had a 57 per cent return rate, for example. I also point out to the committee that only recently Australia Post have announced an increase in costs…So even the size of the yes/no booklet will be a factor in itself on the cost.[31]

3.30 However, Mr Pirani confirmed:

> If parliament were to enact legislation for it to be done as a postal vote it could be conducted as a postal vote.[32]

3.31 In respect of the use of electronic voting for a plebiscite, Mr Rogers noted the Joint Standing Committee on Electoral Matters, *Second interim report on the inquiry*

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29 *Committee Hansard*, 10 September 2015, p. 38.

30 *Submission 6*, p. 3.

31 *Committee Hansard*, 10 September 2015, p. 43.

32 *Committee Hansard*, 10 September 2015, p. 39.

into the conduct of the 2013 federal election: An assessment of electronic voting options, which made the following assessment in respect of electronic voting:

> The report concludes, irrespective of one's philosophical view about electronic voting, that there can be no widespread introduction of electronic voting in the near term without massive costs and unacceptable security risks.[33]

3.32 Mr Rogers emphasised:

> [Electronic voting] is a huge project.
>
> I would also point out…that if we were actually talking electronic voting for, essentially, 15 million voters, it might be the largest-ever electronic vote ever conducted. We are talking about a few months to prepare for this. It is not a simple matter of turning on a computer and running an electronic vote; we are talking about a detailed implementation of a very complex issue.[34]

Commonwealth funding to the 'yes' and 'no' campaigns

3.33 At the public hearing, Mr Rogers confirmed that the AEC's costings only included the conduct of the vote and not for any public funding of the 'yes' and 'no' campaigns.[35]

3.34 The committee received a broad range of responses in relation to the issue of Commonwealth funding for the 'yes' and 'no' campaigns. For example, Mr Puplick and Mr Galbraith, while making a joint submission, noted that the issue of Commonwealth expenditure on the 'yes' and 'no' campaigns of a popular vote was one issue on which they held different opinions:

> Mr Puplick is opposed to any Commonwealth expenditure other than that provided for in section 11 of the *Referendum (Machinery Provisions) Act 1984*, namely the printing and distribution of the yes and no cases. Mr Galbraith is open to additional public funding being available to ensure equal opportunities for the presentation of "yes" and "no" cases but acknowledges that further detailed consideration is [required of] the mechanism for determining and providing such funding.[36]

3.35 The Gilbert+Tobin Centre of Public Law contended the Commonwealth should fund 'yes' and 'no' campaign committees:

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33 *Committee Hansard*, 10 September 2015, p. 39, quoting from the Joint Standing Committee on Electoral Matters, *Second interim report on the inquiry into the conduct of the 2013 federal election: An assessment of electronic voting options*, November 2014, p. 2.

34 *Committee Hansard*, 10 September 2015, p. 39. In a supplementary submission the AEC noted that section 11(4) of the Referendum Act provides for the preparation and distribution of a pamphlet containing arguments for and against the proposed law. The preparation and distribution of this pamphlet was included in the AEC's discussion of costs in the AEC's submission, see *Supplementary Submission 26*, pp 3-4.

35 *Committee Hansard*, 10 September 2015, p. 40.

36 *Submission 10*, pp 1-2.

> This would enable partisans on both sides of the debate to promote their arguments to the community, and would be an effective way of raising public awareness about the cases for and against change. It would also follow the precedent set by the Howard government in the lead-up to the 1999 republic referendum, whereby it allocated $7.5m each to the Yes and No campaign committees.[37]

3.36 However, the Gilbert+Tobin Centre of Public Law noted that section 11(4) of the Referendum Act, which would apply to the funding of campaigns under the bill, prohibits Commonwealth funding of partisan campaign committees:

> Section 11(4) of the Referendum Act provides that the Commonwealth "shall not expend money in respect of the presentation of the argument in favour of, or the argument against , a proposed law" unless that spending is in relation to the production and distribution of the official "Yes/No" information pamphlet, or ancillary activities. This provision therefore stands in the way of any federal government that wishes to fund Yes and No committees. It also prevents the Commonwealth from spending money to promote referendum arguments via mass media outlets such as television, radio and newspapers, even if it wishes to do so in an even-handed manner. The expenditure limits further pose a barrier to government spending on education campaigns, as such spending will be vulnerable to challenge where any information materials produced could be perceived as crossing the fine line between neutral information and "argument".[38]

