

SEPTEMBER 2015

Submission to the Senate Legal and Constitutional
Affairs References Committee

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



UnitingJustice Australia is a
unit of the Uniting Church in
Australia Assembly

Introduction

UnitingJustice Australia, the justice advocacy and policy unit of the Uniting Church in Australia Assembly (the Church's national council), welcomes the opportunity to comment on the matter of a popular vote, in the form of a plebiscite or referendum, on the matter of marriage in Australia.

In light of the short timeframe, this submission will address only point (d) of the terms of reference – that is, whether such an activity is an appropriate method to address matters of equality and human rights.

The Uniting Church in Australia has articulated a strong stance on the protection of human rights since its inception in 1977, including an affirmation of the importance of every human being and the rights of each citizen to personal dignity.¹ The 2006 Uniting Church statement *Dignity in Humanity* said:

We affirm the inherent and inalienable right of all people to live free of persecution and violence, with access to all that is necessary for a decent life.²

UnitingJustice Australia does not believe that a plebiscite or a referendum are appropriate methods to address matters of equality and human rights in this country. We address this from a legal and from a human rights perspective.

UnitingJustice Australia is concerned that the tight timeline provided for submission to this inquiry may prevent many organisations and individuals from contributing.

Same-sex marriage is a matter for Parliament

A referendum to change the constitution is not necessary because there is no reference to marriage in the Constitution.³ A decision to amend the Marriage Act (1961) is, therefore, a matter for the Federal Parliament.

The High Court found in 2013 that, while the ACT Marriage Equality (Same-sex marriage) Act 2013 cannot operate concurrently with the federal Marriage Act 1961, the Federal Parliament does have the capacity to change the definition

¹ *Statement to the Nation*, Uniting Church in Australia, 1 July 1977, <http://www.unitingjustice.org.au/uniting-church-statements/key-assembly-statements/item/511-statement-to-the-nation>

² *Dignity in Humanity: A Uniting Church in Australia Statement on Human Rights*, Uniting Church in Australia, 2006, <http://www.unitingjustice.org.au/human-rights/uca-statements/item/484-dignity-in-humanity-a-uniting-church-statement-on-human-rights>

³ Parliamentary Education Office, *Fact Sheet: Referendums and Plebiscites*, accessed 2 September 2015, <http://www.peo.gov.au/learning/fact-sheets/referendums-and-plebiscites.html>

The High Court found in 2013 that, while the ACT Marriage Equality (Same-sex marriage) Act 2013 cannot operate concurrently with the federal Marriage Act 1961, the Federal Parliament does have the capacity to change the definition of marriage to include same-sex couples.

of marriage to include same-sex couples.⁴ It described marriage in gender-neutral terms as being "a consensual union formed between natural persons in accordance with legally prescribed requirements".⁵

George Williams, Professor of Law at University of NSW, explained this finding:

The High Court's decision did not give legal recognition to same-sex marriage in Australia. It merely clarified that the Federal Parliament has the power to bring this about. As a result, no referendum to change the constitution is required.⁶

And while some people might argue that Australia should hold a referendum anyway, as a way of bypassing an unwilling Parliament, Professor Williams says this idea is flawed, because such a referendum can only be held with the consent of Parliament.

Holding a referendum to entrench the idea of same-sex marriage in the Australian constitution would be unwise. As with the Irish text on the family and the role of women, it runs the risk of preventing future developments. It is better to leave these matters to parliamentarians to resolve so that concepts like marriage can evolve over time.⁷

Indeed, marriage has changed considerably over the centuries, for example with the changing role of women in society and the promotion and protection of women's rights, marriage has shifted from a patriarchal, socio-economic tradition to an expression of love between two consenting adults. It is likely that the nature of marriage will change again in the future.

The Prime Minister has raised the possibility of a plebiscite, or public vote, on the matter instead of a referendum. However, a plebiscite has no legal force, and UnitingJustice is sympathetic to the argument that, on this matter, it would be nothing more than a glorified survey. In addition, a plebiscite requires both an Act of Parliament to instigate the public vote, and then a further Act of Parliament to enact the decision.⁸ Australia has had only three plebiscites in its history. Twice (in 1916 and 1917) regarding conscription, which the Government ignored, and once (1977) regarding the National Anthem, which it enacted. It is possible that, after the cost, both emotional and financial, of a massive campaign on this issue, no new legislation would be enacted.

