The Constitutional and Regulatory Dimensions of Plebiscites in Australia

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In September 2016, the Federal Government introduced legislation to enable a plebiscite on same-sex marriage to be held in February 2017. It was subsequently voted down in the Senate and it is now unlikely that a vote will be held. Nonetheless, the debate surrounding the proposed poll placed a spotlight on the use of the plebiscite as a democratic device. One topic that warrants more attention is the constitutional and regulatory framework within which plebiscites operate. The Constitution does not contemplate plebiscites, and they are an unfamiliar presence in a parliamentary democracy that entrusts almost all law-making and policy decisions to elected representatives. There is, moreover, no standing legislation on how federal plebiscites should be run. This article examines how the ill-defined constitutional and legal status of plebiscites affects how they are initiated and conducted. It considers these issues in a general sense, but also analyses how they arose with respect to the proposed vote on same-sex marriage. It argues that the absence of express constitutional authority and established rules of practice means that federal governments face choices, and considerable uncertainty, about the most basic matters, including: the constitutional foundation of the vote; the use of compulsory voting; the consequences of a plebiscite if it is carried; the drafting of the question; the breadth of the franchise; the method of conducting the vote; and the rules around campaign information, funding and expenditure. The article suggests that long-term measures, such as standing legislation, should be considered, but that this should be preceded by a broader debate about the appropriate use of plebiscites within Australia's constitutional arrangements.

I. INTRODUCTION

In September 2016, Prime Minister Malcolm Turnbull introduced legislation to enable a plebiscite on same-sex marriage to be held in February 2017.[1] This fulfilled a commitment that his predecessor, Tony Abbott, had first announced a year earlier, and that Turnbull and the Coalition Government had taken to the federal election in July. The *Plebiscite (Same-Sex Marriage) Bill 2016* (Cth) (Plebiscite Bill) proposed that voters be asked the question: "Should the law be changed to allow same-sex couples to marry?"[2] The result of the plebiscite was to be advisory only, but Turnbull predicted that Parliament would "swiftly" legislate for same-sex marriage if the plebiscite is carried.[3]

The introduction of the Plebiscite Bill followed an intense, year-long debate on the merits of holding a public vote on same-sex marriage. The government argued that a popular ballot is a democratic means of resolving "a very big moral issue … an issue of conscience" on which Australians hold different views.[4] Opponents, including the Australian Labor Party (ALP) and many LGBTIQ groups, contended that a plebiscite was unnecessary (as the Federal Parliament already

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[1] *Plebiscite (Same-Sex Marriage) Bill 2016* (Cth).

[2] *Plebiscite (Same-Sex Marriage) Bill 2016* (Cth) s 5(2).

[3] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 September 2016, 24 (Malcolm Turnbull).

[4] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 September 2016, 24 (Malcolm Turnbull).

possesses the power to legislate on same-sex marriage with or without popular consent) and that the issue should be resolved by a free vote in Parliament.[5] They also argued that it was too expensive (the estimated cost was $170 million), put minority rights in the hands of the majority, and that the campaign would be harmful to members of the LGBTIQ community.[6] Public opinion was initially behind holding a plebiscite but later surveys suggested that support had waned.[7]

On 7 November 2016, the Plebiscite Bill was defeated in the Senate by four votes (33:29). The ALP, along with a bloc of minor party and independent senators, opposed the Bill. While the Bill's defeat does not necessarily scupper the plebiscite,[8] the government may not be inclined to hold it in the absence of parliamentary endorsement.

The debates of the past year have placed a spotlight on the use of the plebiscite as a democratic device. Its pros and cons have been debated, and some have suggested it should be used for other issues (such as physician assisted suicide) and more frequently.[9] This is significant for a mechanism that has been used sparingly at the federal level: there have been just three national plebiscites since Federation, and the most recent, on the national song, was held in 1977.[10] The idea of consulting voters on contentious policy issues has, at least for the time being, entered mainstream political consciousness.

With this in mind, one topic that warrants more attention is the constitutional and regulatory framework within which plebiscites operate.[11] Plebiscites, as well as being rare, hold an uncertain place in Australia's constitutional system of representative government. The Constitution does not contemplate them, and they are an unfamiliar presence in a parliamentary democracy that entrusts almost all law-making and policy decisions to elected representatives. There is, moreover, no standing legislation on how federal plebiscites should be run. In this respect, plebiscites are very different from referendums, which are authorised by the Constitution (s 128) and subject to detailed regulation in the *Referendum (Machinery Provisions) Act 1984* (Cth) (Referendum Act).

This article examines how the ill-defined constitutional and legal status of plebiscites affects how they are initiated and conducted. It considers these issues in a general sense, but also analyses how they arose with respect to the proposed vote on same-sex marriage. It argues that the absence of express constitutional authority and established rules of practice means that federal governments face choices, and considerable uncertainty, about the most basic matters. Australia's long history of referendum practice offers only a partial guide, as in many respects the conduct and regulation of plebiscites present distinct challenges.

This article continues in Part II by providing background on the use of plebiscites in Australia. It explains the distinction between plebiscites and referendums, gives a brief history of plebiscites at federal and State levels, and describes the purpose that they serve in a representative democracy. It

[5] *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441.

[6] See, eg views expressed in Senate Legal and Constitutional Affairs Reference Committee, Parliament of Australia, *Matter of a Popular Vote, in the Form of a Plebiscite or Referendum, on the Matter of Marriage in Australia* (2015) 12-16.

[7] Heath Aston, "Poll Questions Level of Community Support for Same-sex Marriage Plebiscite", *The Sydney Morning Herald*, 20 July 2016 <http://www.smh.com.au/federal-politics/political-news/poll-questions-level-of-community-support-for-samesex-marriage-plebiscite-20160720-gq9wed.html>.

[8] See discussion of the commercial ballot option in Part III.

[9] For example, Garry Linnell, "The Plebiscite We Should Have: Is There a Right to Die?", *The Sydney Morning Herald*, 30 July 2016 <http://www.smh.com.au/comment/the-plebiscite-we-should-be-having-the-right-to-die-20160728-gqg1i3.html>; "Peter Reith Suggests More Plebiscites Needed in Australian Politics", *Out in Perth*, 26 July 2016 <http://www.outinperth.com/peter-reith-suggests-plebiscites-needed-australian-politics>.

[10] Prior to Federation, colonial governments held advisory referendums on the adoption of the Commonwealth Constitution: see Helen Irving (ed), *The Centenary Companion to Australian Federation* (CUP, 1999) 415-416.

[11] One notable contribution on this topic is Anne Twomey, "Constitutional Law: Plebiscites and Referenda" (2015) 89 *Australian Law Journal* 832. For an earlier examination of the legal dimension of plebiscites, see Graeme Orr, "The Conduct of Referenda and Plebiscites in Australia: A Legal Perspective" (2000) 11 PLR 117.

also outlines the events that prompted the Coalition Government to commit to a plebiscite on same-sex marriage, noting the confluence of moral and strategic justifications. Part III examines the two options available for initiating a plebiscite – passing legislation through Parliament, and contracting the Australian Electoral Commission (AEC) to run the poll as a commercial ballot – and uses same-sex marriage as a case study to illustrate the challenges that each option presents. It considers three possible sources of constitutional authority for a law initiating a poll on same-sex marriage (the marriage power, the executive nationhood power and the executive power to undertake inquiries) and argues that none provide a sure source of validity. It also argues that the commercial ballot option is unsuitable due to concerns about enforcement, spending and legitimacy. In Part IV, the article turns its focus to the regulation of the conduct of plebiscites. It discusses the various options available with respect to: the consequences of a plebiscite if it is carried; the drafting of the question; the breadth of the franchise; the method of conducting the vote; and the rules around campaign information, funding and expenditure. The article concludes in Part V by suggesting that long-term measures, such as the introduction of standing legislation, should be considered, but that this should be preceded by a broader debate about the appropriate use of plebiscites within Australia's constitutional arrangements.

II. Plebiscites in Australia: Meaning, History and Practice

The meaning of the terms "referendum" and "plebiscite" varies across jurisdictions, and in some countries they are used interchangeably.[12] In Australia, the word "referendum" refers to a binding vote by the people on a proposed amendment to the Commonwealth Constitution or a State constitution.[13] By contrast, the term "plebiscite" is used to describe a non-binding popular vote on a policy issue. In other contexts, such a vote might be called a "consultative referendum".[14] This understanding of the term "plebiscite" is not prescribed in the Constitution or in legislation, but has developed as matter of practice.[15] The referendum/plebiscite distinction, while meaningful, is not always observed: State and Territory polls are often described as "referendums" even when constitutional amendment is not in issue.[16]

Plebiscites serve a number of purposes in representative democracies. First, they provide governments with a means of deferring to popular judgment on issues that are particularly contentious or divisive. On such issues, a government may feel that direct popular consent is required to confer legitimacy on its plans[17] to overcome a longstanding parliamentary stalemate, or to resolve the issue conclusively. Secondly, a plebiscite may be seen as a means of promoting public deliberation. The holding of a popular ballot, and the campaign that precedes it, may help to facilitate informed debate and consensus on complex and contentious issues.[18] Thirdly, and more strategically, a plebiscite may

[12] Maija Setälä, *Referendums and Democratic Government: Normative Theory and the Analysis of Institutions* (Palgrave Macmillan, 1999) 3-4.

[13] Twomey, n 11, 832. Note that the word "referendum" does not appear in the Constitution: s 128 merely prescribes a process whereby a "proposed law shall be submitted … to the electors". Section 3 of the Referendum Act defines "referendum" as "the submission to the electors of a proposed law for the alteration of the Constitution".

