

AUSTRALIA'S SAME-SEX MARRIAGE SURVEY: EVALUATING A UNIQUE POPULAR VOTE PROCESS

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In 2017, the Australian government conducted the Australian Marriage Law Postal Survey (‘AMLPS’). This saw the federal government make innovative use of national survey processes to conduct an exercise that closely resembled an advisory referendum or plebiscite. This article views the marriage survey as a type of ‘popular vote process’ and uses the conceptual tools of referendum research to understand and evaluate it from a process perspective. The article begins by examining the legal framework that applied to the AMLPS and highlights how it differed from the laws that apply to referendums and plebiscites. Next, the article evaluates the AMLPS as a popular vote process. While acknowledging that the survey delivered some important democratic benefits, it offers a mostly critical assessment. The analysis identifies several shortcomings, including insufficient checks on the power of the executive to initiate the survey, gaps in legal regulation, inadequate protection of ballot secrecy, the absence of a mechanism to challenge the result, and questions around the effectiveness of administration. The article concludes that the survey device should not be used as the basis for future popular votes on policy issues.

I INTRODUCTION

Over an eight-week period in late 2017, 12.7 million Australians participated in the Australian Marriage Law Postal Survey (‘AMLPS’).¹ The voluntary survey consisted of a single question: ‘Should the law be changed to allow same-sex couples to marry?’. A clear majority (61.6%) of respondents answered ‘Yes’ and,² a few weeks after this result was announced, the Parliament passed legislation to change the legal definition of marriage from the union of ‘a man and a woman’

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1 This amounted to 79.5% of enrolled voters.

2 Australian Bureau of Statistics, *Report on the Conduct of the Australian Marriage Law Postal Survey 2017* (28 June 2018) iv (‘*Report on the Conduct of the AMLPS*’).

to the union of ‘2 people’.³ The marriage survey has come to be viewed as a historic event, precipitating as it did a landmark social reform.⁴ As we look back on it, however, we should not overlook its institutional significance: namely, the federal government’s innovative use of national survey processes to conduct an exercise that closely resembled an advisory referendum or ‘plebiscite’.⁵ This article presents the first detailed analysis of the process underlying the AMLPS and considers its implications for the conduct of future popular vote processes.

Following the 2016 federal election, the Coalition government was committed to holding a plebiscite on same-sex marriage because, even though a popular vote was constitutionally unnecessary,⁶ it presented a means of managing strong internal disagreement over the meaning of marriage.⁷ However, in the face of disagreement from the Opposition and the crossbench, who viewed a plebiscite on marriage as not only redundant but also expensive and potentially harmful and divisive,⁸ the government was unable to pass enabling legislation. In November 2016, the Senate voted down the Plebiscite (Same-Sex Marriage) Bill 2016 (Cth) (‘Plebiscite Bill’), which authorised the holding of a compulsory plebiscite run by the Australian Electoral Commission (‘AEC’). In the wake of that defeat a minister floated the idea of running a voluntary postal survey instead.⁹ This fall-back plan took shape quickly after the Bill was voted down a second time on 9 August 2017: that same day, the Treasurer instructed the Australian Statistician and the Australian Bureau of Statistics (‘ABS’) to ‘collect ... statistical information’ on the proportions of electors for and against the legalisation of same-sex marriage and to report back within three months.¹⁰ A month later, the roughly 16 million Australians on the electoral roll began receiving a ‘survey form’ that invited them to record a Yes or No response and to return it to the ABS in a reply paid envelope.¹¹ The hybrid nature of the exercise — survey in form, plebiscite in

3 *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) sch 1 s 3. The first same-sex weddings took place soon afterwards: Australian Bureau of Statistics, *Marriages and Divorces, Australia, 2017* (Catalogue No 3310.0, 27 November 2018).

4 Nick Baker, ‘Same-Sex Marriage is Australia’s Most Historic Event: Survey’, *SBS News* (online, 24 January 2018) <<https://www.sbs.com.au/news/same-sex-marriage-is-australia-s-most-historic-event-survey>>.

5 By contrast, the term ‘referendum’ is reserved for popular votes on proposals for constitutional amendment.

6 The *Australian Constitution* confers power on the Commonwealth Parliament to legislate on ‘marriage’, and this encompasses marriage between persons of the same sex: *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, 452 [2] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

7 Judith Brett, *From Secret Ballot to Democracy Sausage: How Australia Got Compulsory Voting* (Text Publishing, 2019) 165 (‘*From Secret Ballot to Democracy Sausage*’).

8 See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 11 October 2016, 1575–80 (Bill Shorten).

9 Brett, *From Secret Ballot to Democracy Sausage* (n 7) 168.

10 *Census and Statistics (Statistical Information) Direction 2017* (Cth) s 3 (‘*Statistics Direction*’).

11 Australian Bureau of Statistics, *Annual Report: 2017–18* (Report, 19 October 2018) 19–20 (‘*ABS Annual Report: 2017–18*’).

substance — prompted some commentators to call the exercise a ‘plebisurvey’.¹²

This article views the marriage survey as a type of ‘popular vote process’. Here I follow el-Wakil and McKay and use the term to encompass any of a wide ‘variety of referendum and initiative processes that allow citizens to vote on policy issues’.¹³ That term is deliberately broad in scope so as to capture the manifold ways in which the people are sometimes invited to have a direct say on an issue and to facilitate comparison between them. Some may query whether the AMLPS warrants characterisation as a ‘popular vote process’ when other ABS surveys are viewed as statistical exercises and nothing more. However, several factors make the marriage survey stand out. First, it sought responses not from a sample group but from the entire electorate.¹⁴ Second, participants were asked to answer a single question only.¹⁵ Third, it was understood that the survey results would have a direct impact on law-making by elected representatives.¹⁶ Fourth, the marriage survey was held as a substitute for a plebiscite and, once it was announced, government ministers routinely referred to the process as a plebiscite or ‘vote’.¹⁷ Taking these factors together it is clear that the AMLPS, while a statistical exercise, is also appropriately understood as a popular vote process and warrants analysis as such.

The focus of this article is not so much the events of the marriage survey as it is the process underlying it.¹⁸ It is most interested in *how* this ‘vote’ on same-sex

12 See, eg, Michael Maley, ‘The 2017 Australian Marriage Law Postal Plebisurvey: Issues and Controversies’, *Australian Public Law Blog* (Blog Post, 16 August 2017) <<https://auspublaw.org/2017/08/the-2017-australian-marriage-law-postal-plebisurvey>>. The novelty of the the AMLPS was also remarked on by Michael Kirby (‘irregular’, ‘completely novel’) and Graeme Orr (a ‘funny platypus halfway in between’ a plebiscite and a survey): ‘Fact Check: Is the Same-Sex Marriage Survey a Completely Novel Idea That Is Not Actually a Plebiscite?’, *ABC News* (online, 22 August 2017) <<http://www.abc.net.au/news/2017-08-22/fact-check-same-sex-marriage-postal-survey/8826300>>; ‘High Court Ruling on Same Sex Marriage Postal Survey’, *The Law Report* (ABC Radio National, 12 September 2017) <<https://www.abc.net.au/radionational/programs/lawreport/same-sex-marriage-postal-survey/8892574#transcript>>.

13 Alice el-Wakil and Spencer McKay, ‘Disentangling Referendums and Direct Democracy: A Defence of the Systemic Approach to Popular Vote Processes’ (2020) 56(4) *Representation* 449, 449.

14 The *Macquarie Dictionary* defines a ‘survey’ as ‘a partial poll or gathering of sample opinions, facts or figures in order to estimate the total or overall situation’: *Macquarie Dictionary* (online at 3 October 2019) ‘survey’ (def 12). The ABS provides that a survey ‘involves collecting information from every unit in the population (a census), or from a subset of units (a sample) from the population’: Australian Bureau of Statistics, ‘Statistical Language: Statistical Language Glossary’ (Web Page, 22 October 2013) <<http://www.abs.gov.au/websitedbs/a3121120.nsf/home/statistical+language+-+statistical+language+glossary#S>>.