4 High Court of Australia, *The Commonwealth of Australia v The Australian Capital Territory*, 12 December 2013 <http://www.hcourt.gov.au/assets/publications/judgment-summaries/2013/hca55-2013-12-12.pdf>

5 G. Williams, 'Referendum not the way to resolve our impasse on same sex marriage', *Sydney Morning Herald* 15 May 2015 <http://www.smh.com.au/comment/referendum-not-the-way-to-resolve-our-impasse-on-samesex-marriage-20150515-gh31f1.html>

6 *ibid.*

7 *ibid.*

8 Parliamentary Education Office, *op. cit.*

A public vote will be divisive and harmful

In addition to legal concerns about the appropriateness of holding of a public vote on the matter of same-sex marriage, UnitingJustice is extremely concerned that a public vote on marriage will be socially divisive and possibly even harmful. Our expectation is that in the lead-up to such a vote, the public conversation would include the expression of sentiments that a significant number of Australians would find offensive and distressing, unnecessarily reigniting prejudices that most of the Australian community has now moved beyond. The potential for open and hateful displays of bigotry would undermine the significant gains made over decades for the acceptance and inclusion of people who are lesbian, gay, bisexual, transgender or intersex (LGBTI) and be harmful to the health of an already vulnerable group of people.

Cory Booker, New Jersey's first black senator expressed sentiments against putting such an issue to the public vote, saying,

Dear God, we should not be putting civil rights issues to a popular vote to be subject to the sentiments and passions of the day ... Equal protection under the law – for race, religion, gender or sexual orientation – should not be subject to the most popular sentiments of the day.⁹

Evidence suggests that significant harm is already experienced by same-sex attracted people as a result of prejudice, discrimination and violence. A survey of Australian same-sex attracted young people, found that 38% had experienced unfair treatment, 44% reported verbal abuse and 16% reported physical abuse due to their sexuality. The same study found that such abuse had a profound impact on young people's health and wellbeing. Those who had been abused were more likely to attempt suicide and to use a range of legal and illegal drugs.¹⁰

A study led by Mark Hatzenbuehler considered the impact of institutional discrimination in lesbian, gay and bisexual populations in the USA. The results revealed that public campaigns in states debating policies towards gays and lesbians fostered a negative social climate for those of a minority sexual identity.¹¹

⁹ R. Fine, 'Newark Mayor Cory Booker blasts gay marriage referendum', *LGBT Weekly*, 27 January 2012, <http://lgbtweekly.com/2012/01/27/newark-mayor-cory-booker-blasts-gay-marriage-referendum/>

¹⁰ L. Hillier, A. Turner, & A. Mitchell, *Writing themselves in again: 6 years on. The 2nd national report on the sexuality, health & well-being of same sex attracted young people in Australia*. Australian Research Centre in Sex, Health and Society, 2005 http://www.glhv.org.au/files/writing_themselves_in_again.pdf

¹¹ M. Hatzenbuehler et al, 'The impact of Institutional Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual Populations: A Prospective Study', *American Journal of Public Health*, March 2010, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2820062/>

Glenda Russell has also warned of the dangers of a same-sex marriage referendum for community and individual wellbeing. Her research findings indicate that where LGBTI rights have become the focus of political debate, communities become more divided, not less. Neighbourhoods that were once friendly became disrupted, with fear and hostility more commonplace than before. Research into media and political communication around these issues also indicates that, because the rhetoric relies upon “simplified moral constructs” and undocumented and faulty arguments, old prejudices are revived within communities. The research also found that when a particular group is the subject of political debate, those group members exhibit symptoms of negative health impacts such as increased anxiety, depression, alienation, fear and anger.¹²

Rodney Croome, National Director of Australian Marriage Equality, is particularly concerned that the health and wellbeing of members of the LGBTI community will suffer during the inevitable campaign associated with a public debate in the lead up to a public vote on same-sex marriage. He remembers that the numbers of suicides increased during the 1990s when Tasmania was debating the decriminalisation of homosexuality, and notes an Australian study which found that exposure to media articles in support of and against same-sex marriage caused significant feelings of depression, loneliness, powerlessness, hopelessness and a fear of further assault.¹³

Recommendation

UnitingJustice Australia does not recommend a plebiscite or referendum in the matter of whether same-sex marriage should be legalised.

¹² G. Russell, 'The Dangers of a Same-Sex Marriage Referendum for Community and Individual Well-being: A summary of Research Findings', *The Policy Journal of the Institute for Gay and Lesbian Strategic Studies*, Vol 7, Issue 1, June 2004, http://drglendarussell.com/?page_id=90

¹³ R. Croome, *From this day forward: Marriage Equality in Australia*, Walleah Press, Tasmania, 2015, p140

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