[14] Lawrence LeDuc, "Referendums and Initiatives: The Politics of Direct Democracy" in Lawrence LeDuc, Richard G Niemi and Pippa Norris (eds), *Comparing Democracies 2: New Challenges in the Study of Elections and Voting* (Sage Publications, 2002) 73.

[15] For examples of usage, see AEC, *What are Referendums and Plebiscites?* (9 September 2015) <http://www.aec.gov.au/elections/referendums/types.htm>; Parliament of Australia, *Parliamentary Handbook of the Commonwealth of Australia* (32nd ed, 2011) Pt 5.

[16] See, eg Western Australian Electoral Commission, *Past Referendums* (30 August 2016) <https://www.elections.wa.gov.au/elections/referendums/past-referendums> which includes that State's four polls on daylight saving. Federal plebiscites are sometimes described incorrectly too: eg National Archives of Australia, *Conscription Referendums, 1916 and 1917 – Fact Sheet 161* (15 January 2016) <http://www.naa.gov.au/collection/fact-sheets/fs161.aspx>.

[17] FB Smith, *The Conscription Plebiscites in Australia, 1916-17* (Victorian Historical Association, 1981) 3.

[18] Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (OUP, 2012).

help a government to neutralise an issue that is a potential threat to internal party cohesion,[19] or allow it to postpone having to act in a contentious area.[20]

Australian governments have used plebiscites sparingly.[21] The first two national plebiscites, held in 1916 and 1917, asked voters whether they supported the introduction of conscription for overseas military service during the First Word War.[22] The government, which was split on the issue, argued that compulsion was necessary to reinforce Australian forces serving in Europe and elsewhere. The campaigns were hard fought and opened up social, ethnic and religious divisions within the Australian community.[23] Both conscription plebiscites failed by a small margin: the first by 48.4% to 51.6%, the second by 46.2% to 53.8%.[24]

The third national plebiscite, held in 1977, asked voters for their preferences on a national song. While not especially contentious, nor fundamental to government, it did concern a national symbol that had divided public opinion for some time.[25] The Fraser Government had reinstated "God Save the Queen" as national anthem soon after coming to office, and held the song poll as a way of choosing a national tune to be played outside of royal, vice-regal and defence occasions. Presented with four options, voters chose "Advance Australia Fair" over "Waltzing Matilda", "God Save the Queen" and "Song of Australia".[26] In 1984, the Hawke Government acted to make "Advance Australia Fair" the national anthem, consigning "God Save the Queen" to be played on royal visits only.[27]

While it is four decades since the last national plebiscite was held, the idea of holding an advisory poll on one issue or another has arisen periodically during that time. In 1998, the Howard Government amended the *Flag Act 1953* (Cth) to require that any change to the national flag be approved at a plebiscite.[28] The Australian Republican Movement has proposed that two plebiscites be held as part of any process to introduce a republic, with the first asking whether Australia should become a republic, and the second asking about which model should be put at a referendum.[29] As recently as 2011, Opposition Leader Tony Abbott called for a national plebiscite on the introduction of a carbon tax.[30] And, as noted, plebiscites on other issues were suggested in the months following the announcement of the same-sex marriage poll.

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[19] Laurence Morel, "Party Attitudes Towards Referendums in Western Europe" (1993) 16(3) *West European Politics* 225, 230.

[20] David Butler and Austin Ranney, "Practice" in David Butler and Austin Ranney (eds), *Referendums Around the World: The Growing Use of Direct Democracy* (Macmillan, 1994) 1, 3.

[21] Orr, n 11, 120. The Federal Government has been far more active in holding referendums: in the same time that the Commonwealth has conducted three national plebiscites, it has asked the people for their verdict on 44 proposals to amend the Constitution.

[22] Smith, n 17, 9.

[23] Smith, n 17, 9; Leslie C Jauncey, *The Story of Conscription in Australia* (Macmillan, 1968).

[24] Parliament of Australia, n 15, 398-399.

[25] Tony Ward, "The Heart of What It Means to Be Australian" (2009) 10(5) *Soccer & Society* 532.

[26] "Advance Australia Fair" won 43.29% of the vote, compared to "Waltzing Matilda" (28.28%), "God Save the Queen" (18.78%) and "Song of Australia" (9.65%): Parliament of Australia, n 15, 400. On a two-song preferred basis, "Advance Australia Fair" received 65.2% of votes, defeating "Waltzing Matilda" at 34.8%: Ian McAllister et al, *Australian Political Facts* (Longman Chesire, 1990) 89.

[27] Ward, n 25, 537.

[28] *Flag Act 1953* (Cth) s 3.

[29] George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 6.

[30] Dennis Atkins, "Coalition Stunt Risky Junk Politics", *Courier Mail*, 21 June 2011 <http://www.couriermail.com.au/news/coalition-stunt-risky-junk-politics/story-e6frerff-1226078831217>.

At State and Territory level, the issues most often put to the people through a plebiscite have been daylight saving, hotel closing hours, prohibition and retail trading.[31] In recent times, State plebiscites have been rare: just three have been held since the turn of the century, all in Western Australia. In decades past, however, plebiscites have been employed to decide momentous issues. To cite just a few examples, it was plebiscites that saw individual States or Territories opt to secede from the Federation (Western Australia, 1933), reject self-government (Australian Capital Territory, 1978), split over the damming of the Franklin River (Tasmania, 1981), and reject statehood (Northern Territory, 1998). Separately, State and Territory governments have held referendums on proposed constitutional amendments, often in compliance with "manner and form" requirements: the most recent example is the 2016 poll in which Queensland voters approved the introduction of fixed, four-year parliamentary terms.[32] It is difficult to calculate an overall success rate for State and Territory plebiscites and referendums as many of them – such as those on hotel closing hours – have presented voters with multiple options. Of those that invited a Yes/No response, about 40% have passed.

Local councils also hold plebiscites from time to time. Residents are occasionally asked to vote directly on issues considered salient to the local community, including council amalgamations[33] and water supply.[34] Some councils have adopted citizens' initiated referenda (CIR), which provide residents with a mechanism for initiating a popular vote on issues of concern.[35]

A poll on same-sex marriage would fit squarely within the tradition of past plebiscites. It concerns a moral issue that has divided public opinion for some time.[36] The Federal Parliament has undoubted power to legislate on same-sex marriage,[37] but the government considers a popular ballot appropriate due to the contentious nature of the issue. It is also the case that a plebiscite serves a strategic objective for the Coalition parties: namely the managing of internal disagreement on same-sex marriage, in the face of external pressure to allow its members a conscience vote on the issue in Parliament, similar to the ALP position.[38]

The idea of holding a plebiscite emerged from a six-hour joint party room meeting in August 2015 in which Coalition MPs debated, and then voted against, a proposal to allow a conscience vote in the event that same-sex marriage arose for consideration prior to the 2016 federal election.[39] In a press conference after the meeting, then Prime Minister Abbott said that the Coalition would allow either a conscience vote or a popular vote in the next parliamentary term, but that it was "the disposition of the party room" that "this is a matter that should rightly be put to the Australian people".[40] Malcolm

[31] Information about State and Territory plebiscites and referendums has been collated from electoral commission websites, and the list published in Colin A Hughes, "Australia and New Zealand" in David Butler and Austin Ranney (eds), *Referendums Around the World: The Growing Use of Direct Democracy* (Macmillan, 1994) 154, 167.

[32] Electoral Commission Queensland, *2016 State Referendum – Summary* (2 August 2016) <http://results.ecq.qld.gov.au/elections/state/REF2016/results/summary.html>.

[33] Murray Trembath, "Rockdale Merger Overwhelmingly Rejected by Voters in Botany Bay Council Plebiscite", *The Leader*, 29 February 2016 <http://www.theleader.com.au/story/3759187/botany-bay-says-i-dont-to-rockdale>.

[34] AAP, "Toowoomba Says No to Recycled Water", *The Sydney Morning Herald*, 30 July 2006 <http://www.smh.com.au/news/national/toowoomba-says-no-to-recycled-water/2006/07/29/1153816419568.html>.

[35] George Williams and Geraldine Chin, "Australian Experiments with Community Initiated Referendum: CIR for the ACT?" (1998) 7 *Griffith Law Review* 274, 277.

[36] Notwithstanding recent surveys showing strong majority support for change, which higher estimates put at 70%: James Massola and Mark Kenny, "Federal Election 2016: Australian Voters Overwhelmingly Back Malcolm Turnbull's Plebiscite Policy", *The Sydney Morning Herald*, 1 July 2016.

[37] *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441.

[38] The ALP changed its platform to support same-sex marriage in 2011. Under a 2015 amendment to the party platform, Labor MPs will be bound to vote for same-sex marriage from the commencement of the 46th Parliament (anticipated in 2019).

[39] Chris Uhlmann and Eliza Borrello, "Same-sex Marriage: Coalition Party Room in Favour of the Status Quo; No Conscience Vote on Gay Marriage", *ABC News*, 11 August 2015 <http://www.abc.net.au/news/2015-08-11/same-sex-marriage-party-room-votes-in-favour-of-status-quo/6689678>.

[40] Uhlmann and Borrello, n 39. It was initially unclear whether Abbott was suggesting a referendum or a plebiscite, but it was later clarified that the latter was favoured.

Turnbull – a longstanding supporter of both same-sex marriage and the use of a conscience vote – affirmed the Coalition's commitment to a plebiscite soon after replacing Abbott as Prime Minister.[41]

Having made a decision to hold the first national plebiscite in four decades, the government was set to confront a wide range of challenges with respect to the initiation and conduct of the vote.