15 *ABS Annual Report: 2017–18* (n 11) 19.

16 Malcolm Turnbull, ‘Liberals and Nationals for YES Campaign Launch’ (Speech, Sydney, 10 September 2017) <<https://www.malcolmturnbull.com.au/media/speech-at-the-liberals-and-nationals-for-yes-campaign-launch-sydney>>.

17 On the day that the results were announced, Turnbull declared ‘[t]he Australian people have spoken in their millions and they have voted overwhelmingly “yes” for marriage equality’: Malcolm Turnbull, ‘Press Conference with Senator the Hon. Mathias Cormann, Minister for Finance’ (Transcript, 15 November 2017) <<https://www.malcolmturnbull.com.au/media/press-conference-with-senator-the-hon-mathias-cormann-minister-for-finance>>. See also Mathias Cormann, ‘Next Steps for a National Plebiscite on Same Sex Marriage’ (Media Release, 9 August 2017); Finance and Public Administration References Committee, Parliament of Australia, *Arrangements for the Postal Survey* (Report, 13 February 2018) 37.

18 For an account of the survey told by two Yes campaigners, see generally Alex Greenwich and Shirleene Robinson, *Yes Yes Yes: Australia's Journey to Marriage Equality* (NewSouth, 2018).

marriage was conducted. The analysis presented is designed not only to improve our understanding of what took place in 2017, but also to inform assessments of how future popular votes might be undertaken. The Turnbull government's creative use of the survey device broke new ground in that it demonstrated a new means by which governments can conduct popular vote processes — but a question arises as to whether that means is a good one, and whether it should be repeated. This is a question that has received little attention and is one that this article sets out to answer.¹⁹

Historically, federal governments have made infrequent use of plebiscites, so it might be asked whether the marriage survey is best viewed as a one-off that warrants only cursory attention. Such an approach would be misguided. The Turnbull government's use of a survey to conduct a popular vote, and the High Court's unanimous dismissal of two challenges to it,²⁰ affirms that the Commonwealth now has an additional tool with which it can give the public a direct say on policy issues. This alone justifies close consideration of the marriage survey process. Further, it is probable that future governments will at least turn their minds to the survey option when weighing the merits of holding a popular vote. Indeed, in the aftermath of the AMLPS, Turnbull himself floated the idea of holding a postal survey to ascertain public views on different republic models.²¹ More broadly, the growing calls for popular votes on contentious policy issues — including immigration levels, the date of Australia Day, and climate targets — strengthen the need to understand and evaluate all possible popular vote devices, including the survey option introduced by the AMLPS.²²

This article has two objectives. The first is to explain the legal framework that applied to the conduct of the marriage survey and to compare it to the laws that govern the referendum and plebiscite (Part II). One of the key observations made is that the AMLPS was conducted within a legal framework designed for the carrying out of surveys and that this had significant consequences for how it was

19 Judith Brett and Michael Maley stand out for having provided commentary on the AMLPS process: see generally Brett (n 7) ch 17; Maley (n 12).

20 *Wilkie v Commonwealth; Australian Marriage Equality Ltd v Minister for Finance* (2017) 263 CLR 487 ('*Wilkie*'). For analysis of this decision, including on whether the AMLPS was lawfully funded (an issue not addressed in this article), see Anne Twomey, 'Wilkie v Commonwealth: A Retreat to Combat over the Bones of Pape, Williams, and Responsible Government', *Australian Public Law Blog* (Blog Post, 27 November 2017) <<https://auspublaw.org/2017/11/wilkie-v-commonwealth>>.

21 Malcolm Turnbull, 'Doorstop with the Minister for Health and the Minister for Sport' (Transcript, 1 January 2018) <<https://www.malcolmtturnbull.com.au/media/doorstop-with-the-minister-for-health-and-the-minister-for-sport>>.

22 See, eg, Dean Bialek, 'How Australia's Attempted Carbon Trickery Is Stoking India to Pollute', *The Sydney Morning Herald* (online, 13 December 2019) <<https://www.smh.com.au/environment/climate-change/how-australia-s-attempted-carbon-trickery-is-stoking-india-to-pollute-20191212-p53jgd.html>>; Jackson Gothe-Snape, 'SSM: Australia Votes on Same-Sex Marriage, so Why Not Indigenous Recognition or Euthanasia?', *ABC News* (online, 31 October 2017) <<http://www.abc.net.au/news/2017-10-31/what-vote-next-after-same-sex-marriage/9103328>>; Andrew MacLeod, 'If We Change Australia Day, to Which Date Should We Change It?' (Blog Post, 25 January 2018) <<https://betterdebate.wordpress.com/2018/01/25/if-we-change-australia-day-to-which-date-should-we-change-it/>>.

delivered. These consequences included unilateral initiation by the executive, a regulatory framework that contained notable gaps and left basic process matters to executive discretion, and the use of a voluntary postal ballot rather than compulsory attendance voting.

The article's second objective is to evaluate the AMLPS as a popular vote process (Part III). The marriage survey is assessed against five criteria drawn from scholarship on referendum process and international guidelines on the conduct of elections and referendums: a balanced initiation procedure, a suitable regulatory framework, equal participation, integrity of the voting process, and effective administration. My analysis of the AMLPS identifies several shortcomings, including insufficient checks on the power of the executive to initiate the survey, an ill-tailored regulatory framework, inadequate protection of ballot secrecy, the absence of a mechanism to challenge the result and questions around the effectiveness of administration. While my analysis acknowledges that the marriage survey delivered some important democratic benefits, my overall assessment is a critical one. The article concludes that the survey device should not be used as the basis of future popular votes on policy issues.

II THE MARRIAGE SURVEY AND ITS LEGAL FRAMEWORK

In this section, I identify and explain the defining characteristics of the AMLPS as a popular vote process and note similarities and differences with the referendum and plebiscite. The purpose of the section is to better understand the AMLPS as a legal instrument and process: what form did it take, and how is it distinctive? As my analysis reveals, there are points of commonality and difference between the referendum, plebiscite and AMLPS. Some of the more consequential differences relate to the manner of regulation: put simply, the AMLPS was conducted within a legal framework created for statistical exercises and this had important process implications.

To assist in comparing the three processes, I employ some key criteria commonly used in classifications of referendum institutions.²³ The criteria are as follows:

- *Popular vote requirement*: whether a popular vote is or is not legally required to effect a certain change (mandatory vs optional);
- *Initiation power*: whether authority to initiate a popular vote resides in

23 See, eg, Markku Suksi, *Bringing in the People: A Comparison of Constitutional Forms and Practices of the Referendum* (Martinus Nijhoff Publishers, 1993) 28–37; Maija Setälä, 'On the Problems of Responsibility and Accountability in Referendums' (2006) 45(4) *European Journal of Political Research* 699, 705–7; Pier Vincenzo Uleri, 'Introduction' in Michael Gallagher and Pier Vincenzo Uleri (eds), *The Referendum Experience in Europe* (Macmillan Press, 1996) 1, 12; Laurence Morel, 'Types of Referendums, Provisions and Practice at the National Level Worldwide' in Laurence Morel and Matt Qvortrup (eds), *The Routledge Handbook to Referendums and Direct Democracy* (Routledge, 2017) 27.

the legislature and/or executive, or is vested in citizens or a parliamentary minority;

- *Possible topics*: whether a popular vote may be held on proposals for ordinary legislative or policy change, or is confined to proposals for constitutional amendment;
- *Decision threshold*: whether the proposal will be carried with the support of a simple majority of votes cast, or whether a super-majority is required;
- *Impact of result*: whether the result of the popular vote is binding on political authorities, or is merely advisory;
- *Type of regulation*: whether the popular vote process is governed by a set of standing constitutional or statutory rules (‘pre-regulated’) or whether it is held in the absence of pre-existing legal norms (‘ad hoc’).