3.37 The Gilbert+Tobin Centre of Public Law argued that the restrictions in section 11(4) of the Referendum Act, which would apply to a plebiscite conducted pursuant to the bill, are 'unsuited to a modern-day campaign environment':

> This is demonstrated by the fact that, both in 1999 and 2013, the Parliament passed legislation to suspend the operation of section 11(4) [of the Referendum Act] for the duration of the referendum campaign…
>
> Rather than apply the Referendum Act's overly strict expenditure limits to a future popular vote on same-sex marriage, the [bill] should set down rules that provide the Commonwealth with a greater degree of spending freedom, as is appropriate in today's campaign environment.[39]

3.38 The Gilbert + Tobin Centre of Public Law provided some comparative figures from other campaigns. At the last referendum in 1999 on the issue of a republic, $15 million was provided in funding for the 'yes' and 'no' campaigns. A further $4.5 million was expended on a 'neutral education campaign'. In 2013 for the proposed, and subsequently abandoned, referendum on local government recognition, the government had allocated $11.6 million for a civics education campaign and a further $10.5 million for 'yes' and 'no' campaigns.[40]

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37 *Submission 11*, pp 2-3.

38 *Submission 11*, p. 3.

39 *Submission 11*, p. 3.

40 *Submission 11*, p. 2.

3.39 Australian Marriage Equality indicated that they did not support the level of funding for the 'yes' and 'no' campaigns that had been provided in the 1999 referendum:

> Marriage equality has been debated in Australia for over a decade. There is already a significant amount of quality information available to the public. The cases for and against can be prepared and distributed for less than the amount spent in 1999.[41]

3.40 A number of submissions and witnesses expressed the view that there should be equal funding for the 'yes' and 'no' campaigns.[42]

3.41 Professor Anne Twomey referred to concerns that she has about yes/no campaigns during referenda and suggested it may be possible to conduct a plebiscite without a yes/no campaign:

> For some time I have been disturbed by yes/no cases in referenda because I think, for the most part, they are misleading, emotive and unhelpful. I would be quite happy, personally, if there was no yes/no case in relation to a plebiscite. I do not think it is necessary. Because it is not concerning detailed constitutional technical issues that do need an explanation, I think most people can understand the question of whether you want same-sex marriage or not. I really do not think it is a matter that you ought to have a yes/no case.[43]

3.42 Professor Twomey also expressed reservation about the Commonwealth funding of yes/no campaigns:

> I am also not even sure that we should have funding at the Commonwealth level for it. I suspect that, again, these are issues that people have their own personal views about and you do not need to have massive campaigns to convince people one way or another.[44]

3.43 The Human Rights Law Centre, noting its concerns that a sustained public debate on the issue of marriage 'may risk the promotion of views that invite hatred and discrimination towards [lesbian, gay, bisexual, transgender and intersex (LGBTI)] people', proposed that recipients of public money for a yes/no campaign should be required to comply with a code of conduct.[45] At the public hearing, Ms Anna Brown, Director of the Human Rights Law Centre, explained further:

> We saw that there was a need to have some regulation of the conduct, particularly if there was to be a publicly funded yes and no campaign. Our suggestion was that anyone in receipt of government funds, and potentially

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41 *Submission 17*, p. 12.

42 See for example Australian Marriage Equality, *Submission 17*, p. 12. See also Mr Lyle Shelton, Managing Director, Australian Christian Lobby, *Committee Hansard*, 10 September 2015, p. 9. Dr David Phillips, FamilyVoice Australia, *Committee Hansard*, 10 September 2015, p. 11.

43 *Committee Hansard*, 10 September 2015, p. 36.

44 *Committee Hansard*, 10 September 2015, p. 36.

45 *Submission 33*, p. 2.