III. Initiating a Plebiscite

In holding a national plebiscite, one of the first decisions a federal government must make is how it will initiate the vote. The orthodox path is to pass enabling legislation that provides for the holding of the poll and establishes rules of conduct. This is the approach the Turnbull Government sought to take on same-sex marriage. An alternative route would see the government engage the AEC to run the plebiscite as a commercial ballot. The latter option remains open to the Turnbull Government despite the defeat of its Plebiscite Bill in the Federal Parliament.

Initiation by Legislation

The legislative path is the more desirable of the two. It allows parliamentarians to publicly debate and vote on the merits of holding a plebiscite, and to deliberate on process matters such as the wording of the question, voting arrangements and campaign funding. It is in line with previous practice, in that both conscription plebiscites were conducted under legislation,[42] and State and Territory votes generally have statutory underpinning. This approach also mirrors the process for initiating federal referendums: the Constitution requires that proposed amendments must be presented in the form of a Bill and approved by an absolute majority of both Houses before they can be presented to the people.[43]

However, the legislative path brings uncertainty. The Constitution envisages that the Commonwealth may hold elections and referendums, but it does not contemplate plebiscites and confers no specific power to conduct them. This means that a law establishing a plebiscite must locate its constitutional authority in a less direct source of power. Depending on the topic, a plebiscite law might be enacted in reliance on a head of legislative power, or on an exercise of executive power in combination with the incidental legislative power.

The proposed poll on same-sex marriage illustrates the challenges that governments confront when seeking a firm constitutional foundation for a plebiscite law. There are three main sources of constitutional authority available for a plebiscite on same-sex marriage: the marriage power in s 51(xxi); the executive power to undertake inquiries; and the executive nationhood power. While a reasonable case can be made that one or more of these would ensure validity, the issue is not beyond doubt.

Section 51(xxi): The Marriage Power

The obvious source of power for a plebiscite on same-sex marriage is s 51(xxi), which empowers the Commonwealth Parliament to make laws with respect to "marriage". The question is whether a law that sets up a national vote on same-sex marriage can be fairly described as a law "with respect to" marriage. Would a plebiscite law display a "sufficient connection"[44] with the subject of marriage, or would any link best be described as "insubstantial, tenuous or distant"?[45] The analysis that follows considers this question in light of the Plebiscite Bill introduced by the Turnbull Government.

[41] Malcolm Turnbull, "Blog: A Vote on Same Sex Marriage" on *Malcolm Turnbull MP* (16 August 2015) <http://www.malcolmturnbull.com.au/media/blog-ssm>.

[42] The first conscription vote was conducted under the *Military Service Referendum Act 1916* (Cth), with supplementary rules set out in regulations. The second conscription vote took place entirely under regulations: *War Precautions (Military Service Referendum) Regulations 1917* (Cth).

[43] Australian Constitution, s 128.

[44] *Grain Pool (WA) v Commonwealth* (2000) 202 CLR 479, 492 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[45] *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 369 (McHugh J).

It is arguable that this Bill, were it to be enacted, would not operate directly upon the subject matter of s 51(xxi). It is not akin to a law that regulates who can and cannot marry, or how a marriage ceremony must be conducted. Its relationship to the subject of marriage is more indirect: it creates an obligation to hold a public vote (on marriage), and sets down rules for how it should be run.

The significance of this point is that the law would rely upon the incidental aspect of s 51(xxi) for its constitutional authority. The incidental area of a head of power provides the Parliament with "authority to legislate in relation to acts, matters and things the control of which is found necessary to effectuate its main purpose".[46] For a law to be supported by the incidental power, there must be a "reasonable connection" between the law and the subject matter of the relevant head of power, and making a judgment on this may involve "questions of degree".[47] It may be relevant to consider whether the means adopted by the law are reasonably proportionate to the achievement of a purpose within power, but the decisive question is ultimately whether the law displays a "sufficient connection" with the subject matter.[48]

It is arguable that the establishment of a process to ascertain public attitudes towards same-sex marriage possesses a reasonable connection with the topic of marriage. So far as this is accepted, a plebiscite law would be valid to the extent that it established the basic machinery necessary for holding a vote on marriage – for instance, by authorising the government to hold the poll within a certain period of time and by setting the terms of the question.

Less certain would be the constitutional status of any provisions that set down rules about the administration of the plebiscite. One view is that any process matters are intimately bound up in the holding of a national poll, in that it is not possible to conduct a large-scale ballot without providing for supporting machinery and procedures. On this reasoning, if s 51(xxi) empowers the Parliament to initiate a ballot, that same head of power would also support any rules about its conduct, including in relation to voting, the counting of votes, and the regulation of polling places. Put another way: having accepted that the establishment of the plebiscite is within power, a court may defer to Parliament as to its actual conduct.

On the other hand, the view may be taken that all procedural regulations require a connection with the head of power. If this approach is adopted, compulsory voting – a feature of the government's proposed plebiscite – could come under particular scrutiny.[49] It is not clear that s 51(xxi) could support provisions that fined electors for failing to vote in the plebiscite. In looking for the requisite "reasonable connection", a relevant question would be whether the imposition of a penalty for non-voting would be reasonably proportionate to the ascertainment of public opinion on same-sex marriage. It is arguable that compulsion, under threat of a fine, is necessary to ensure a representative measurement of public opinion as it encourages high turnout. It may enhance the integrity of the process, including by minimising opportunities for personation and bribery.[50] And a court may be reluctant to second-guess a legislative judgment that compulsory voting is necessary. Looked at from a different perspective, however, it is arguable that a voluntary ballot would produce a reasonable assessment of public views on marriage.[51] With this in mind, the adoption of coercive means to maximise turnout may be a step too far – it could "drive [the enactment] beyond the application of the incidental power".[52] This conclusion is strengthened when we consider that the opinions that voters

[46] *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55, 77 (Dixon CJ, McTiernan, Webb and Kitto JJ).

[47] *Burton v Honan* (1952) 86 CLR 169, 179 (Dixon CJ).

[48] *Leask v Commonwealth* (1996) 187 CLR 579, 605 (Dawson J), 616 (Gaudron J), 617 (McHugh J), 636 (Kirby J).

[49] *Plebiscite (Same-Sex Marriage) Bill 2016* (Cth) s 9, applying *Referendum (Machinery Provisions) Act 1984* (Cth) s 45, to the plebiscite.

[50] The Turnbull Government mounted similar arguments in defence of compulsory voting: Explanatory Memorandum, *Plebiscite (Same-Sex Marriage) Bill 2016* (Cth) [31]. On the link between compulsory voting and integrity, see Lisa Hill, "Public Acceptance of Compulsory Voting: Explaining the Australian Case" (2010) 46 *Representation* 425, 431-432.

[51] Annabelle Lever, "Compulsory Voting: A Critical Perspective" (2010) 40 *British Journal of Political Science* 897.

[52] *Burton v Honan* (1952) 86 CLR 169, 178 (Dixon CJ).

expressed under compulsion would have no legal consequences (in contrast to votes cast at an election or referendum) but would merely inform Parliament as to future deliberations.[53]

The validity of provisions that regulate voter fraud – such as electoral bribery, or multiple voting – could also be open to question. However, penalties for such conduct are arguably necessary to the integrity of the poll, and so are more justifiable than the enforcement of mandatory voting.

Section 61 and Section 51(xxxix)

The Power to Undertake Inquiries

An alternative source of constitutional authority for a plebiscite law is the executive power to undertake inquiries. This power encompasses the ability to ask questions and to request the production of documents. In *Clough v Leahy* (1904) this power was characterised as a capacity that the executive holds in common with all legal persons.[54] Griffith CJ reasoned that, subject to limitations imposed by law, "every person is free to make any inquiry he chooses; and that which is lawful to an individual can surely not be denied to the Crown, when the advisers of the Crown think it desirable in the public interest to get information on any topic".[55] In later decisions, however, some members of the Court have viewed the power to inquire as part of the prerogative.[56] In the *BLF Case*, for example, Brennan J reasoned:

> A commission to inquire and report cannot be issued in exercise of the prerogative or of the statutory power merely to satisfy an idle curiosity: what distinguishes a prerogative commission from an inquiry which any person is at liberty to make is that it is an inquiry on behalf of the executive government for a purpose of government.[57]

As intimated by Brennan J, governments have relied on this category of executive power to establish commissions of inquiry, such as royal commissions. Section 51(xxxix), when used in combination with the power to inquire, enables the Commonwealth to pass legislation on the conduct of such commissions.[58] The Court has recognised that the express incidental power will support coercive aspects of an inquiry, such as compelling witnesses to answer questions under threat of penalty.[59] Importantly, the power to make compulsory inquiries is limited to matters that fall within federal legislative competence.[60]

Could the Federal Government initiate a plebiscite in the exercise of its power to undertake inquiries? There are several reasons to think that it could. The holding of plebiscites involves the asking of questions to collect information on public attitudes towards matters of public policy. They are held for a purpose of government, namely to guide Parliament as to how it should approach future law-making. And, when the vote is on a topic such as marriage, there would be no concern about the Commonwealth using the power in order to interfere with State issues. On the contrary, the High Court has confirmed that the Federal Parliament alone is in a position to enact an operative and national law on marriage. The States hold an interest in marriage, but State legislation on the subject will be inoperative for inconsistency with the *Marriage Act 1961* (Cth).[61]

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[53] Assuming that a substantive law, the commencement of which is made contingent on a successful plebiscite, is not enacted prior to the poll. This possibility is discussed in Part IV.

[54] *Clough v Leahy* (1904) 2 CLR 139, 156-157.