To orient the reader, Table 1 sets out how these categories apply to each of the three processes. The points summarised in the table are elaborated upon below.

Table 1: Comparing the referendum, plebiscite and AMLPS

	Referendum	Plebiscite	AMLPS
Popular vote requirement	Mandatory	Optional	Optional
Initiation power	Legislature (with executive)	Legislature (with executive)	Executive
Possible topics	Constitutional	Policy	Policy
Decision threshold	Super-majority	Simple majority	Simple majority
Impact of result	Binding	Advisory	Advisory
Type of regulation	Pre-regulated	Ad hoc	Pre-regulated + ad hoc

A Referendums

Federal referendums in Australia are binding, mandatory votes on proposals for constitutional amendment.²⁴ In practice, a proposal for amendment is prepared by the government and presented to the legislature in the form of a Bill.²⁵ The proposed change must be approved by absolute majorities of both Houses of Parliament, and then submitted to electors where the approval of a national

24 For history and analysis of Australian referendums see George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010); Scott Bennett, ‘The Politics of Constitutional Amendment’ (Research Paper No 11, Parliamentary Library, Parliament of Australia, 23 June 2003); Cheryl Saunders, ‘The Australian Experience with Constitutional Review’ (1994) 66(3) *Australian Quarterly* 49.

25 *Australian Constitution* s 128 (‘Constitution’).

majority *plus* majorities in four of six states is required for the Bill to be presented for royal assent.²⁶ Australians have voted in 44 referendums since Federation in 1901. Of these, only eight have resulted in constitutional amendments, the most recent being in 1977. Five further proposals achieved national majorities but failed to achieve majorities in at least four states.²⁷ The frequency of referendums has diminished in recent years. In the three decades since 1988, a year in which four proposals suffered decisive defeats, just two referendums have been held: the 1999 polls on the republic and preamble.

Referendums are pre-regulated in that their conduct is governed by a mix of constitutional and statutory rules.²⁸ The legal framework sets down rules on timing, question setting, and the franchise. A proposed amendment must be put to the people no sooner than two months, and no later than six months, after its passage through Parliament.²⁹ The *Referendum (Machinery Provisions) Act 1984* (Cth) ('*Referendum Act*') further provides that voting day must occur between 33 and 58 days after the issue of the referendum writ.³⁰ The question on the ballot paper is determined by Parliament and must take a certain form. Legislation requires that ballot papers present voters with the long title of the Bill that proposed the constitutional amendment, followed by the question: 'Do you approve this proposed alteration?'³¹ The franchise is defined as being identical to that which applies to federal elections: that is, citizens who have reached 18 years of age.³²

The *Referendum Act* also establishes rules that govern the administration of the poll, the voting process and the campaign. The task of administering a referendum is conferred on the AEC.³³ Voting is compulsory (failure to vote incurs a \$20 fine)³⁴ and, while attendance voting is the norm, postal ballots are made available to a limited class of electors.³⁵ Several provisions operate to protect ballot secrecy; for example, those attending polling places are to mark their vote in private, and

26 Ibid.

27 Australian Electoral Commission, 'Past Referenda Fact Sheet' (Web Page) <<https://www.aec.gov.au/Elections/referendums/files/past-referenda-fact-sheet.pdf>>.

28 *Constitution* (n 25) s 128; *Referendum (Machinery Provisions) Act 1984* (Cth) ('*Referendum Act*'). For a more detailed treatment than is possible here, see Graeme Orr, 'The Conduct of Referenda and Plebiscites in Australia: A Legal Perspective' (2000) 11(2) *Public Law Review* 117.

29 *Constitution* (n 25) s 128.

30 *Referendum Act* (n 28) s 9(2).

31 Ibid s 25, sch 1. 'A procedural reference to the "title" of a bill, without being qualified, may be taken to mean the long title': Department of the House of Representatives, *House of Representatives Practice* (7th ed, 2018) 344.

32 *Referendum Act* (n 28) s 4(1); *Commonwealth Electoral Act 1918* (Cth) s 93 ('*Commonwealth Electoral Act*').

33 *Referendum Act* (n 28) s 4(1); *Commonwealth Electoral Act* (n 32) s 7(1)(g).

34 *Referendum Act* (n 28) s 45.

35 Persons eligible for a postal vote include those who will not be near a polling booth on election day or are seriously ill: *ibid* sch 3. At the 2016 federal election, just over 1.2 million electors voted by post, accounting for about 8.5% of votes overall: Damon Muller, 'The 2016 Federal Election' (Research Paper, Parliamentary Library, Parliament of Australia, 30 August 2016).

officers and scrutineers have an obligation to observe secrecy.³⁶ The Act makes it an offence to engage in certain conduct, including multiple voting, bribery, and interference with the exercise of the vote.³⁷ The use of public funds to support campaign advocacy is prohibited, except in relation to the distribution of an official pamphlet and other, narrowly defined, exceptions.³⁸ It is an offence for campaigners to publish anonymous material or misleading statements about the process of voting.³⁹ Provision is made for the referendum result to be challenged in the High Court.⁴⁰

B Plebiscites

The term ‘plebiscite’ is not defined in law but is widely used in Australia to describe an advisory, optional vote on a policy issue.⁴¹ The initiation of a plebiscite is not governed by standing rules; in practice, the executive develops a proposal and then presents it to Parliament in the form of an enabling Bill.⁴² In the event that Parliament supports it, the proposed vote will go ahead.⁴³ Plebiscites are rare at the federal level. Just three have been held: two on compulsory military service in 1916 and 1917 (both narrowly defeated), and one on the national song in 1977 in which voters chose ‘Advance Australia Fair’ over three alternatives.⁴⁴ In each of these a simple majority was required for the proposal to be carried. Plebiscites may be held on a wide array of policy issues and, as noted above, the holding of the marriage survey has prompted calls for popular votes on a range of matters.⁴⁵ Unusually, the *Flags Act 1953* (Cth) requires that any change to the national flag must be approved at a plebiscite.⁴⁶

36 *Referendum Act* (n 28) ss 35, 116.

37 *Ibid* Pt X.

38 *Ibid* s 11(4).

39 *Ibid* Pt IX, s 122.

40 *Ibid* Pt VIII.

41 For detailed discussion of the legal status and conduct of plebiscites, see Paul Kildea, ‘The Constitutional and Regulatory Dimensions of Plebiscites in Australia’ (2016) 27(4) *Public Law Review* 290.

42 Among other things, an enabling Bill will seek parliamentary authorisation for plebiscite expenditure that will be required in most cases: *Williams v Commonwealth* (2012) 248 CLR 156; *Williams v Commonwealth* (No 2) (2014) 252 CLR 416.

43 See, eg, Plebiscite (Same-Sex Marriage) Bill 2016 (Cth). Notably, the Turnbull government also explored the idea of engaging the AEC, under s 7A of the *Commonwealth Electoral Act*, to conduct a commercial ballot on same-sex marriage that would, effectively, have operated as a voluntary attendance plebiscite. This approach risked constitutional invalidity, however, as it would have involved the executive government spending money on a commercial ballot without first obtaining parliamentary approval in the form of a supporting statute. See also Kildea (n 41) 299–301.

44 Parliamentary Library, *Parliamentary Handbook of the Commonwealth of Australia* (33rd ed, 2014) 379.

45 See above n 22 and accompanying text.

46 *Flags Act 1953* (Cth) s 3. Twomey argues that this requirement ‘is unlikely to be legally effective’ as the Commonwealth Parliament cannot impose limits on how it exercises its constitutionally-conferred legislative powers: Anne Twomey, ‘Constitutional Law: Plebiscites and Referenda’ (2015) 89(12) *Australian Law Journal* 832, 832.