> any parties involved in public debate on the plebiscite issue, should subscribe to a code of conduct and, ideally, as part of that code of conduct, speech that vilifies or incites hatred or violence should be prohibited. Of course, there are already protections in some states and territories against vilification, but it think it is really important that the parties that are actually signing up to run the yes and no sides of the debate make sure that they make a commitment to do so on a respectful basis.[46]

3.44 Several submissions also raised concerns about the funding of campaigns outside of any Commonwealth funds which might be provided. For example, Mr Lyle Shelton, Managing Director of the Australian Christian Lobby, argued that there should be a prohibition on money from overseas to fund campaigns.[47]

Timing of a plebiscite

3.45 In the event that a plebiscite was to be held, many submissions supported the vote occurring in conjunction with the next federal election, as is proposed in the bill. For example, Australian Marriage Equality argued:

> To ensure the least delay and the least cost to taxpayers, a plebiscite should be held at the next federal election. Again, this will provide whichever government is elected at the election with a stronger mandate to act.[48]

3.46 However, a number of submissions also supported a popular vote, in whatever form, being held separately to an election. For example, Lawyers for the Preservation of the Definition of Marriage argued it would be unwise to include the issue of marriage as part of a general election campaign:

> The matter is of such import, that electors deserve the opportunity to consider it as a stand-alone proposal rather than have to consider it with all the "noise" of a general election.[49]

3.47 At the public hearing, Mr Sean Mulcahy, Co-convenor of the Victorian Gay and Lesbian Rights Lobby, outlined why that organisation does not support a plebiscite until after the next election:

> [W]e do need to weigh up the overwhelming view of the LGBTI community, and I think the community at large, that this issue should be resolved as soon as possible against the strong view of the LGBTI community that a plebiscite or a referendum is not an appropriate mechanism for resolving this dispute, most especially because of the potential harms that it could cause to young and/or vulnerable LGBTIQ people. Both the [NSW and Victorian Gay and Lesbian Rights] lobby

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46 *Committee Hansard*, 10 September 2015, p. 4.

47 *Committee Hansard*, 10 September 2015, p. 9. See also Australian Catholic Bishops Conference, *Submission 24*, p. 8;

48 *Submission 17*, p. 12. See also Professor Geoffrey Lindell, *Submission 4*, p. 5; Gilbert+Tobin Centre of Public Law, *Submission 11*, p. 3;

49 *Submission 20*, p. 6. See also FamilyVoice Australia, *Submission 23*, p. 5; Australian Catholic Bishops Conference, *Submission 24*, p. 7.

> groups took this feedback on board and considered it deeply. Our considered view is that the best way of resolving this issue is in fact through a parliamentary vote, but if there is to be a plebiscite it should be held after the next election.
>
> There are three main reasons for that. Firstly, it would give the voters the opportunity to consider each party's position on the issue of a public vote at the next election. I understand there are differences across the parties on this position. Secondly, it would ensure that the vote on this issue would be set aside from the general election, so voters could concentrate their minds purely on the question at hand. Finally, it would allow for a fixed date to be set rather than a floating date of an election and ensure that appropriate protections and guidelines can be put in place. In summary, our strong view is that there should be a parliamentary vote on this. If there is to be a plebiscite, there is a strong argument that it should be held after the next election[.][50]

3.48 Mr Puplick and Mr Galbraith expressed concern that if a popular vote on marriage did not occur at the next election, then it would be delayed until 2018:

> [The holding of any plebiscite in conjunction with a general election is desirable as] this would allow the speedy resolution of a matter which, unless dealt with in the next year will undoubtedly not be submitted to the public until at least 2018. We base this on the Prime Minister's reported opposition to holding such a vote in conjunction with the proposed referendum on Indigenous recognition which is unlikely to take place before 2017.[51]

3.49 The AEC noted that it required sufficient time to prepare for any additional electoral event:

> The AEC would require adequate lead time [to] procure materials, and to make any required operational or technical adjustments in preparation for an additional electoral event (be it stand-alone, joint or postal). In terms of the preparation of a referendum advertising campaign, a truncated or minimum timeframe carries certain risks. These include insufficient or no market testing to confirm the objectivity and effectiveness of materials (which in turn could impact formality levels), escalation of costs relating to the development and market testing, and impacts on preparations.[52]

3.50 At the public hearing, Mr Rogers stated that it was difficult to provide an accurate timeframe without knowing the parameters of the enabling legislation. By way of comparison, Mr Rogers provided the following information on timeframes from the 2013 proposed referendum on the recognition of local government:

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50 *Committee Hansard*, 10 September 2015, p. 21. See also Dr Justin Koonin, Convenor of the NSW Gay and Lesbian Rights Lobby, *Committee Hansard*, 10 September 2015, p. 21.