[55] *Clough v Leahy* (1904) 2 CLR 139, 157.

[56] *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73, 93-94 (Dixon J); *Victoria v Australian Building Construction Employees' & Builders Labourers' Federation (BLF Case)* (1982) 152 CLR 25, 89 (Mason J), 119-120 (Aickin J), 155-156 (Brennan J). For a detailed discussion of the power to inquire and its source, see Nicholas Aroney, "A Power 'Singular and Eccentrical': Royal Commissions and Executive Power after Williams" (2014) 25 PLR 99.

[57] *BLF Case* (1982) 152 CLR 25, 156 (Brennan J).

[58] For example, *Royal Commissions Act 1902* (Cth).

[59] *Colonial Sugar Refining Co Ltd v Attorney-General (Cth)* (1912) 15 CLR 182, 194 (Griffith CJ), 205-206 (Barton J). See, eg *Royal Commissions Act 1902* (Cth) s 6.

[60] *Colonial Sugar Refining Co Ltd v Attorney-General (Cth)* (1912) 15 CLR 182, 194 (Griffith CJ), 205-206 (Barton J).

[61] *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441.

On the other hand, the conduct of a nationwide poll that asks a question of 15 million voters is very different from a commission of inquiry. The latter is conducted in an institutional setting and involves the questioning of a comparatively small group of individuals who have particular knowledge or experience that is relevant to the inquiry.

Should the power to undertake inquiries support the holding of plebiscites, the Commonwealth would seemingly have more scope to rely on s 51(xxxix) to enact coercive legislation – including for the enforcement of compulsory voting. Arguably, voters could be compelled to the polls to respond to a government's inquiry about marriage, just as royal commission witnesses must answer questions put to them by a commissioner. Compared to a plebiscite initiated in reliance on the executive nationhood power (discussed below), the Commonwealth would have more scope to use s 51(xxxix) to implement coercive elements of the vote.

The Nationhood Power

A third source of constitutional authority for plebiscite legislation is the executive "nationhood" power, supplemented by the incidental legislative power in s 51(xxxix). A threshold question concerns whether the initiation of a plebiscite falls within the scope of the executive nationhood power; if it does, the capacity of s 51(xxxix) to support enabling legislation remains to be considered.

The executive nationhood power provides the Commonwealth with "a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation".[62] The scope of the power is uncertain, but matters that are said to fall within its reach include national symbols (such as the flag and anthem) and the creation of national institutions such as museums, art galleries and scientific research institutes.[63] The power has supported the incorporation of a company to organise the commemoration of Australia's bicentenary,[64] and expenditure on a fiscal stimulus package to protect the national economy against the effects of the global financial crisis.[65] In deciding whether a matter falls within the power, it is relevant to consider whether the States have the capacity to carry out the particular enterprise or activity.[66]

For the nationhood power to operate as the constitutional basis of a plebiscite, it would need to be shown that the conduct of a poll on the issue at hand was "peculiarly adapted" to the government of a nation. Does a plebiscite on same-sex marriage meet this description? It is understandable that a national government may, from time to time, wish to ascertain public views to inform policy development. And, as noted, only the Federal Parliament has capacity to enact a marriage law that operates nationally. Further, only the Federal Government is capable, in a practical sense, of conducting a single, countrywide poll. A comparison might be made with the circumstances in *Pape v Federal Commissioner of Taxation* (2009), where it was recognised that only the Commonwealth had the resources to deliver the economic stimulus measures within the short timeframe that was considered necessary to the success of the program.[67]

On the other hand, there is little about a plebiscite on marriage that makes it distinctively the "province of the Commonwealth in its capacity as the national and federal government".[68] Unlike the circumstances in *Pape*, there is no crisis of a scale and nature that requires the response of a national government. Indeed, the task of resolving public disagreement on contentious social issues, such as same-sex marriage, might be said to rest "peculiarly" with national Parliaments or other democratic processes. And, unlike the commemoration of events of national historical and cultural significance at

[62] *Pape v Federal Commisioner of Taxation* (2009) 238 CLR 1, 61, 63 (French CJ), 91-92 (Gummow, Crennan and Bell JJ) (*Pape*), adopting test applied by Mason J in *Victoria v Commonwealth (AAP Case)* (1975) 134 CLR 338, 397.

[63] *Davis v Commonwealth* (1988) 166 CLR 79, 111 (Brennan J) (*Davis*).

[64] *Davis* (1988) 166 CLR 79.

[65] *Pape* (2009) 238 CLR 1.

[66] *Davis* (1988) 166 CLR 79, 93-94 (Mason CJ, Deane and Gaudron JJ), 111 (Brennan J); *Pape* (2009) 238 CLR 1, 60 (French CJ), 90-91 (Gummow, Crennan and Bell JJ).

[67] *Pape* (2009) 238 CLR 1, 63 (French CJ), 91-92 (Gummow, Crennan and Bell JJ), 122 (Hayne and Kiefel JJ).

[68] *Davis* (1988) 166 CLR 79, 94 (Mason CJ, Deane and Gaudron JJ).

issue in *Davis v Commonwealth* (1988), it is not clear that a poll on marriage has an intrinsic "national" quality nor that it advances the cultural life of the nation.

If the conduct of a plebiscite (on same-sex marriage or any other topic) is understood to fall within the scope of the executive nationhood power, the next question concerns the extent to which s 51(xxxix) enables the Parliament to enact supporting legislation. The High Court has given a narrow reading to the express incidental power as it relates to s 61, particularly as regards the enactment of coercive laws.[69] This is significant as it raises doubts about the capacity of s 51(xxxix) to support provisions that impose penalties, and so has implications for the enforcement of compulsory voting.

In *Davis*, Mason CJ, Deane and Gaudron JJ stated that coercive laws must be "reasonably appropriate and adapted" to the achievement of an end within power, and must not unduly interfere with fundamental common law rights.[70] In that case, the Court ruled that the provisions imposing penalties for the unlawful use of symbols and expressions related to the Bicentenary were "grossly disproportionate" to the objective of protecting the commemoration and the Bicentennial Authority.[71] A relevant factor in the judges' reasoning was the degree to which the impugned provisions interfered with freedom of expression.[72]

As noted above, when discussing the ambit of the marriage power in s 51(xxi), it is arguable that the punishment of electors for a failure to vote is reasonably proportionate to the conduct of an accurate and representative poll. This reasoning, however, may be weaker in this context, given that the Court has been concerned about the implications of giving a broad reading to s 51(xxxix) when it is used in conjunction with the executive nationhood power. The Court would presumably be less willing to endorse coercion. The use of penalties to protect against fraud would seem less vulnerable to challenge, again for the reasons stated above.

In summary, the fact that the Constitution does not confer a plebiscite-holding power on the Commonwealth need not be an insurmountable barrier. As the same-sex marriage example shows, the Commonwealth's existing legislative and/or executive powers may be sufficient to support a law that establishes a plebiscite and sets down rules about its conduct, although the matter is not beyond doubt. Taking a step back, it would undeniably be controversial for the High Court to stand in the way of an attempt by the Commonwealth to hold a plebiscite in its preferred form, particularly where the vote is on an issue squarely within federal power.

Conducting the Plebiscite as a Commercial Ballot

The events of 2016 demonstrate that the legislative path to initiating a plebiscite can be fraught. A government may encounter a Senate that is unwilling to approve its plebiscite law, or it may be concerned about the risk of constitutional challenge. To evade such difficulties, as an alternative to initiation by legislation, the Federal Government may engage the AEC to conduct the plebiscite as a commercial ballot. It can do this pursuant to s 7A of the *Commonwealth Electoral Act 1918* (Cth), which permits the AEC to "make arrangements for the supply of goods or services to any person or body". This provision enables the AEC to conduct elections and ballot processes on a "fee-for-service" basis.[73].

When Parliament first conferred this capability on the AEC, it was envisaged that the services provided would be on a small scale. When enacted in 1992, s 7A empowered the AEC to "provide goods or services to other organisations or to individuals" and was designed to facilitate basic service

[69] *Davis* (1988) 166 CLR 79, 111 (Brennan J); *Pape* (2009) 238 CLR 1, 24 (French CJ), 91-92 (Gummow, Crennan and Bell JJ), 122 (Hayne and Kiefel JJ); *Williams v Commonwealth* (2012) 248 CLR 156, 267-270 (Hayne J).

[70] *Davis* (1988) 166 CLR 79, 98-100 (Mason CJ, Deane and Gaudron JJ).

[71] *Davis* (1988) 166 CLR 79, 100.

[72] *Davis* (1988) 166 CLR 79, 100.

[73] Section 7B provides that reasonable fees may be charged for the supply of services under s 7A.

delivery, such as the provision of a roll scanning service to State electoral authorities.[74] In 1998, the text of s 7A(1) was altered to its current form.[75] Since then, it has been used primarily to enable the AEC to conduct small-scale electoral services such as trade union elections and workplace agreement ballots.[76] In the 2014-2015 reporting period, the AEC ran 187 elections and ballots for public and private sector organisations under the authority of s 7A.[77]

Only once has s 7A been used to support large-scale plebiscites. In 2007, the Howard Government engaged the AEC to ask Queensland residents their opinions on the Beattie Government's proposed local government amalgamations. Pursuant to s 7A, the Department of Infrastructure, Transport, Regional Development and Local Government contracted the AEC to run plebiscites on behalf of 85 local councils, at a cost of $1.5 million.[78] The plebiscites were conducted as voluntary postal ballots; about 700,000 voters were sent ballot papers and the response rate was 55%.[79] Prior to the plebiscites, the government had amended s 7A to make clear that a plebiscite was an activity contemplated by the provision, and to authorise the AEC to use personal information on the electoral roll when conducting fee-for-service ballots.[80]

The AEC has confirmed that it could conduct a plebiscite on same-sex marriage as a service under s 7A.[81] It has advised that the various procedural matters that would otherwise be dealt with by legislation – such as ballot secrecy, the terms of the question and scrutiny rules – would be included in a memorandum of understanding between the AEC and the commissioning department.[82]

The Turnbull Government has not ruled out the option of running its same-sex marriage plebiscite as a commercial ballot. Were it to do so, it would be the first time a national plebiscite has been initiated without any parliamentary involvement.[83] The closest precedent is the national song plebiscite in 1977, where the Chief Electoral Officer initiated the poll and the only supporting legislation was a very short Act that enabled the plebiscite to make use of the same ballot-boxes and polling booths that were in place for the four referendums that took place on the same day.[84] Parliament nonetheless had some involvement in the process, however modest.