In the absence of direct constitutional rules or standing legislation, plebiscites are the subject of ad hoc regulation.⁴⁷ New legislation must be enacted for each vote and this provides the government and legislature with an opportunity to set process rules without regard to pre-existing laws. The freedom enjoyed by these two branches should not be overstated. The executive's process preferences will form part of the enabling Bill and will thus be subject to the scrutiny and approval of the legislature. And, as occurred with the Turnbull's government's Plebiscite Bill, both the government and the legislature are likely to use the *Referendum Act* as a template for setting process parameters. Nonetheless, the ad hoc nature of regulation means that plebiscite rules may well vary across time or depart from those that apply under the *Referendum Act*. The Plebiscite Bill, for instance, departed from referendum laws by not providing for an official pamphlet and by requiring balance in broadcasting. Voluntary participation was introduced for the 1977 national song poll to cater to territory voters who, in contrast to their state counterparts, were not compelled to attend the polls for the four referendums held on the same day.⁴⁸ Such regulatory flexibility can help to foster sound process; on the other hand, it can also open the way for lawmakers to shape rules to their political advantage. For this reason, some have argued for the introduction of standing legislation to remove some of the ad hoc nature of current arrangements and provide a more stable environment for the conduct of plebiscites.⁴⁹

C Australian Marriage Law Postal Survey

The core characteristics of the AMLPS, viewed as a popular vote process, can be stated briefly. It was an advisory, optional vote on a policy issue. It was initiated by the executive alone. There was no decision-rule in place, but there was an understanding that a simple majority of survey responses would be sufficient for the proposal to be considered carried. The marriage survey was pre-regulated in the sense that it was governed by existing laws on statistics collection. These were, primarily, the *Census and Statistics Act 1905* (Cth) ('*Census and Statistics Act*'), which sets down arrangements for the taking of the Census and the collection of statistical information, and the *Australian Bureau of Statistics Act 1975* (Cth) ('*ABS Act*'), which establishes the ABS and prescribes its functions.⁵⁰ Among other legislation that applied to the AMLPS was the *Criminal Code Act 1995* (Cth) and its offence provisions relating to the use of the postal service.⁵¹ While these laws provided pre-regulation, Parliament later supplemented them with specific or ad hoc rules in the form of the *Marriage Law Survey (Additional*

47 Kildea (n 41).

48 See *ibid* for other examples of process variations.

49 *Ibid* 310.

50 For example, the collection and analysis of statistics: *Australian Bureau of Statistics Act 1975* (Cth) ss 5, 6 ('*ABS Act*').

51 *Criminal Code Act 1995* (Cth) div 471.

Safeguards Act 2017 (Cth) (*'Safeguards Act'*). That Act, as is explained below, sought to add some electoral law protections that were absent from the laws on statistics collection.

Three aspects of the AMLPS legal framework warrant closer consideration: the initiation power, regulations designed for statistics collection, and the manner in which those regulations affected the available modes of participation. Each of these distinguish the marriage survey process from the referendum and plebiscite.

1 Initiation

One of the more distinctive elements of the AMLPS process was the fact that the government initiated the poll unilaterally, by executive instrument. The Treasurer initiated the survey by exercising his authority under s 9(1)(b) of the *Census and Statistics Act*. This section provided that the Australian Statistician 'shall, if the Minister so directs by notice in writing, collect such statistical information in relation to the matters so prescribed as is specified in the notice'. The Treasurer issued the *Census and Statistics (Statistical Information) Direction 2017* (Cth) (*'Statistics Direction'*), which instructed the Statistician to collect statistical information about the proportions of electors who were in favour of, and against, the law being changed to allow same-sex couples to marry.⁵² The issuing of this Direction did not require the passage of an enabling Bill or any other form of parliamentary involvement.

The government's use of s 9(1)(b) to initiate a popular vote process was unprecedented and was almost certainly unanticipated by its architects. The Parliament first legislated for a ministerial power to direct the Statistician in 1905.⁵³ In its original form, the statute provided that the Statistician 'shall, subject to the regulations and the directions of the Minister, collect, at least annually, statistics in relation to all' or any of a list of 12 matters including population, employment and non-employment, and '[a]ny other prescribed matters'. In 1981, the Parliament enacted a series of amendments to consolidate the Act and strengthen privacy protections and, as part of this, it inserted s 9(1)(b) in its current form.⁵⁴ The Second Reading Speech and parliamentary debates of the time reveal little about the purpose of this power and Parliament's expectations about how it would be used.⁵⁵ Some members expressed concern that the list of topics on which statistics could be collected was too broad, while others worried it was

⁵² *Statistics Direction* (n 10) s 3(1).

⁵³ *Census and Statistics Act 1905–1973* (Cth) s 16, as enacted.

⁵⁴ *Census and Statistics Amendment Act (No 2) 1981* (Cth) s 10.

⁵⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 23 August 1905, 1384–6 (Littleton Groom); Commonwealth, *Parliamentary Debates*, House of Representatives, 3 October 1905, 3055–102; Commonwealth, *Parliamentary Debates*, Senate, 2 November 1905, 4494–510; Commonwealth, *Parliamentary Debates*, Senate, 3 November 1905, 4563–72.

too narrow; the provision otherwise received scant attention.⁵⁶ Nothing in that parliamentary record suggests that parliamentarians in 1905 or 1981 envisaged that this apparently modest provision on statistics collection might be used to conduct a process resembling a nationwide plebiscite.

The question of whether the Minister's power to direct the Statistician to 'collect ... statistical information' can support the initiation of a popular vote process arose in the course of a High Court challenge to the legality of the AMLPS.⁵⁷ In *Wilkie v Commonwealth* ('*Wilkie*'),⁵⁸ one set of plaintiffs argued that the *Statistics Direction*, 'as a matter of substance', did not instruct the Statistician to collect statistical information but instead directed him to 'conduct a postal vote' and, as such, was beyond power and invalid.⁵⁹ The Court dismissed this argument. It did not accept that a dichotomy could be drawn between a vote or plebiscite, on the one hand, and the collection of statistical information, on the other. The Court found that the only 'legally relevant' question was whether the *Statistics Direction* directed the collection of 'statistical information'; whether what was directed could also be described as a 'vote' or 'plebiscite' was 'irrelevant to its validity'.⁶⁰

The ability of the government to initiate the AMLPS on its own, without any direct input from Parliament, is a striking process feature. Its implications are considered in Part III.

2 Regulations Designed for Statistics Collection

As noted above, the AMLPS was governed primarily by legislation on statistics collection and a supplementary set of legislated safeguards. This was significant from a process perspective, as some elements that we associate with popular vote processes were either not covered by that regulatory framework or were addressed in ways quite different to the approach adopted in the *Referendum Act*. (To aid the reader in comparing the two regimes, Table 2 summarises key aspects of regulation under the *Referendum Act* and the survey laws.)

For instance, neither the *Census and Statistics Act* nor the *ABS Act* set down any rules about the conduct of marriage survey campaigning — although this gap was ultimately addressed in the *Safeguards Act*. This is not at all surprising when we

56 Compare, for example, the contributions of James McCay and William Knox: Commonwealth, *Parliamentary Debates*, House of Representatives, 3 October 1905, 3098 (James McCay), 3060 (William Knox). On the 1981 amendments, see Commonwealth, *Parliamentary Debates*, House of Representatives, 15 October 1981, 2133–4 (John Howard).

57 *Census and Statistics Act 1905* (Cth) s 9(1)(b) ('*Census and Statistics Act*').

58 *Wilkie* (n 20).

59 Andrew Damien Wilkie, 'Plaintiffs' Annotated Submissions', Submission in *Wilkie v Commonwealth*, M105/2017, 23 August 2017, 14 [64].

60 *Wilkie* (n 20) 545 [142] (emphasis added).

consider that the very idea of a survey ‘campaign’ is alien; campaign groups do not typically mobilise for the purpose of influencing responses to ABS surveys.⁶¹ The survey laws also provided no specific protection in relation to ballot secrecy and multiple voting, and established no mechanism for challenging the result.