51 *Submission 10*, p. 2. See also The Hon Trevor Khan, MLC, NSW Parliamentary Working Group on Marriage Equality, *Committee Hansard*, 10 September 2015, p. 23.

52 *Submission 26*, p. 11.

> [The AEC] said then that we would need something like about three months' notice to source raw materials like paper and other things that we need to conduct an electoral event.[53]

3.51 However, Mr Rogers did provide the following commitment:

> [The AEC is] here to serve the parliament and if parliament gives us direction to run an event, we will run an event in the time frame that we are given for it.[54]

53 *Committee Hansard*, 10 September 2015, p. 38.

54 *Committee Hansard*, 10 September 2015, p. 38.

Chapter 4

Committee view

4.1 On the basis of the evidence before the committee and the experience, concerns and expertise of submitters and witnesses, the committee does not support a plebiscite or a referendum on the matter of marriage in Australia. The High Court's decision in *The Commonwealth v The Australian Capital Territory* renders a referendum redundant. Further, as the evidence to this committee emphasised, the matter of marriage is not one which should be decided by a popular vote. Whether the definition of marriage should be changed to encompass the union of two people, regardless of sex, is a matter which is squarely within the Parliament's power to legislate.

4.2 In the committee's view a bill to amend the definition of marriage in the *Marriage Act 1961* to provide for the marriage between two people regardless of sex should be introduced into the Parliament as a matter of urgency.

4.3 The committee strongly supports a conscience vote for all members of the Parliament on any bill to amend the definition of marriage.

Recommendation 1

4.4 The committee recommends that a bill to amend the definition of marriage in the *Marriage Act 1961* to allow for the marriage between two people regardless of their sex is introduced into the Parliament as a matter of urgency, with all parliamentarians being allowed a conscience vote.

Senator Glenn Lazarus
Chair

Dissenting Report by Coalition Senators

1.1 The most democratic course of action in settling the marriage equality debate is to refer the matter to a compulsory plebiscite. While potentially costly a plebiscite would be invaluable in affirming the often referenced majority support for same-sex marriage, and would assure the government that it was taking the right course of action by the Australian people.

> The people of Australia should be allowed to discuss freely and openly what marriage is in Australia.[1]

1.2 On the appropriateness of a plebiscite to decide this matter, same-sex marriage is an incredibly divisive social issue, and while there are 'no consistent criteria for when and why a plebiscite is desirable or warranted':[2]

> Plebiscites have been held before on divisive social issues, particularly where the division crosses party boundaries and there are strong differing views within political parties.[3]

1.3 We believe that same-sex marriage fits this precedent, and that a plebiscite will provide closure on a much contended issue that has been in the domain of public debate for many years:

> The issue of same-sex marriage has been in the public domain for quite a number of years. It is one of the very few subjects that keeps on raising its head. It has been dealt with by the parliament in the past and it has been dealt with by state parliaments, but it keeps resurfacing all the time. The idea that it should just be left to the parliament because if not, what else are you opening, has very little support on the basis that this issue itself has dominated public debate for quite a number of years. Therefore, it is not resolved.
>
> One way perhaps to bring it to a 'closure'—to use your words, Senator—would be to put it to a popular vote in order for the people to express their opinions and for parliament to be informed and guided by the outcome of that popular vote.[4]
>
> So our comments there were, 'Look, this has been through the democratic process up hill and down dale. A lot of parliament's time has been expended on it and yet it keeps coming back.' I guess, in the face of the relentlessness of this, where have we left to go? Obviously, we support this now going to the people. If it keeps going to the parliament and getting rejected, as it has,

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1 Mr Christopher Brohier, Founder, Lawyers for the Preservation of the Definition of Marriage, *Committee Hansard*, 10 September 2015, p. 13.