The commercial ballot option is understandably appealing for any government facing opposition in Parliament and/or constitutional uncertainty. But its convenience must be weighed against significant concerns with respect to enforcement, spending, and legitimacy.

As noted, the AEC would conduct a fee-for-service plebiscite according to standards outlined in a memorandum of understanding. However, as a matter of law, these standards would bind only the parties to the agreement – that is, the AEC and the commissioning department. Many basic plebiscite rules, therefore, would not be enforceable against the wider public, including voters, political parties and campaign groups. A number of implications flow from this. Voting would effectively be voluntary,

[74] *Electoral and Referendum Amendment Act 1992* (Cth); Commonwealth, *Parliamentary Debates*, House of Representatives, 16 December 1992, 3867 (Roger Price).

[75] *Electoral and Referendum Amendment Act 1998* (Cth).

[76] AEC, *AEC Commercial Election Services (Fee-for-Service)* (20 October 2015) <http://www.aec.gov.au/about_aec/AEC_Services/Fee_for_service.htm>.

[77] AEC, *Annual Report 2014-15* (2015) 45.

[78] Department of Infrastructure, Transport, Regional Development and Local Government, *Annual Report 2007-08* (2008) 211.

[79] AEC, *Results of Plebiscites on Council Amalgamations* (9 September 2015) <http://www.aec.gov.au/elections/referendums/Advisory_Referendums/qld_council_2007/results.htm>.

[80] *Commonwealth Electoral Amendment (Democratic Plebiscites) Act 2007* (Cth).

[81] Evidence to Senate Legal and Constitutional Affairs Reference Committee, Parliament of Australia, Canberra, 10 September 2015, 42 (Paul Pirani, Chief Legal Officer, AEC).

[82] Evidence to Senate Committee, n 81, 42 (Tom Rogers, Australian Electoral Commissioner). See also AEC, Submission No 26 to the Senate Legal and Constitutional Affairs Reference Committee, Parliament of Australia, *Matter of a Popular Vote*, September 2015, 6. Note that the AEC requires that fee-for-service plebiscites adhere to certain minimum standards: AEC, n 76.

[83] Excepting Parliament's prior conferral of a general authority to supply services on a commercial basis, in s 7A.

[84] *Referendum (Constitution Alteration) Modification Act 1977* (Cth).

as there would be no means of enforcing compulsion. Campaigners could engage in conduct that would be unlawful in election or referendum campaigns – say, the distribution of unauthorised campaign material – without fear of legal consequences. And, in the event that the plebiscite was won or lost by a small margin, there would be no clear process for hearing and resolving claims about the formality of votes, polling irregularities or other issues that become highly contentious in a close poll.

As to spending, the authority of the Federal Government to spend money on the delivery of a fee-for-service plebiscite, absent specific approval from Parliament, is uncertain. The High Court has established that the Commonwealth's executive power to spend public money is not unlimited and requires authority beyond that conferred by a valid appropriation.[85] Unless it fell into a narrow class of exceptional categories, the government's expenditure on the AEC's fee for conducting the plebiscite would need to be authorised by a statute enacted pursuant to a source of federal legislative power.[86] In the case of a plebiscite on same-sex marriage, s 51(xxi) should (subject to what I have argued above) provide a basis for such legislation. However, the need for statutory authority of this kind (not recognised when the Howard Government ran its commercial plebiscites in 2007) would channel the government back to the legislature, and a potentially hostile Senate with the power to deny spending authority and thus scupper the plebiscite. The government could avoid this scenario by making a regulation authorising the plebiscite expenditure under s 32B of the *Financial Management and Accountability Act 1997* (Cth).[87] The Senate could, in turn, exercise its power to disallow that regulation within 15 parliamentary sitting days.

The expenditure on the AEC's fee would not require legislative authorisation if it could be shown to fall into an exceptional category. One possibility is that such spending would be authorised by the executive nationhood power.[88] As noted above, it is far from clear that a plebiscite is an activity "peculiarly adapted" to the government of a nation. But, if a court accepted this characterisation, legislative authorisation would not be necessary for plebiscite expenditure. It could also be contended that such expenditure is related to the administration of the ordinary functions of government, but the fact that plebiscites are such rare events blunts the force of this argument.[89]

Finally, the legitimacy of a plebiscite would be weakened if the government held it without parliamentary endorsement. It would mean that Parliament would have no say on fundamental aspects of the plebiscite, such as question wording and the rules of conduct. More broadly, it would be curious for a major national vote on a contentious issue to proceed without the support of the nation's elected representatives. Pressing ahead in the face of parliamentary opposition could also prove counterproductive, as it would surely make some parliamentarians less likely to respect the plebiscite's outcome. And, whatever the result, a substantial segment of the community would likely feel that the issue had not been resolved in a definitive way.

Overall, these three concerns suggest that s 7A is not a suitable vehicle for initiating a nationwide plebiscite on a contentious policy issue, such as same-sex marriage. The enactment of legislation is the most desirable means of establishing such a poll, notwithstanding doubts about constitutional validity.

IV. Conducting the Plebiscite

Putting aside questions about the constitutional basis of plebiscites, a variety of questions arise with respect to the rules of conduct for the vote. Governments must make decisions about basic elements of their plebiscite and must do so in the absence of standing rules and established practice. Referendum

[85] *Pape* (2009) 238 CLR 1; *Williams* (2012) 248 CLR 156.

[86] *Williams* (2012) 248 CLR 156; *Williams v Commonwealth (No 2)* (2014) 252 CLR 416. On what is required for expenditure to be valid, see Anne Twomey, "Post-Williams Expenditure: When can the Commonwealth and States Spend Public Money without Parliamentary Authorisation?" (2014) 33 *University of Queensland Law Journal* 9.

[87] Section 51(xxi) should provide adequate constitutional authority, subject to what I have said above about the connection of this head of power to a plebiscite on same-sex marriage.

[88] *Pape* (2009) 238 CLR 1, 63-64 (French CJ), 89 (Gummow, Crennan and Bell JJ), 119 (Hayne and Kiefel JJ). On the status of this exception, see Twomey, n 86, 23-25.

[89] *Williams v Commonwealth* (2012) 248 CLR 156, 233 (Gummow and Bell JJ).

regulations are available as a guide on some, but not all, matters. Ultimately, the government and Parliament have a wide discretion to set ground rules for plebiscites. This broad discretion is a source of uncertainty but, as will be made clear, it also presents an opportunity to trial process innovations that could be adopted for future referendums.

This Part considers the regulatory options available with respect to five aspects of plebiscites: the consequences of a plebiscite if it is carried, the drafting of the question, the breadth of the franchise, the method of conducting the vote, and the rules around campaign funding and expenditure. It focuses on these regulatory issues as they are relevant to plebiscites generally, but also considers their specific application to a poll on same-sex marriage.

Consequences of a Plebiscite if Carried

As already noted, plebiscites are advisory and carry no legal consequences. Neither the government nor the Parliament is legally obliged to honour the outcome of a plebiscite. In the context of the proposed vote on same-sex marriage, Malcolm Turnbull said that the outcome would be decisive and "respected by this government and by this Parliament and this nation".[90] But these assurances were political rather than legal in nature. Three Coalition Senators indicated that they would vote against any legislation that sought to implement a public vote in favour of same-sex marriage.[91] Other Members of Parliament said that they might abstain from a parliamentary vote,[92] or vote in line with the preferences of their electorates.[93] Similarly, it would be open to the ALP to try to legislate for same-sex marriage in the event of a majority No vote. The non-binding nature of a plebiscite therefore creates uncertainty, as it remains possible for governments or parliaments to refuse to implement the result.

It is, however, open to Parliament to minimise this uncertainty by passing a substantive Bill in advance of a plebiscite that attaches legal consequences to the vote. It could pass an Act authorising all necessary changes to implement a Yes vote (for example, by providing for specific amendments to the *Marriage Act 1961* (Cth)) but make that Act's commencement contingent upon a successful plebiscite.[94] The public vote would therefore act as the trigger for legislative change. Parliament would, of course, retain the ability to repeal or amend that Act at a later date.

Linking commencement to the occurrence of a certain event is not uncommon in legislative drafting. Many Bills, for instance, specify that they will commence upon royal assent, proclamation, or the commencement of another Act.[95] Nonetheless, making commencement contingent upon the result of a national vote would be a relatively novel approach. An analogy might be drawn with legislation whose commencement is expressed to be contingent on a treaty coming into force. For example, some provisions in the *Comprehensive Nuclear-Test-Ban Treaty Act 1998* (Cth) commence on "[t]he day on which the Treaty enters into force for Australia".[96] The Office of Parliamentary Counsel, in its drafting directions on this topic, cautions that commencement provisions of this nature are undesirable where the "event" is not easily traceable, as it can make it difficult to determine if an

[90] ABC, "Malcolm Turnbull Argues Australians Will Conduct Same Sex Marriage Plebiscite with Civility", *PM*, 22 October 2015 <http://www.abc.net.au/pm/content/2015/s4337033.htm?site=newcastle>.