Other gaps concerned rules on the timing of the vote, question setting, and eligibility to participate. In the absence of regulation, the executive decided these basic process matters; the Treasurer, through the vehicle of the *Statistics Direction*, determined when the marriage survey was held, what question was asked, and from whom information was collected.⁶² Notably, there was no formal opportunity for the legislature to scrutinise or overturn the government’s preferences on these matters: a direction to the Statistician, while a legislative instrument, is not subject to disallowance by either House of Parliament.⁶³ The significance of executive control of these matters is discussed in Part III.

A question that was left untested in 2017 is whether the term ‘statistical information’ in s 9(1)(b) of the *Census and Statistics Act* imposes limits on the Minister’s discretion over these basic procedural matters. Is it possible that a Minister could give instructions to the Statistician that altered the character of the process to the point where it could no longer be described as an exercise in collecting ‘statistical information’? It is arguable, for instance, that a Minister that required information to be collected in an unreasonably short timeframe, or that directed the asking of a misleading, loaded or unclear question, would be asking for the collection of information that is not ‘statistical’ in nature. If such a limit inheres in the term ‘statistical information’, the Minister’s power to determine basic process matters would have to be exercised within certain parameters.

One area in which the legal framework did impose a clear limit on the Turnbull government was the choice of topic for the survey. Under s 9(1)(b), the Minister may only direct the collection of statistics on prescribed matters. There are currently more than 50 matters prescribed by regulation (including broadly-framed topics like ‘cultural activities’, ‘education’, ‘health, health services and quarantine’ and ‘law’),⁶⁴ and in *Wilkie*, the High Court ruled that the government need only demonstrate a direct or indirect relationship between the information to be collected and the prescribed subject matter.⁶⁵ In 2017, the Treasurer framed his *Statistics Direction* as a request for statistics about ‘one or more of’⁶⁶ ‘[b]

61 The closest precedent may be the push made during the 2001 Census for Australians to identify their religion as Jedi, but even this was on a small-scale and lacked an opposing side: Australian Associated Press, ‘May the Farce Be with You’, *The Sydney Morning Herald* (online, 27 August 2002) <<https://www.smh.com.au/national/may-the-farce-be-with-you-20020827-gdfkvx.html>>.

62 See, eg, *Statistics Direction* (n 10) ss 3(3), 3(1), 3(4).

63 *Legislation (Exemptions and Other Matters) Regulation 2015* (Cth) reg 9 item 2.

64 *Census and Statistics Regulation 2016* (Cth) reg 13 (‘*Census and Statistics Regulation*’).

65 *Wilkie* (n 20) 546 [147].

66 *Statistics Direction* (n 10) s 3(1).

irths, deaths, marriages and divorces’, ‘[l]aw’, and ‘[p]opulation and the social, economic and demographic characteristics of the population’.⁶⁷ The High Court accepted that same-sex marriage was ‘plainly “in relation to”’ these three subject matters.⁶⁸

Table 2: Comparing standing laws for the referendum and the AMLPS

	Referendum <i>Australian Constitution + Referendum Act</i>	AMLPS <i>Census and Statistics Act + ABS Act</i>
Rules on timing?	Yes — legislature decides, subject to constraints	No — set by executive
Question	Set by legislature	Set by executive
Franchise (participants)	Same as for elections (citizens 18yo+)	Set by executive
Limit on topics?	Yes	Yes
Compulsory or voluntary voting?	Compulsory	Voluntary
Voting method	Multiple options available including voting at polling station	Postal
Campaign rules?	Yes	No (Addressed in <i>Safeguards Act</i>)
Prohibition against public funding of campaign advocacy?	Yes	No
Mechanism to challenge result?	Yes	No
Administering body	AEC	ABS

If the *Census and Statistics Act* and the *ABS Act* do not cover various matters that we associate with referendum regulation, they set down some rules that resemble standard electoral law protections. For instance, ABS officers are required to undertake an oath of fidelity and secrecy, and it is an offence for those officers to divulge or communicate collected information.⁶⁹ This goes some way to protecting the ‘secrecy’ of responses, or at least to safeguarding the privacy of respondents. It is also an offence for a person to make a statement in response

67 *Census and Statistics Regulation* (n 64) reg 13 items 5, 30, 38.

68 *Wilkie* (n 20) 546 [147].

69 *Census and Statistics Act* (n 57) ss 7, 19. In addition, these officers are bound by the Public Service Code of Conduct and its obligations to ‘behave honestly and with integrity’: *Public Service Act 1999* (Cth) s 13. Officers seconded to the ABS from other agencies and contractors are also bound by an oath of fidelity and secrecy.

to a request for statistical information that they know ‘is false or misleading in a material particular’;⁷⁰ and, in circumstances where a survey is administered by post, it is an offence to open someone else’s mail.⁷¹ These measures are capable of capturing conduct akin to multiple voting. The question of how effectively these and other survey regulations can replicate electoral protections is picked up in Part III.

The regulatory framework for the AMLPS was ultimately expanded to align more closely with the protections provided under the *Referendum Act*. On 13 September 2017, five weeks after the initiation of the survey, the Parliament passed the *Safeguards Act*. The purpose of the *Safeguards Act* was to ‘complement’ survey laws with additional measures ‘broadly consistent with safeguards which would apply in the context of a federal election’, and to ‘help ensure the integrity of [the] process’.⁷² For instance, the Act set down rules about campaigning (eg, on the authorisation of communications, and the publication of false and misleading material) and conduct related to the vote (eg, bribery and intimidation).⁷³ It also included provisions that had no equivalent in the *Referendum Act*, such as a requirement for broadcasters to be balanced in their coverage of the marriage survey,⁷⁴ and protections against hate speech.⁷⁵ The provisions of the Act applied for a limited period, ceasing to have effect upon the announcement of the survey result.⁷⁶ As I explain in Part III, the enactment of the *Safeguards Act* was welcome but demonstrated some of the risks of ad hoc lawmaking, including gaps, lack of timeliness, and reliance on the goodwill of government.

Another question that was not tested during the AMLPS was whether some provisions in the *Safeguards Act* exceeded the legislative competence of the federal Parliament. This is not something that is typically in doubt with respect to elections and referendums, as the High Court has described the power of the Commonwealth Parliament over its elections as ‘plenary’.⁷⁷ However, it is a question that arises for the *Safeguards Act* because this broad legislative power over elections is not available; instead, the Parliament must rely primarily on its

70 *Census and Statistics Act* (n 57) s 15.

71 *Criminal Code Act 1995* (Cth) ss 471.1(1), 471.3, 471.6(1), 471.7(1), 471.8.

72 Commonwealth, *Parliamentary Debates*, Senate, 13 September 2017, 7076 (Mathias Cormann).

73 *Marriage Law Survey (Additional Safeguards) Act 2017* (Cth) ss 6, 17, 13, 14 (‘*Safeguards Act*’).

74 Section 11 of the *Safeguards Act* required broadcasters to provide both sides with a ‘reasonable opportunity’ to air their views.

75 The Act made it unlawful for persons to vilify, intimidate or threaten harm to another person due their views on the survey question, or due to their ‘religious conviction, sexual orientation, gender identity or intersex status’: *Ibid* s 15.

76 *Ibid* ss 5, 27.

77 *Smith v Oldham* (1912) 15 CLR 355, 363 (Isaacs J); *Judd v McKeon* (1926) 38 CLR 380, 383 (Knox CJ, Gavan Duffy and Starke JJ). It is arguable that the Commonwealth’s legislative power over referendums is similarly broad, noting in particular the fact that s 128 of the *Constitution* provides that ‘the vote shall be taken in such manner as the Parliament prescribes’.

ability to make laws about ‘census and statistics’.⁷⁸ Provisions in the *Safeguards Act* designed to protect the integrity of the process (such as those making it unlawful to engage in bribery and intimidation) were arguably more closely connected⁷⁹ with the subject matter of ‘census and statistics’ than, say, the rules about authorisation of survey-related communications.⁸⁰ A close constitutional analysis of these matters is beyond the scope of this article; the point of raising the issue is to demonstrate a further difference between the regulatory frameworks for the referendum and the AMLPS.

