

4 September 2015



Ms Sophie Dunstone
Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Ms Dunstone

Referendum or Plebiscite on Same-sex Marriage

Thank you for the opportunity to provide comments to the Senate Legal and Constitutional Affairs References Committee Inquiry into this matter. The Law Council has restricted its comments to the question of the legal issues associated with the plebiscite or referendum, on the matter of marriage in Australia.

The Law Council Directors first considered the issue of same-sex marriage in 2005, resolving that the Law Council should publicly advocate for the removal of legal restrictions preventing the marriage of same-sex couples. This policy was confirmed in 2013, and remains Law Council policy.

The Law Council notes that it is not necessary to hold a popular vote as a matter of law, in the form of a plebiscite or referendum, on the matter of marriage in Australia. In 2013, the High Court of Australia in *The Commonwealth of Australia v The Australian Capital Territory* [2013] HCA 55, stated that 'marriage' in section 51(xxi) of the Constitution includes a marriage between persons of the same-sex.

However, the High Court also found that the *Marriage Act 1961* (Cth), which currently does not provide for the formation or recognition of marriage between same-sex couples, must be considered to be a comprehensive and exhaustive statement of the law of marriage. Importantly, the High Court also held that the federal Parliament has power under the Constitution to legislate with respect to same-sex marriage, and that under the Constitution and federal law as it now stands, whether same-sex marriage should be provided for by law is a matter for the federal Parliament.

Yours sincerely

A handwritten signature in black ink, appearing to read "Martyn Hagan".

MARTYN HAGAN
SECRETARY-GENERAL