[91] The three senators are Cory Bernardi, Eric Abetz and Bridget McKenzie.

[92] James Fettes, "Election 2016: Liberals' Zed Seselja 'Likely' to Abstain from Same-sex Marriage Vote if Public Vote in Favour", *ABC News*, 28 June 2016 <http://www.abc.net.au/news/2016-06-28/liberal-zed-seselja-will-abstain-from-same-sex-marriage-vote/7549440>.

[93] Mark Kenny, "Same-sex Marriage: Secret Moves within Coalition to Hobble Plebiscite", *The Sydney Morning Herald*, 25 June 2016 <http://www.smh.com.au/federal-politics/federal-election-2016/samesex-marriage-secret-moves-within-coalition-to-hobble-plebiscite-20160624-gprerl.html>.

[94] As suggested by Anne Twomey and George Williams: see Twomey, n 11, 834; George Williams, Submission No 32 to the Senate Legal and Constitutional Affairs Reference Committee, Parliament of Australia, *Matter of a Popular Vote*, September 2015, 3.

[95] JR Odgers, *Odgers' Australian Senate Practice* (13th ed, 2012) 340.

[96] *Comprehensive Nuclear-Test-Ban Treaty Act 1998* (Cth) s 2(1).

Act has actually commenced.[97] This objection would not seem to apply to a high-profile event like a national plebiscite but, out of caution, the legislation could require that a statement of the result be tabled in Parliament or reported in the Gazette.

A question arises as to the timing of commencement, and whether it should be self-executing or reliant on some further action by the government. The approach of the New Zealand Parliament to its flag referendum offers guidance. Section 2 of the *New Zealand Flag Referendums Act 2015* provided that a series of amendments (specified in ss 70, 71 and 72) would be triggered in the event that the public voted for a new flag:

> (2) If, in the second flag referendum, the alternative flag design gains a greater number of votes than the current New Zealand Flag, then sections 70, 71, and 72 commence on whichever of the following dates is earlier:
>
> (a) a date set by the Governor-General by Order in Council:
>
> (b) the day that is 6 months after the date on which the result of the second flag referendum is declared.
>
> (3) If, in the second flag referendum, the current New Zealand Flag gains a greater number of votes than the alternative flag design, then sections 70, 71, and 72 do not commence.

Subsection (2) operates to ensure that a vote for a new flag will be implemented within six months, but confers discretion on the government to bring it into effect at an earlier date. Both possibilities allow time for any necessary arrangements to be made in preparation for a change of flag. Subsection (3) clarifies that a vote against change will preserve the status quo.

This approach would be appropriate for plebiscites in Australia. It signals to the public that a vote in favour of change will be implemented within a set period of time. It also allows a lead-time between the vote and commencement to allow for any necessary adjustments to be made. On same-sex marriage, for example, it would ensure that anyone involved in the institutional or commercial side of marriages had time to prepare for the change. A further advantage of this approach is that it provides electors with the specific text of amendments that will be introduced in the event of a Yes vote. This is in line with the practice of federal referendums, where electors vote on specific alterations to the constitutional text (as contained in a referendum Bill). It ensures that, whatever the outcome, there will be no doubt what Australians have voted for or against. By contrast, as the United Kingdom's 2016 referendum on European Union membership shows, there can be intense disagreement over how to interpret the meaning of a poll that has presented voters with a generic question rather than a concrete proposal for reform.[98]

The Plebiscite Bill did not attach legal consequences to the proposed vote on same-sex marriage. However, the government did release an exposure draft of the Bill that it said it would introduce if the plebiscite were carried.[99] Under this approach, the plebiscite result is not self-executing, but voters enter the ballot box with a reasonable idea of the legal changes that would be put before Parliament in the event of a majority Yes vote.

Setting the Question

Federal Parliament has more control over the wording of plebiscite questions, and the manner in which they are asked, than is the case for referendums. The Referendum Act requires that ballot papers present voters with the long title of the Bill that proposed the constitutional alteration, followed by the question: "Do you approve this proposed alteration?"[100] By contrast, Parliament can adopt whatever

[97] Office of Parliamentary Counsel, *Drafting Directions No. 1.3: Commencement Provisions* (18 May 2016) <https://www.opc.gov.au/about/docs/drafting_series/DD1.3.pdf>.

[98] Albert Weale, "Is There a Future for Referendums?" on *The Constitution Unit Blog* (25 July 2016) <https://constitution-unit.com/2016/07/25/is-there-a-future-for-referendums/#more-5210>.

[99] Attorney-General, "Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill" (Media Release, 10 October 2016).

[100] *Referendum (Machinery Provisions) Act 1984* (Cth) s 25, Sch 1.

wording it likes for a plebiscite question. This frees legislators to put the question in a plain and direct fashion, but also provides more scope to "load" the question to nudge voters to answer one way or another.

Past questions have been criticised for manipulating voters in this way.[101] Anti-conscriptionists objected to the question put at the 1916 plebiscite, feeling that it tilted electors towards a Yes vote.[102] The question was:

> Are you in favour of the Government having, *in this grave emergency*, the same compulsory powers over citizens in regard to requiring their military service, for the term of this War, outside the Commonwealth, as it now has in regard to military service within the Commonwealth?[103]

The question put at the second conscription vote, meanwhile, was criticised for assuming a detailed knowledge of the government's policies and for not making specific reference to the prospect of compulsory military service. The question was: "Are you in favour of the proposal of the Commonwealth Government for reinforcing the Australian Imperial Force overseas?" Archbishop Daniel Mannix, a prominent opponent of conscription, criticised Prime Minister William Hughes for "not having the ordinary honesty or even decency, to put a fair, straight question".[104] The proposal put at the 1977 national song plebiscite was more neutral and descriptive, albeit long-winded.[105]

For its proposed same-sex marriage plebiscite, the Turnbull Government set the following question: "Should the law be changed to allow same-sex couples to marry?"[106] The Prime Minister described it as "a very straightforward question".[107] It had the merit of avoiding potentially loaded terms like "marriage equality" or "traditional marriage",[108] although some criticised it for excluding intersex people.[109]

The wording of plebiscite questions will always be contested, out of concern that certain words or phrases may influence the responses of voters and therefore have an impact on the plebiscite result. For this reason, Australia should consider adopting the UK practice of allowing an independent body to assess the final question for clarity and neutrality. The UK Electoral Commission has a statutory obligation to consider the wording of referendum questions and to publish a statement on their intelligibility.[110] In line with this obligation, the Commission reports on whether a question presents the options clearly, simply and neutrally.[111] Most recently, the Commission advised the United Kingdom Government that its proposed question for the referendum on EU membership ("Should the United Kingdom remain a member of the European Union?") could be perceived as encouraging voters to favour the status quo.[112] In response, the government altered the question to: "Should the

[101] Orr, n 11, 125.

[102] Jauncey, n 23, 154.

[103] Parliament of Australia, n 15, 398 (emphasis added).

[104] Quoted in Smith, n 17, 16.

[105] It read: "Against the background that 'GOD SAVE THE QUEEN' is the NATIONAL ANTHEM to be played on Regal and Vice Regal occasions, electors may indicate their preferences as to which of the tunes of the songs listed below they would prefer to be played on other occasions."

[106] *Plebiscite (Same-Sex Marriage) Bill 2016* (Cth) s 5(2).

[107] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 September 2016, 23 (Malcolm Turnbull).

[108] Paul Kildea, "Setting the Ground Rules for the Same-sex Marriage Plebiscite" on *AUSPUBLAW* (27 April 2016) <https://auspublaw.org/2016/04/same-sex-marriage-plebiscite>.

[109] George Williams, "Malcolm Turnbull's Same-sex Marriage Bill May Hit a High Court Hitch", *The Sydney Morning Herald*, 19 September 2016.

[110] *Political Parties, Referendums and Elections Act 2000* (UK) s 104(1), (2).

[111] Electoral Commission, *Referendum Question Assessment Guidelines* (2009).

[112] Electoral Commission, *Referendum on Membership of the European Union: Assessment of the Electoral Commission on the Proposed Referendum Question* (September 2015) 40.

United Kingdom remain a member of the European Union or leave the European Union?"[113] In the Australian context, there is no obvious independent body to perform this function – it is likely too politicised a role for the AEC. As an alternative, a parliamentary committee could commission research into, and report on, the intelligibility of proposed plebiscite questions.

The Franchise

In the absence of standing legislation, Parliament faces no prior statutory constraints when it comes to defining the plebiscite franchise. This is in contrast to referendums, where the Referendum Act provides that the franchise is the same as for federal elections.[114] Legislators may wish to take advantage of this absence of regulation by expanding the franchise beyond usual electoral practice. They may also wish to narrow the franchise, although there may be constitutional limits on their capacity to do so.

Parliament has made use of this regulatory flexibility at previous national plebiscites, to the benefit of some groups and the detriment of others. Prior to the first vote on conscription, legislators disqualified from voting any naturalised British subject who was born in an enemy country, a rule that may have disenfranchised as many as 4,000 Germans in South Australia alone.[115] Before the second conscription poll a year later, the Hughes Government issued regulations that extended this disqualification to "every person whose father was born in an enemy country".[116] Parliament also departed from referendum practice of the time to allow residents of federal territories to vote at both conscription polls, an approach that was repeated at the 1977 plebiscite on the national song.[117] Looking ahead to future plebiscites, it would be open to Parliament to expand the franchise to include 16 and 17 year olds, in line with the practice adopted for the 2014 referendum on Scotland's independence.