3 Mode of Participation

The survey framework limited the Turnbull government’s options when it came to determining how people would participate in the AMLPS. In short, it led firmly to the conclusion that participation would be voluntary and by post. This stands in contrast to referendums, where compulsory, attendance voting has long been the norm, and to plebiscites, where it holds as the current norm despite variation in historical practice.

The *Census and Statistics Act* enables the holding of a compulsory survey. The Statistician has authority to direct a person to answer a survey question, and failure to comply with that direction is a strict liability offence that carries a penalty of one penalty unit, or \$210.⁸¹ However, where a survey is being run for the first time, Parliament must be given an opportunity to consider the merits of compulsion. The *ABS Act* requires that ‘each new proposal for the collection of information for statistical purposes by the Bureau shall be laid before both Houses of the Parliament before its implementation, unless the proposal is for the collection of information on a voluntary basis’.⁸² This requirement was introduced in 1975 to allow parliamentary oversight of the work of the ABS and, in particular, to ensure that the Bureau did not use its compulsion powers to undermine privacy and individual freedom.⁸³

The Turnbull government, therefore, could have mandated participation in the marriage survey, but only if it had put its plans before Parliament and subjected them to possible disallowance. The fate of the Plebiscite Bill suggested that any attempt to provide for mandatory participation would surely have been disallowed in the Senate. In any event, the episode demonstrated a participation constraint

78 *Constitution* (n 25) s 51(xi).

79 *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 492 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

80 *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55, 77 (Dixon CJ, McTiernan, Webb and Kitto JJ); *Burton v Honan* (1952) 86 CLR 169, 179 (Dixon CJ).

81 *Census and Statistics Act* (n 57) ss 11(2), 14; *Crimes Act 1914* (Cth) s 4AA.

82 *ABS Act* (n 50) s 6(3).

83 Commonwealth, *Parliamentary Debates*, Senate, 29 May 1975, 2062–3 (Gordon Davidson).

that applies to surveys but not to referendums and plebiscites.

Turning to available means of participation, the ABS *Surveys Charter* provides that it may conduct surveys face-to-face, over the telephone or by a form that is left with the respondent to be completed and returned at a later date.⁸⁴ For large-scale surveys, such as the AMLPS, the first two methods are impractical. This leaves the third method, which can be delivered either online or by hard copy.

Could the marriage survey have been conducted entirely online? The Census experience shows that online delivery is feasible: in 2016 the ABS adopted a 'digital-first' approach and, despite some difficulties (including the shutting down of the ABS website on Census night), 63.3% of people eventually completed their census online.⁸⁵ Nonetheless, the technological challenge of delivering an online survey to many millions of respondents, and the associated risks of security breaches and system failure, pointed strongly to a paper survey. This is especially the case when we consider how circumspect authorities have been towards online participation in the electoral space. In 2014, for instance, the Joint Standing Committee on Electoral Matters recommended against the expansion of electronic voting (including internet voting) at federal elections due to concerns that it would undermine the security, integrity and transparency of the ballot process.⁸⁶ Even New South Wales, which has embraced internet voting more than any jurisdiction in Australia, restricts it to certain classes of voters.⁸⁷

Bearing all of this in mind, a paper-based survey, distributed and returned by post, was the most practicable option for the delivery of the marriage survey. It was supplemented by small-scale telephone and online survey delivery (dubbed the 'paperless' method) for members of the electorate who, due to vision impairment, overseas travel or other circumstances were unable to complete a postal survey.⁸⁸

The above analysis of the legal framework governing surveys has illuminated some distinctive process features of the AMLPS compared to the referendum and plebiscite. The executive was able to initiate the marriage poll unilaterally; the legislative framework in many cases did not address basic elements of a popular vote process, and in other instances dealt with them very differently to established referendum rules; and a combination of legal and practical constraints led the government to adopt a form of survey participation (voluntary, by post) that differs markedly from the norm of compulsory, attendance voting at referendums and plebiscites.

84 Australian Bureau of Statistics, *Surveys Charter* (Catalogue No 1008.0, 5 May 2010) 4.

85 Australian Bureau of Statistics, *Annual Report: 2016–17* (Report, 19 October 2017) 3.

86 Joint Standing Committee on Electoral Matters, Parliament of Australia, *Second Interim Report on the Inquiry into the Conduct of the 2013 Federal Election: An Assessment of Electronic Voting Options* (Report, 18 November 2014) vi, 65–7.

87 *Electoral Act 2017* (NSW) s 152.

88 *Report on the Conduct of the AMLPS* (n 2) 15, 17, 19.

Having examined the legal regulation of the AMLPS and how it differed from the referendum and plebiscite, the article now turns to an evaluation of the marriage survey as a popular vote process.

III EVALUATING THE MARRIAGE SURVEY AS A POPULAR VOTE PROCESS

This Part evaluates the AMLPS process with respect to five considerations: balanced initiation procedure; suitable regulatory framework; equal participation; integrity of the voting process; and, effective administration. This framework draws on a review of both the literature on referendum process and international guidelines on the conduct of elections and referendums. Those guidelines include the *Code of Good Practice on Referendums* ('Code'), developed and adopted by the European Commission for Democracy through Law (better known as the Venice Commission),⁸⁹ the Inter-Parliamentary Union's *Declaration on Criteria for Free and Fair Elections*⁹⁰ ('Declaration') and International IDEA's handbook on direct democracy.⁹¹ The conclusion that I reach is that the marriage survey process had numerous shortcomings and that it should not be used as a template for future popular votes on policy issues.

Before turning to describe my evaluative criteria, it is important to acknowledge that the marriage survey, despite its process shortcomings, did manage to deliver some democratic benefits. In particular, it arguably brought three benefits commonly associated with popular vote processes: responsiveness,⁹² deliberation⁹³ and the provision of a circuit-breaker on a contested issue.⁹⁴ The survey enhanced democratic responsiveness by prompting lawmakers to change marriage laws to better reflect the preferences of citizens. Parliament had proven reluctant to act on the issue for some years despite public support for same-sex marriage having long been evident; the survey proved to be the event that precipitated a closer alignment between marriage laws and the views of citizens. The AMLPS also opened up a space for public deliberation on marriage. The

89 Council of Europe, European Commission for Democracy through Law (Venice Commission), *Code of Good Practice on Referendums*, Doc No CDL-AD(2007)008rev-cor, 70th plenary session, 16–17 March 2007.

90 Inter-Parliamentary Union, Inter-Parliamentary Council, *Declaration on Criteria for Free and Fair Elections*, 154th session, 26 March 1994.

91 International Institute for Democracy and Electoral Assistance, *Direct Democracy: The International IDEA Handbook* (2008) ('Direct Democracy').

92 On referendums and responsiveness, see Maija Setälä, 'Introduction' in Maija Setälä and Theo Schiller (eds), *Referendums and Representative Democracy: Responsiveness, Accountability and Deliberation* (Routledge, 2009) 1, 7–9.

93 On referendums and public deliberation, see Lawrence LeDuc, 'Referendums and Deliberative Democracy' (2015) 38 *Electoral Studies* 139; Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press, 2012) ch 7 ('Constitutional Referendums').

94 David Butler and Austin Ranney, 'Theory' in David Butler and Austin Ranney (eds), *Referendums Around the World: The Growing Use of Direct Democracy* (Macmillan, 1994) 11, 14–15; John Parkinson, *Deliberating in the Real World: Problems of Legitimacy in Deliberative Democracy* (Oxford University Press, 2006) 171.

survey received extensive media coverage, making it easy to access information and a range of perspectives, and prompted ‘kitchen table’ conversations in which different views were articulated and discussed among friends and family.⁹⁵ On the other hand, the staging of a campaign in some ways impeded an open-minded exchange of views, as evidenced by the circulation of harmful material, including homophobic pamphlets and social media posts.⁹⁶ Finally, the AMLPS made it possible to overcome a longstanding deadlock in the federal Parliament on marriage. This is consistent with the view that a popular vote can sometimes help to deliver an accepted outcome on an issue where elected representatives cannot reach agreement.⁹⁷

These benefits show that the decision to hold a popular vote did deliver some positive outcomes. Recognition of this fact should not, however, interfere with a clear-eyed assessment as to *how* that popular vote was conducted. Such an assessment is essential if we are to conduct future popular votes in a sound and defensible way. With this in mind, I turn now to explain my evaluative criteria, before proceeding to apply them to the marriage survey.