2 The University of Adelaide - Public Law & Policy Research Unit, *Submission 2*, p. 3.

3 Professor Anne Twomey. *Submission 6*, p. 3.

4 Mr Rocco Mimmo, Founder and Chairman, Ambrose Centre for Religious Liberty, *Committee Hansard*, 10 September 2015, p. 6.

> and through numerous Senate and parliamentary inquiries, it is only logical now that it goes to the people for all Australians to have a say. I think that is the best way to resolve this, given that those who want change, as is their right, keep bringing this forward. We need to come to some sort of resolution, and a people's vote obviously is the way to go.[5]

1.4 The position that Coalition Senators recommend is that enunciated by the Prime Minister, Mr Turnbull in Question Time on 15 September 2015

> *Our government has decided that the resolution of this matter will be determined by a vote of all the people via a plebiscite to be held after the next election.*
>
> *Our government, our party room, has decided that the decision will be taken by a plebiscite. Why is the opposition afraid of the people having a vote? Why don't they want all Australians having a vote? There is no greater virtue in a free vote here or a plebiscite.*
>
> *At the next election, Australians will have a choice. The Labor Party will say, "Vote for us and marriage equality will be dealt with by the politicians, by the parliament, in a free vote after the election". And we will say "If we're re-elected to government, every single Australian will have a say". We all respect members of parliament – after all, we are all members of parliament – but we are just representatives and we are just 150 in number. Every single Australian will have a vote on the issue after the next election if we are returned to government. How can the opposition seriously and credibly say that that is anything other than thoroughly democratic? When did it cease to be democratic to let the people speak?*[6]

1.5 Apart from Mr Turnbull's poor mathematics (there are in fact 226 parliamentarians) we agree entirely with Mr Turnbull's statement.

5 Mr Lyle Shelton, Managing Director, Australian Christian Lobby, *Committee Hansard*, 10 September 2015, p. 12.

6 *House of Representatives Hansard*, 15 September 2015.

Recommendation 1

1.6 The Government Senators do not support the recommendation of the Labor, Green Independent majority. We recommend that the matter of amending the *Marriage Act 1961* to allow for the marriage between two people regardless of their sex be addressed by a compulsory national plebiscite.

Senator the Hon Ian Macdonald
Deputy Chair

Senator Linda Reynolds

Additional Comments by Senator Ian Macdonald

This inquiry by the Legal and Constitutional Affairs References Committee effectively into the terms of the *Marriage Equality Plebiscite Bill 2015* continues the farcical situation into which the whole Senate Committee system is being taken.

Blatantly political inquiries are being established by the Labor, Greens, and Green Independents in the Senate that have little significance in public policy areas and which, for no practical or useful parliamentary outcome, engage the time of Senators and Committee Staff in inquiries for which the outcome is predetermined.

To make matters worse, again the element of this inquiry which was legitimate, and that is an inquiry to a Private Members Bill, the *Marriage Equality Plebiscite Bill 2015* should have been referred to the Committee set up to deal with inquiries into legislation, that is the Legal and Constitutional Affairs Legislation Committee.

This abuse of process of the Senate is bringing the whole Senate Committee system into disrepute.

Furthermore the majority decided that an urgent result was required to be tabled in the parliament notwithstanding that there is no likelihood of any Bill being debated in the immediate future.

This resulted in one public inquiry which was held during a sitting of the Senate making it difficult for Senators to discharge their duties to parliament, to the Senate Chamber and other Committee work and attend all sessions of the public inquiry.

This has resulted in government members of the Committee being unable to attend all of the hearings and leads a partisan and biased approach to the questions and accordingly limits responses from witnesses.

The conduct of the majority of the committee in calling meetings subsequent to the hearings at short notice and without sufficient notice and then allowing originally less than an hour for dissenting reports to be tabled, demonstrates the blatant political nature of these inquiries and the unfortunate unfairness of this committee led by a Green Independent Chair.