A related question is whether the Parliament could narrow the franchise for future plebiscites. The High Court has determined that ss 7 and 24 of the Constitution – which require that the Senate and House of Representatives be "directly chosen by the people" – mandate universal adult suffrage for elections, subject to any exceptions that can be justified by a "substantial reason".[118] In *Roach*, the blanket exclusion of prisoners from the federal franchise was said to lack a reasonable justification and was ruled invalid; the Court reinstated the pre-existing ban that applied to persons serving prison terms of three years or more.[119] This limitation on Parliament's capacity to depart from universal adult suffrage likely applies to referendums too – at least in an indirect sense, due to the requirement in s 128 that proposed constitutional amendments be submitted "to the electors qualified to vote for the election of members of the House of Representatives".

However, this particular constitutional limitation would not seem to apply to Parliament when it sets the franchise for a plebiscite. When Australians cast a vote at a plebiscite, they are not making a "choice" of the kind contemplated by ss 7 and 24, and so the constraint embodied in those provisions would not be engaged. This raises the prospect that Parliament could exclude certain classes of people (whether they be prisoners, overseas electors or whomever) from voting at plebiscites without fear of censure from the courts.

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[113] Electoral Commission, *EU Referendum Question Assessment* (8 February 2016) <http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/upcoming-elections-and-referendums/eu-referendum/eu-referendum-question-assessment>.

[114] *Referendum (Machinery Provisions) Act 1984* (Cth), s 4(1).

[115] *Military Service Referendum Act 1916* (Cth) s 7(a). This disqualification did not apply to the parents of serving or former members of the armed forces. On disenfranchisement of Germans, see Murray Goot, "The Results of the 1916 and 1917 Conscription Referendums Re-examined" in Robin Archer et al (eds), *The Conscription Conflict and the Great War* (Monash University Press, 2016) (forthcoming).

[116] *War Precautions (Military Service Referendum) Regulations 1917* (Cth) s 22(1).

[117] Parliament of Australia, n 15, 398-400. On the same day as the 1977 plebiscite, Australians approved a constitutional amendment permitting Territory residents to vote at future referendums.

[118] *Roach v Electoral Commissioner* (2007) 233 CLR 162, 173-174 (Gleeson CJ), 198-199 (Gummow, Kirby and Crennan JJ).

[119] *Roach v Electoral Commissioner* (2007) 233 CLR 162.

Might another constitutional constraint apply? The implied freedom of political communication could prevent Parliament defining the scope of the franchise too narrowly. That freedom operates to protect communications about "political or government matters", including those between voters and their elected representatives, and requires a flow of information at all times, not just during election or referendum campaign periods.[120] It is arguable that the casting of a ballot at a plebiscite is a communication about a political or governmental matter. It is an act that provides the government and Parliament with information about public attitudes on a policy issue, as an aid to subsequent law-making. In this sense, plebiscite voting is distinct from election and referendum voting. Casting votes at elections and referendums is not about conveying information, but is instead about making choices that carry consequences for the election of representatives and the fate of proposed constitutional amendments. Should plebiscite voting be understood as a form of political communication, the Court will require that any constraints placed on the ability of people to vote must be proportionate to the attainment of a legitimate objective.[121] Attempts to exclude certain groups from the plebiscite franchise, without reasonable justification, would risk being ruled invalid.

Conduct of the Vote

Historically, the process for casting votes at national plebiscites has mirrored that of referendums. Parliament has provided Australians with the usual array of voting options, including in-person and postal voting. The Turnbull Government followed this practice for its proposed plebiscite on same-sex marriage.

Plebiscites nonetheless present an opportunity for experimentation in two respects. First, Parliament could opt to run the plebiscite entirely by postal vote. Voting by post has grown in popularity at federal elections but,[122] excepting the 1997 election of Constitutional Convention candidates,[123] there is no precedent for a national election or referendum conducted exclusively by postal ballot. The most prominent overseas example of recent times is New Zealand's two-stage flag referendum in 2015-2016.[124] As with that poll, the main advantage of holding a plebiscite by postal vote is that it would keep costs down and make the vote easier to administer.[125] On the other hand, it could send a message that the plebiscite is less important than other votes, and ballot secrecy could not be secured in the way that it is at polling stations.

Secondly, Parliaments could use plebiscites as a testing ground for the wider use of electronic voting. Following the 2016 federal election, leaders of both major parties expressed interest in exploring electronic voting to expedite the counting of ballots.[126] At the 2015 New South Wales state election, 283,669 people cast ballots using the internet voting system, iVote.[127] It has been suggested that a plebiscite presents a good opportunity to experiment with electronic voting at the federal level because, compared to an election, the vote "would be less complex to manage, with a simple Yes/No

[120] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560-561.

[121] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560; *McCloy v New South Wales* (2015) 89 ALJR 857.

[122] Joint Standing Committee on Electoral Matters, Parliament of Australia, *The 2013 Federal Election: Report on the Conduct of the 2013 Election and Matters Related Thereto* (2013) 98.

[123] Postal voting for this election was conducted under the *Constitutional Convention (Election) Act 1997* (Cth).

[124] Electoral Commission, *Referendums on the New Zealand Flag* (22 July 2016) <http://www.elections.org.nz/events/referendums-new-zealand-flag-0>; Therese Arseneau and Nigel S Roberts, "New Zealand's Flag Referendums: The Story so Far" on *Constitution Unit Blog* (16 February 2016) <https://constitution-unit.com/2016/02/16/new-zealands-flag-referendums-the-story-so-far>.

[125] Twomey, n 11, 834.

[126] Matt Wade, "Election 2016: Malcolm Turnbull and Bill Shorten Push for e-Voting", *The Sydney Morning Herald*, 11 July 2016 <http://www.smh.com.au/federal-politics/federal-election-2016/election-2016-malcolm-turnbull-and-bill-shorten-push-for-evoting-20160710-gq2lpk.html>.

[127] New South Wales Electoral Commission, *NSW Electoral Commission Report on the Conduct of the 2015 State General Election* (2015) 43.

vote, rather than complex preferences".[128] Against this, however, must be weighed ongoing concerns about security, the immense cost of setting up new technology to facilitate the vote, the need to ensure compatibility with existing AEC systems, and the risk of system failure due to the difficulty of providing access to 15 million voters within a short period of time.[129] Australian Electoral Commissioner, Tom Rogers, raised some of these issues in recent testimony about the proposed same-sex marriage plebiscite; he remarked: "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."[130] For these reasons, it would be unwise in the short term to use a plebiscite to trial electronic voting.

The Campaign

The regulation of the plebiscite campaign is another area that may be highly contested. Three issues warrant particular consideration: the distribution of an official information pamphlet, the allocation of public funding to campaign groups, and the introduction of spending limits for campaign participants. The second of these was especially controversial with respect to the proposed vote on same-sex marriage.[131] Referendum practice on these matters provides only limited guidance, as it has long been considered inadequate or at least in need of review.[132] Plebiscites present an opportunity to experiment with some new approaches as a precursor to possible future reforms to referendum processes.

Distribution of an Official Pamphlet

The official pamphlet is a familiar feature of referendum campaigns. Under rules set out in the Referendum Act, the pamphlet contains arguments for and against the proposed constitutional amendment and a statement showing the proposed textual changes to the Constitution.[133] The arguments are authorised by a majority of the parliamentarians who voted for or against proposed amendment, which is contained in a Constitution Alteration Bill.[134] The document must be sent to each household.[135] Some States and Territories also provide for the distribution of official arguments, in similar terms to Commonwealth law.[136]

The Turnbull Government chose to depart from this practice for its proposed plebiscite on same-sex marriage by determining that no official pamphlet would be provided. It noted that parliamentarians could not be asked to authorise arguments for or against the substantive legislative changes to implement same-sex marriage, as these would only be introduced into Parliament (if at all) after the plebiscite.[137] The Special Minister of State, Scott Ryan, suggested that publicly funded campaign advertisements (discussed below) may be more effective than pamphlets as means of

[128] Twomey, n 11, 834.

[129] In 2014, the Joint Standing Committee on Electoral Matters recommended against the expansion of electronic voting at federal elections due to concerns that it would undermine the security, integrity and transparency of the ballot process: 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* (2014) vi, 65-67.

[130] Evidence to Senate Committee, n 81, 42 (Tom Rogers, Australian Electoral Commissioner) 39-40.

[131] For example, Rosie Lewis, "Don't Fund Same-sex Campaigns, Says Warren Entsch", *The Australian*, 23 August 2016 <http://www.theaustralian.com.au/national-affairs/dont-fund-samesex-campaigns-says-warren-entsch/news-story/1d1231801107a909c46d56764e0b2417>.

[132] House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *A Time for Change: Yes/No? – Inquiry into the Machinery of Referendums* (2009).

[133] *Referendum (Machinery Provisions) Act 1984* (Cth) s 11(1).

[134] *Referendum (Machinery Provisions) Act 1984* (Cth) s 11(1).

[135] *Referendum (Machinery Provisions) Act 1984* (Cth) s 11(1).

[136] For example, *Referendums Act 1983* (WA) s 9.