The existence of a *balanced initiation procedure* is a core process concern. Here we are interested in the circumstances in which a popular vote may be initiated and whether the ‘trigger power’ is shared or vested in a single pair of hands.⁹⁸ The ability to decide whether a referendum will be held is a ‘significant discretion’:⁹⁹ it enables the initiator to determine when the referral of a matter to the people is (or is not) justified, and brings with it the ability to hold popular votes for ‘political and tactical’ reasons rather than a genuine interest in promoting popular sovereignty.¹⁰⁰ Legal regulation of the initiation power varies: the law might control the circumstances in which political actors may hold a referendum (as is the case for constitutional referendums in Australia) or, at the other end of the spectrum, the law might be silent and therefore allow those actors to choose when to stage a popular vote.¹⁰¹ When it comes to who has authority to organise a referendum, the more common scenario is for the initiation power to be shared between the executive and the legislature. Even if sharing is not mandated by law it will often

95 Jason Om, ‘Same-Sex Marriage: Dad Was Disappointed I Was Gay. I Never Thought He’d Change His Mind and Vote Yes’, *ABC News* (online, 15 November 2017) <<https://www.abc.net.au/news/2017-11-15/same-sex-marriage-how-my-dad-changed-his-mind/9152518>>.

96 Will Woodward et al, ‘Homophobia Hits Home: Readers Expose Ugly Side of Same-Sex Marriage Campaign’, *The Guardian* (online, 13 September 2017) <<https://www.theguardian.com/australia-news/2017/sep/13/homophobia-hits-home-readers-expose-ugly-side-of-same-sex-marriage-campaign>>; Peter J Chen, ‘Civic Discourse on Facebook During the Australian Same-Sex Marriage Postal Plebiscite’ (2019) 54(3) *Australian Journal of Social Issues* 285.

97 Parkinson (n 94) 171.

98 Tierney, *Constitutional Referendums* (n 93) 108.

99 Ibid 105.

100 *Direct Democracy* (n 91) 195 [243]; Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (Yale University Press, 1984) 203.

101 Tierney, *Constitutional Referendums* (n 93) 105.

occur as a matter of practice, as where a government requires enabling legislation to proceed with a vote and so must ultimately work with the legislature.¹⁰² Where the trigger power is vested solely in the executive, however, this 'tends to set alarm bells ringing'¹⁰³ as it denies the legislature an opportunity to scrutinise the proposal for a popular vote and increases the scope for a government to stage a poll for political advantage.

Another important process question is whether there exists a *suitable regulatory framework* for holding a popular vote. There is no 'correct' legal framework for a popular vote and, across the globe, there is variation as to whether such rules are of a standing nature or are determined in relation to each specific referendum, how much of the process is left to executive discretion, and the level of detail with which process rules are expressed. In evaluating a regulatory framework for its suitability, one matter that requires particular attention is the degree of freedom that political actors in the executive and legislature have to shape how the process is conducted. International IDEA suggests that a middle ground should be sought:

A balance has to be found between a large amount of specific and detailed regulation, which may limit flexibility and transparency, and an almost complete absence of regulations, which may open the door to arbitrariness and even deliberate manipulation.¹⁰⁴

Tierney is of a similar mind: drawing on the UK experience, he sees value in the passage of a general referendum statute to curb executive discretion, but also supports the enactment of supplementary legislation to set down targeted rules for each new referendum.¹⁰⁵ The Code, on the other hand, is more prescriptive on this point. It sees stable referendum regulations as a necessary condition for achieving the key principles of universal, equal, free, and secret suffrage. The Code advises that, aside from technical matters of detail, referendum rules should be protected in either a statute or the constitution, and that fundamental aspects of referendum law should not be open to amendment within a year of a vote.¹⁰⁶

Equal participation is another important process consideration. While referendums offer the promise of political equality in the sense that each elector

102 Ibid 117.

103 Stephen Tierney, 'Direct Democracy in the United Kingdom' [2015] (October) *Public Law* 633, 637. Only a small number of democratic nations permit executive-initiated referendums. A 2007 study of 22 Western democracies found that France and Iceland were the only countries 'with constitutional provisions for a referendum at the initiative of the executive alone, without the necessary approval of parliament': Laurence Morel, 'The Rise of "Politically Obligatory" Referendums: The 2005 French Referendum in Comparative Perspective' (2007) 30(5) *West European Politics* 1041, 1052.

104 *Direct Democracy* (n 91) 197 [251].

105 Tierney, 'Direct Democracy in the United Kingdom' (n 103) 640–2.

106 *Code of Good Practice on Referendums* (n 89) pt II paras 2.a, 2.b. Among the matters considered 'fundamental' are the composition of electoral commissions or any other body responsible for organising the referendum, the franchise, the effects of the referendums, and rules about the use of broadcast media by Yes and No campaigners.

has an equal share of authority to exert over the outcome, that promise will not be met where voters face barriers to participation or are unable to exercise their choice freely. That is problematic, as inclusion is at the heart of democratic legitimacy; as Iris Marion Young writes: ‘The normative legitimacy of a democratic decision depends on the degree to which those affected by it have been included in the decision-making processes and have had the opportunity to influence the outcomes’.¹⁰⁷ Reidy and Suiter identify two elements of equal participation that are central to a referendum: ‘equality of opportunity for voters’ and ‘freedom to form an opinion’.¹⁰⁸ Various process factors might foster or hinder the realisation of these principles, including access to a polling station and other voting options, the use of public funds to support campaign advocacy, and regulation of spending by campaign groups.¹⁰⁹ Notably, international standards place strong emphasis on administrative neutrality, that is, the idea that the government should be precluded from using the power and resources of the state to influence the referendum outcome.¹¹⁰ Those standards also require balance in television and radio coverage and transparency in campaign funding, but are less prescriptive about the regulation of private expenditure.¹¹¹

The fourth consideration is the *integrity* of the voting process. In its most basic sense, ‘integrity’ refers to an absence of corruption, and here I am interested in the extent to which the AMLPS was vulnerable to ‘conduct intended to corrupt the process’ by which votes were cast and counted.¹¹² Activities that fall into this category include vote buying, voter intimidation and illegal voting (such as voting more than once).¹¹³ International standards set down a wide range of measures on integrity. The *Declaration on Criteria for Free and Fair Elections*, for instance, provides that nation states should take steps towards ensuring the integrity of the ballot ‘through appropriate measures to prevent multiple voting or voting by those not entitled thereto’ and to ‘[e]nsure the integrity of the process for counting votes’.¹¹⁴ Both the Declaration and the Code recognise the right to a secret ballot

107 Iris Marion Young, *Inclusion and Democracy* (Oxford University Press, 2000) 5–6.

108 Theresa Reidy and Jane Suiter, ‘Do Rules Matter? Categorizing the Regulation of Referendum Campaigns’ (2015) 38 *Electoral Studies* 159, 161.

109 Ibid 161–3; *Declaration on Criteria for Free and Fair Elections* (n 90) art 2(5). See also *Code of Good Practice on Referendums* (n 89) pt I para 3.2.a.ii.

110 *Code of Good Practice on Referendums* (n 89) pt I para 2.2.

111 *Direct Democracy* (n 91) 152–6; *Declaration on Criteria for Free and Fair Elections* (n 90) art 4(1). The Venice Commission requires that political party and referendum campaign funding be transparent: *Code of Good Practice on Referendums* (n 89) pt I para 2.2.g.