This is another inquiry which has been an absolute and blatant waste of taxpayers' money, of valuable and increasingly challenged Senate Committee Staff time, for an outcome which was predetermined and which sheds little new evidence, thought or debate to a question that has been in the public domain for many years.

For as long as the majority in the Senate continues to establish these sorts of inquiries, the high regard with which Senate Committee Reports were once held, will continue to diminish.

Senator the Hon Ian Macdonald
Deputy Chair

Additional Comments

The Australian Greens

1.1 The Australian Greens believe that the committee report is an excellent articulation of the reasons why the question of marriage equality should be resolved by a vote in the Parliament. We strongly affirm this view.

1.2 The Greens are convinced by the evidence from witnesses and submitters who voiced serious concerns about a popular vote and agree that it is undesirable to amend the definition of marriage in this way. We give serious weight to the evidence of the harm that LGBTIQ members of the community, and their families may suffer as a consequence of the public campaign accompanying a plebiscite.

1.3 The Greens note the intention of the current Government to proceed with a plebiscite after the next election, which could be undertaken using executive power. The evidence presented to the committee indicates that this would be an inappropriate course of action, with potential to cause serious harm to LGBTIQ Australians and their families.

1.4 The Greens believe that if a plebiscite is being pursued then it should only be considered in conjunction with the next federal election, and under the following conditions:

- The framework for its conduct should be the subject of a bill agreed to by Parliament.
- Voting should be compulsory.
- A Joint Select Committee should be established to consider all aspects of the conduct of the plebiscite.
- The question for electors should be researched and developed by the Australian Electoral Commission.
- To ensure that the views and human rights of all participants are respected and upheld the Greens firmly believes that appropriate parameters must be established around:
    - public advertising for the plebiscite and regulation of the media, including social media;
    - funding arrangements for the 'yes' and 'no' campaigns;

- appropriate limitations on campaigning, including the period of time during which campaigning is allowed; and
- the impact of campaigning on vulnerable people, particularly those in the LGBTIQ communities, and social support services available to them.

Senator Janet Rice

Appendix 1

Public submissions

1	Law Council of Australia
2	The University of Adelaide - Public Law & Policy Research Unit
3	Mr Luther Weate
4	Professor Geoffrey Lindell AM
5	Mr Stephen Jones
6	Professor Anne Twomey
7	Associate Professor Neil Foster
8	Mr Tyrone Curtis
9	Mr Daniel Lehrer
10	Mr Chris Puplick Mr Larry Galbraith
11	Gilbert + Tobin Centre of Public Law
12	Castan Centre for Human Rights Law
13	Rainbow Families Council
14	NSW Gay and Lesbian Rights Lobby
15	Salt Shakers
16	Australian Family Association
17	Australian Marriage Equality
18	Liberty Victoria
19	Professor Jim Allan
20	Lawyers for the Preservation of the Definition of Marriage
21	Centre for Comparative Constitutional Studies (CCCS)
22	Australian Human Rights Commission (AHRC)
23	FamilyVoice Australia
24	Australian Catholic Bishops Conference
25	Australian Human Rights Centre
26	Australian Electoral Commission
27	NSW Parliamentary Working Group on Marriage Equality

28 Gay and Lesbian Health Victoria
29 Victorian Gay & Lesbian Rights Lobby
30 Psychologists for Marriage Equality
31 Australian Psychological Society
32 Professor George Williams
33 Human Rights Law Centre
34 Brisbane LGBTIQ Action Group
35 Ambrose Centre
36 Ms Kristen Walker
37 Ms Sarah Woods
38 Mr Tom Mooney
39 Mr Joseph Scales
40 Mr Daniel O'Connell
41 Mr Lee Matthews
42 Hon. Lynn MacLaren MLC
43 Endeavour Forum Inc.
44 Mr Luke Maroney
45 Law Institute of Victoria
46 Relationships Australia
47 Mr Robbie Moore
48 Mr Kevin O'Loghlin
49 Ms Janine Truter
50 Mr Peter Stokes
51 Rev Dr Margaret Mayman
52 Ms Rowan Willis-Hall
54 DiGS Equality
55 Mr Blair Martin
56 Ms Nicole Aebi-Moyo
57 Paul Martin
58 Ms Jo Haylen
59 Ms Cathy Brown
60 Mr Curtis Dickson