[137] Explanatory Memorandum, *Plebiscite (Same-Sex Marriage) Bill 2016* (Cth) [84].

communicating information to voters.[138] It is also arguable that plebiscites generally feature proposals that are less technically complex than those for referendums, and that there is correspondingly less need for an official pamphlet.[139]

On the other hand, the value of a plebiscite pamphlet is that it can help to clarify important matters of detail. On same-sex marriage, for example, it could explain the implications of a Yes vote for the recognition of international marriages, and the responsibilities of religious and marriage celebrants. (These matters were addressed in the Turnbull Government's exposure draft of the *Marriage Amendment (Same-Sex Marriage) Bill* (Cth).) More broadly, State governments have distributed official information guides to help voters make a choice on relatively straightforward issues, such as daylight saving.[140] As to who might authorise the pamphlet arguments, a diverse group of legislators appointed by the government could perform this role, or otherwise a joint parliamentary committee could be established for that purpose. Quite aside from these concerns, plebiscites could be used to trial new approaches to pamphlet design, such as placing more emphasis on providing impartial information to voters.[141]

Public Funding of Campaign Advocacy

Another major question is whether public funding should be allocated to campaign organisations to help them promote arguments for and against a plebiscite proposal. Legislation prevents this practice at referendums, but this has not proven an insuperable barrier.[142] In the lead up to both the 1999 republic referendum and the planned 2013 referendum on local government recognition (later abandoned), the Federal Parliament suspended the statutory prohibition and this freed the Howard and Gillard governments to provide advocacy funding to Yes and No campaigners.[143] An additional legal consideration that has emerged since the 1999 referendum is that expenditure of this kind must now be supported by legislation or otherwise rest on some other source of constitutional authority.[144]

The merits of public funding were hotly debated in relation to the proposed same-sex marriage plebiscite. The government ultimately proposed to allocate $7.5 million each to Yes and No Case campaign committees. The membership of these committees was to be appointed by the Attorney-General and Special Minister of State, and comprise a mix of parliamentarians and members of the public.[145] The purpose behind public funding of campaign advocacy is to provide a level playing field. It ensures that, irrespective of the level of private spending at play, campaign groups have adequate resources to promote arguments for and against change.[146] Campaign funding helps voters by providing access to a diversity of arguments, even in circumstances where private sources are disinclined to fund advocacy for one or both sides of an issue.

While these are worthy objectives, the appropriateness of such funding for plebiscites must be determined on a case-by-case basis. The proposed poll on same-sex marriage provides an example of where the provision of advocacy funding is problematic. It would only enhance public awareness and

[138] Scott Ryan, "Transcript of Sky News with David Speers", *Sky News*, 13 September 2016.

[139] Anne Twomey, Submission No 6 to the Senate Legal and Constitutional Affairs Reference Committee, Parliament of Australia, *Matter of a Popular Vote*, August 2015, 3.

[140] Western Australian Electoral Commission, *2009 Western Australian Referendum on Daylight Saving: Report* (2010) 9-12 (includes reproduction of official arguments).

[141] For a summary of criticisms of the official pamphlet, and suggestions for reform, see Paul Kildea and Rodney Smith, "The Challenge of Informed Voting at Constitutional Referendums" (2016) 39 *University of New South Wales Law Journal* 368, 378-379, 393-394.

[142] *Referendum (Machinery Provisions) Act 1984* (Cth) s 11(4).

[143] The Howard Government allocated $15 million (in equal shares) to Yes and No campaign committees; the Gillard Government provided $10.5 million (in unequal shares) to the Australian Local Government Association and opponents of change. See Paul Kildea, "Achieving Fairness in the Allocation of Public Funding in Referendum Campaigns" (2016) 37(1) *Adelaide Law Review* 13.

[144] As a result of the decisions in *Williams (No 1)* and *Williams (No 2)*, discussed above.

[145] *Plebiscite (Same-Sex Marriage) Bill 2016* (Cth) s 15.

[146] International IDEA, *Direct Democracy: The International IDEA Handbook* (2008) 153.

education in a marginal way, and could undermine the quality of public deliberation. Same-sex marriage has been debated over many years and, as a result, the various arguments for and against are widely known and it is thought that many Australians already have firm positions on the issue. In any event, it is probable that campaign groups on both sides would engage in private spending, which weakens the need for a public subsidy.

Against this small educative gain would need to be weighed the risk that some advocates would use public funding to promote arguments that are inaccurate and even harmful to members of the LBGTIQ community. The Irish experience demonstrates that this is a real prospect. Many of the arguments put by the No campaign focused on the welfare of children, including the claim that legal recognition of same-sex marriage would deny children their "right" to a mother and a father.[147] Opponents of change also promoted the inaccurate claim that the proposed constitutional amendment would alter the rights of same-sex couples to surrogacy services.[148] Some campaigners produced and distributed leaflets claiming that same-sex couples are more likely to contract cancer and to abuse and injure children.[149] An Australian plebiscite on this topic would likely feature similar material. In February 2016, for instance, it was reported that former Liberal MP Chris Miles had prepared and funded a pamphlet claiming that adult children raised by same-sex parents might experience a range of "social outcomes" including unemployment, sexual victimisation, sexually transmitted disease and drug use and abuse.[150] It would be problematic for public money to be used to disseminate material of this nature. It would also do nothing to improve the quality of public deliberation as Australians prepared to cast a ballot on same-sex marriage.

This is not to say that public funding of campaign advocacy will never be appropriate for plebiscites. However, the experience of same-sex marriage debates in Australia and overseas shows that the merits of such funding must be weighed up according to specific plebiscite proposals.

Limits on Campaign Spending

Whatever approach is taken to public funding, plebiscites provide an opportunity to trial controls on campaign spending. Indeed, expenditure limits may be especially suited to plebiscites. The issues involved are often socially contentious, and so individuals and interest groups may be more likely to engage in significant private spending than they would at a referendum.

Limits on campaign expenditure are not a feature of Australian referendum regulation and, in the context of elections, apply only in New South Wales, South Australia and the Australian Capital Territory.[151] The Turnbull Government, moreover, did not seek to introduce spending caps for its proposed plebiscite on same-sex marriage. Australia is, in this sense, out of step with some comparable democracies. In the United Kingdom, differential spending limits apply to the umbrella groups that co-ordinate the Yes and No campaigns, and to political parties, registered third parties and individuals.[152] In New Zealand, expenditure limits were imposed on registered campaigners for the 2011 referendum on the MMP (mixed member proportional) voting system.[153] In these jurisdictions, caps are imposed with the aim of ensuring that neither side enjoys an unfair advantage by virtue of their superior financial resources.[154]

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[147] Yvonne Murphy, "The Marriage Equality Referendum 2015" (2016) 31(2) *Irish Political Studies* 315, 323.

[148] Murphy, n 147, 323.

[149] Felicity Capon, "Homosexuality Causes Cancer, Says Anti-Gay Marriage Group", *Newsweek*, 25 February 2015 <http://www.newsweek.com/homosexuality-causes-cancer-says-anti-gay-marriage-group-309482>.

[150] Matthew Knott, "Leaked Pamphlet Claims Gay Marriage Would Lead to Sexual Diseases, Drug Use and Unemployment", *The Sydney Morning Herald*, 29 February 2016 <http://www.smh.com.au/federal-politics/political-news/leaked-pamphlet-claims-gay-marriage-would-lead-to-sexual-diseases-drug-use-and-unemployment-20160228-gn61ot.html#comments>.

[151] Graeme Orr, "Party Finance Law in Australia: Innovation and Enervation" (2015) 14(4) *Election Law Journal* 1, 7-8.

[152] *Political Parties Elections and Referendums Act 2000* (UK) ss 117, 118, Sch 14. For analysis, see Keith D Ewing, "Promoting Political Equality: Spending Limits in British Electoral Law" (2003) 2(4) *Election Law Journal* 499, 514-519.

[153] *Electoral Referendum Act 2010* (NZ) s 37.

[154] Ewing, n 152, 499.

Care would need to be taken in the design of such regulations. Following the United Kingdom example, Parliament could allow people and organisations to spend up to a certain amount without facing any controls. Beyond that threshold, individuals and groups could be required to register as a certain class of participant and comply with the relevant spending cap. There would need to be clear rules about what expenditure entails, and the period during which the caps apply. The scheme would also need to include offence provisions to penalise failure to comply with the regulations. The plebiscite experience could inform future debates about whether similar constraints should be introduced for referendums.[155]

V. CONCLUSION

Australia's constitutional system of representative government is not well designed for national plebiscites. This is not to say that the constitutional and legal framework precludes governments from conducting them, nor that there are no legitimate reasons for holding one. It is instead to recognise that any federal government intent on holding a plebiscite will face difficult choices and considerable uncertainty on basic matters, including the constitutional foundation of the poll and the manner in which it is run. The Turnbull Government's proposed plebiscite on same-sex marriage provides a clear illustration of this: among the issues that were the subject of doubt and disagreement were the validity of compulsory voting, the consequences of the vote and the provision of campaign funding.

The uncertain legal status of plebiscites, and the possibility that demand for them could grow, underscores the need for further discussion about how such votes are conducted. Part of that conversation should be the introduction of long-term measures (such as standing legislation) to remove some of the *ad hocery* of current arrangements and provide a more stable environment in which to conduct future plebiscites. But, as important as constitutional foundations and regulation are, there is arguably a larger – and prior – debate to be had. That debate concerns fundamental questions about the place of the plebiscite in Australia's democratic arrangements, including whether it is a necessary or dispensable device and the issues on which it is appropriate to hold one. These are difficult issues that remain to be faced.

[155] Note that it is unlikely that the Commonwealth could validly impose plebiscite expenditure caps on State governments. Such restrictions would arguably amount to an undue interference with the exercise by State governments of their constitutional powers and functions: *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272; *Austin v Commonwealth* (2003) 215 CLR 185.