A Referendum or Plebiscite on Same-Sex Marriage?

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It is time that Australia joined other nations in permitting people of the same sex to marry. As it stands, the *Marriage Act 1961* (Cth) discriminates between people on the basis of their sexuality by restricting marriage to the 'union of a man and a woman to the exclusion of all others, voluntarily entered into for life'.[1]

The unfairness involved in excluding same-sex couples from the institution of marriage has led many nations to change their law. In most cases, this has been by way of a parliament legislating to bring about the reform. On occasion, court decisions have also played a key role. For example, gay marriage was recognised in Canada and the United States after judges held that denying same sex couples the right to marry breached constitutional guarantees of equality and freedom from discrimination on the basis of sexuality.[2]

In the United States, its Supreme Court delivered a landmark decision in 2015 in *Obergefell v Hodges*[3] holding that the United States Bill of Rights guarantees same-sex couples the right to marry. As a result, states were required to issue marriage licenses to same-sex couples and to recognise same-sex marriages entered into in other jurisdictions. The result reflected the reasoning of other US courts, including a decision in 2012 by the US Court of Appeals for the 9th Circuit, which found a Californian ban on same-sex marriage unconstitutional because it discriminated against same-sex couples contrary to the US Bill of Rights.[4] The Court said that the ban 'serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples'.[5]

To date, the Australian Parliament has rejected each attempt to legislate for same-sex marriage. There is also no prospect that an Australian court will provide a catalyst for the recognition of same-sex marriage by way of its interpretation of the *Constitution*. Indeed, no attempt has even been made to launch such a case in Australia. This is because Australia is now the only democratic nation without a national Bill of Rights. As a result, Australian

law provides no guarantee of equality, due process or other human right that might serve to override the discriminatory operation of the *Marriage Act*.

The absence of judicial action and inaction on the part of the federal Parliament has led to debate about other routes for achieving same-sex marriage reform. Attention has focused on the Republic of Ireland, which has recognised same-sex marriage by way of a different route. On 22 May 2015, the people of that nation voted in a referendum to permit their parliament to legalise same-sex marriage. Many in Australia have suggested that we should follow the same path, and indeed the Abbott government has proposed to hold either a referendum or plebiscite on same-sex marriage.

For the proponents of same-sex marriage, a national vote offers the prospect of circumventing the inaction of the federal Parliament. It could be the circuit breaker that allows the will of the people to overcome the intransigence of their representatives. On the other hand, for the opponents of the idea, such a vote could delay a further parliamentary vote and could give rise to a national No vote that could put the issue off the political agenda for the foreseeable future.

I. A REFERENDUM?

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

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

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

The Irish courts have not handed down a definitive decision indicating that such text in the Constitution precludes Parliament from recognising same-sex marriage. Nonetheless, the body of case law has been interpreted in this way. For example, Ireland's Minister for Justice and Equality, Alan Shatter, stated:

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

The response to such thinking was to hold a referendum to change the Irish Constitution so as to permit Parliament to legislate for same-sex marriage. The Yes vote at that poll added the following words to the Constitution: 'Marriage may be contracted in accordance with law by two persons without distinction as to their sex.' It is important to note that the referendum did not by itself allow same-sex people to marry. The Irish Parliament must still enact enabling legislation.

Because the Irish Constitution had been interpreted as preventing same-sex marriage by way of ordinary legislation, a constitutional amendment was required to permit this. The same reasoning does not apply to Australia. Australia's *Constitution* does not set out the importance of the family, or the role of women in society. While it mentions 'marriage' in section 51, it does so only by way of stating that the federal Parliament can pass laws on the subject.

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

These doubts have now been dispelled. In 2013, in *Commonwealth v Australian Capital Territory* (*Same-Sex Marriage Case*),[6] the High Court struck down the ACT's recognition of same-sex marriage. In a unanimous judgment, the High Court also commented on the scope of the federal Parliament to itself enact such a law. The Court gave a broad reading to the federal 'marriage' power, describing marriage as 'a consensual union formed between natural persons in accordance with legally prescribed requirements'.[7] This clarified that the federal Parliament can pass a law for same-sex marriage. As a result, no referendum to change the *Constitution* is required in order for the federal Parliament to legislate on the subject.

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

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instead facilitate the making of laws on the subject by Parliament.

Suggestions that Australia might hold a referendum on same-sex marriage reflect the aspirations of opponents of the idea that that they might achieve a national No vote. They are no doubt emboldened by the poor state of Australia's referendum record. Australia has run 44 referendums to change the *Constitution* since 1901. Of these, only eight have succeeded, and none at all since 1977.

II. A PLEBISCITE?

As an alternative to a referendum to change the Australian Constitution, it has been suggested that the people might vote on same-sex marriage by way of a plebiscite. Although constitutional referendums are common in Australia, national plebiscites are not. Nationally, only three plebiscites have been held. The first two occurred in 1916 and 1917, when people voted against introducing conscription during World War I. The last was in 1977, when the people chose *Advance Australia Fair* as the national anthem. It received 43 per cent of the vote, with *Waltzing Matilda* coming in second with 28 per cent.

A plebiscite has no legal effect. It is no more than a formalised, national opinion poll. It would not bring about same-sex marriage, nor, constitutionally, could a bill providing for a plebiscite require Parliament to legislate for this. At best, Parliament might enact a bill providing for same-sex marriage that includes that the Bill will not commence until the Australian people have voted yes at a plebiscite on the subject. In effect, Parliament would legislate for same-sex marriage, with this being contingent upon the outcome of a plebiscite.

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

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

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

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

An additional concern is that a plebiscite is not desirable on this subject. A person's basic human rights should not be the subject of a national vote unless, as in the Irish case, it is the only means of achieving change. Fundamental individual rights, which may well be those of a minority, should not be made subject to majoritarian concerns. A vote on such subjects can also be fraught. In putting a yes/no proposition to the community, such votes necessarily polarise debate. As a result, they can leave bitterness and division in their wake. As with a referendum, a plebiscite is simply not the right way of resolving the same-sex marriage debate. For better or for worse, this must remain a matter for Parliament.

REFERENCES

1. *Marriage Act 1961* (Cth) s 5.
2. See, eg, Halpern v Canada (A-G) (2003) 172 OAC 276; Obergefell v Hodges, 576 US ___ (2015).
3. 576 US ___ (2015).
4. Perry v Brown, 671 F 3d 1052 (9th Cir 2012).
5. Ibid.
6. (2013) 304 ALR 204.
7. Ibid 212.