61 PFLAG NSW Inc.

62 Rae Jones

63 Mr Matthew Drake

64 Uniting Justice Australia

65 Mr Trevar Chilver

66 Mr David Brewster

67 Mr Roger Crompton

68 Amnesty International

69 Mr Simon Corbell MLA

70 Ms Louise Willis

71 Seventh-day Adventist Church - Australia

72 Public Health Association of Australia and Council of Academic Public Health Institutions Australia

73 Organisation Intersex International Australia Ltd (OII)

74 National LGBTI Health Alliance

75 Brian Greig OAM

76 Name Withheld

77 Mr John Wigg

Appendix 2

Public hearings and witnesses

Thursday 10 September 2015—Canberra

BARRY, Mr Brian, Co-Convenor, Rainbow Families Council

BASSET, Ms Amelia, Co-Convenor, Rainbow Families Council

BROHIER, Mr Christopher, Founder, Lawyers for the Preservation of the Definition of Marriage

BROWN, Ms Anna, Director, Human Rights Law Centre

BROWNE, Mr Phillip, Convenor, Brisbane LGBTIQ Action Group

CALLEGARI, Mr Ben William, Clinical Psychologist and Spokesperson, Psychologists for Marriage Equality

CROOME, Mr Rodney Peter, National Director, Australian Marriage Equality

DANE, Dr Sharon, Member, Australian Psychological Society

GERBER, Prof. Paula, Deputy Director Castan Centre for Human Rights Law

HANRAHAN, Mr Paul, Executive Director, Family Life International (Australia) Limited

KELLEHER, Mrs Terri, Victorian President, Australian Family Association

KHAN, The Hon. Trevor, MLC, Member, New South Wales Parliamentary Working Group on Marriage Equality

KOONIN, Dr Justin Elliot, Convenor, New South Wales Gay and Lesbian Rights Lobby

LEONARD, Mr William Thomas, Director, Gay and Lesbian Health Victoria, La Trobe University

LINDELL, Prof. Geoffrey AM, Private capacity

LYNCH, Prof. Andrew, Gilbert + Tobin Centre of Public Law, University of New South Wales

MIMMO, Mr Rocco, Founder and Chairman, Ambrose Centre for Religious Liberty

MULCAHY, Mr Sean, Co-Convenor, Victorian Gay & Lesbian Rights Lobby

PHILLIPS, Dr David, National Director, FamilyVoice Australia

PIRANI, Mr Paul, Chief Legal Officer, Australian Electoral Commission

QUINLAN, Professor Michael, Senior Member, Lawyers for the Preservation of the Definition of Marriage

ROGERS, Mr Tom, Australian Electoral Commissioner, Australian Electoral Commission

SHARPE, The Hon. Penelope Gail (Penny), MLC, Member, New South Wales Parliamentary Working Group on Marriage Equality

SHELTON, Mr Lyle, Managing Director, Australian Christian Lobby

SHORT, Dr Elizabeth, Representative and Member, Australian Psychological Society

STUPARICH, Mr Jeremy, Public Policy Director, Australian Catholic Bishops Conference

TWOMEY, Prof. Anne Frances, Private capacity

WEBSTER, Dr Adam, Lecturer, Public Law and Policy Research Unit, University of Adelaide

WILLIAMS, Prof. George, Private capacity

Appendix 3

Tabled documents, answers to questions on notice and additional information

Answers to questions on notice

Thursday 10 September 2015—Canberra

1 Lawyers for the Preservation of the Definition of Marriage - answers to question taken on notice on 10 September 2015 (received 11 September 2015)

2 Lawyers for the Preservation of the Definition of Marriage - answers to question taken on notice on 10 September 2015 (received 11 September 2015)

3 The University of Adelaide - Public Law & Policy Research Unit - answers to question taken on notice on 10 September 2015 (received 11 September 2015)