112 Craig C Donsanto, ‘Corruption in the Electoral Process Under US Federal Law’ in R Michael Alvarez, Thad E Hall and Susan D Hyde (eds), *Election Fraud: Detecting and Deterring Electoral Manipulation* (Brookings Institution Press, 2008) 21, 22–3.

113 Ibid 22.

114 *Declaration on Criteria for Free and Fair Elections* (n 90) art 4(2).

and require states to take steps to ensure that it is respected.¹¹⁵ Also important is the ability to make complaints about the electoral process, and to challenge the referendum outcome, before an independent and impartial authority such as an electoral commission or a court.¹¹⁶

The final consideration is *effective administration*. The importance of effective administration to fostering election legitimacy is widely accepted.¹¹⁷ As Elklit and Reynolds write, 'the quality of election administration has a direct and important impact on the way in which elections and their outcomes are regarded'.¹¹⁸ There is no reason to think that sound administration is any less important to popular vote processes.¹¹⁹ The body responsible for managing an election (and referendum) will ideally display several qualities including independence, impartiality and competence.¹²⁰ Where these qualities are absent, there is a risk that public confidence in the process will be damaged. The Code places strongest emphasis on impartiality, stipulating that '[a]n impartial body must be in charge of organising the referendum'.¹²¹ This is understandable given the importance of administrative neutrality in a process that asks voters to evaluate arguments for and against a proposition. But the other principles are also relevant to the referendum context; for instance, the absence of competence can inadvertently jeopardise impartiality.¹²²

A Balanced Initiation Procedure

The AMLPS did not possess a balanced initiation procedure. The power to trigger the survey rested solely with the executive and, as no enabling legislation was required, there was no practical need to secure the approval of the legislature. It was therefore immaterial that cross-party consensus for a popular vote was lacking, and that the primary rationale for the survey was to resolve internal government tensions over marriage. From a process perspective, there was no

115 Ibid art 2(7); *Code of Good Practice on Referendums* (n 89) pt I paras 4.a–4.c. The secret ballot requirement is also enshrined in the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 21 and in the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 25.

116 *Declaration on Criteria for Free and Fair Elections* (n 90) art 4(9); Guy S Goodwin-Gill, *Free and Fair Elections: New Expanded Edition* (Inter-Parliamentary Union, 2006) 157; *Code of Good Practice on Referendums* (n 89) pt II paras 3.3.a, 3.3.e.

117 Robert A Pastor, 'The Role of Electoral Administration in Democratic Transitions: Implications for Policy and Research' (1999) 6(4) *Democratization* 1; Jørgen Elklit and Andrew Reynolds, 'Judging Elections and Election Management Quality by Process' (2005) 41(3) *Representation* 189; Pippa Norris, *Why Elections Fail* (Cambridge University Press, 2015) ch 6.

118 Elklit and Reynolds (n 117) 189. See also Pastor (n 117) 6.

119 İlker Gökhan Şen, *Sovereignty Referendums in International and Constitutional Law* (Springer, 2015) ch 7.

120 International Institute for Democracy and Electoral Assistance, *Electoral Management Design* (International IDEA, rev ed, 2014) 21–4; Goodwin-Gill (n 116) 120–6.

121 *Code of Good Practice on Referendums* (n 89) pt II para 3.1.a. See also *Declaration on Criteria for Free and Fair Elections* (n 90) art 4(2); Goodwin-Gill (n 116) 120–6.

122 *Electoral Management Design* (n 120) 24; Maley (n 12).

curb on executive discretion to initiate the survey.

In this way the survey, as a device, leaves the government free to refer a policy issue to the people whenever it perceives that a direct vote will serve its internal party dynamics, policy preferences, electoral prospects or other political interests. This is considerably more influence than the executive wields with respect to referendums and plebiscites where it drives the initiation of a vote, but its preference is ultimately subject to parliamentary override. That check is significant, as it prompts a government to build cross-party consensus on the need for an issue to be referred to the people for their advisory opinion.¹²³ The survey device provides no such incentive, and thus frees the government from having to formulate a coherent rationale that is capable of being accepted by a majority of lawmakers.

The executive's control over initiation raises a wider issue about the alignment between the survey device, when used as the basis of a popular vote process, and Australia's tradition of representative democracy. In the short-term, this use of surveys risks opening up a rift between the public and the Parliament. Where a government, against the wishes of the legislature, puts a proposal to the people by way of a survey *and* that proposal is supported by a majority of respondents, it will often fall to that same legislature to give effect to the result by enacting legislation. This puts the Parliament in a difficult position. To illustrate the point, we might imagine a future government pushing ahead unilaterally with a survey on climate targets or immigration levels and then looking to a disapproving legislature to implement an affirmative outcome. Lawmakers would then face a choice: do they enact a legislative change with which they disagree, or do they honour the popular will as expressed through the survey? This type of conflict, between the people and their political representatives, was navigated relatively easily in 2017, but in other instances it could prove difficult to resolve.

In the longer term, the executive's ability to unilaterally hold popular votes on policy issues is a potentially destabilising force in Australia's representative democracy. It empowers the executive to choose when to give the people an influential, and perhaps decisive, say over policy decisions that would otherwise be a matter for Parliament alone. Of course, the federal government has long been able to consult the people through plebiscites and has proven to be restrained in its use of them, so it would be premature to predict an imminent rush of popular vote surveys. Nonetheless, the executive now has a tool that enables it to toggle between representative and popular vote processes depending on what best serves its interests, as opposed to a coherent philosophy, or agreed public position, about when popular votes are warranted.

¹²³ An exception arises in the rare case of a government holding a majority in both Houses. This last occurred under the Howard government in the period 2005–07: Harry Evans, 'Constitutionalism, Bicameralism, and the Control of Power' (Papers on Parliament No 50, Parliament of Australia, March 2010).

B Suitable Regulatory Framework

The AMLPS receives a mixed report card on the question of whether it was governed by a regulatory framework that balanced flexibility against the need to curb the discretion of political authorities. Certainly, it could not be said that the marriage survey took place amidst a ‘complete absence of regulations’.¹²⁴ As outlined in Part II, the survey was conducted according to a set of established rules in the *Census and Statistics Act* and the *ABS Act*. Overall, though, the AMLPS framework was insufficiently prescriptive, leaving too many important matters to be decided by the executive in the absence of parliamentary oversight, or through a process of ad hoc lawmaking. This is not surprising given that these survey laws were designed to regulate the collection of statistical information, not the casting and counting of votes in a referendum-like process.

In defence of the AMLPS, it can be argued that both the government and the Parliament took steps to craft a sound process. The Turnbull government gave voters and campaigners a generous amount of time to complete their survey forms and present their arguments; it drafted a survey question that was clear and straightforward and had been considered by lawmakers during debate over the Plebiscite Bill;¹²⁵ and it defined the respondent group so that it mirrored the election franchise.¹²⁶ Further, the government and the Parliament worked together to enact the *Safeguards Act*, which filled in many of the regulatory gaps in the survey framework. In some ways this is not so dissimilar to what occurs with plebiscites: in the absence of standing legislation of the kind that applies to constitutional referendums, the Parliament must agree on process rules in the course of enacting enabling legislation.

In other respects, though, the marriage survey experience demonstrated the risks of a flexible regulatory framework. Although the need for supplementary regulation was identified early, Parliament moved slowly: the new safeguards were not enacted until five weeks after the announcement of the marriage poll and, as such, did not apply to the early weeks of the campaign, nor to the first two days of the mailout.¹²⁷ To take one concrete example, the distribution of anonymous material was not regulated during this period. There were numerous reports of the circulation of anonymous pamphlets containing misleading and hurtful claims, but neither the ABS nor AEC possessed authority at that time to contact transgressors and instruct them to provide appropriate authorisation.¹²⁸ A

¹²⁴ *Direct Democracy* (n 91) 197.

¹²⁵ Plebiscite (Same-Sex Marriage) Bill 2016 (Cth) s 5(2) (‘Plebiscite Bill’).

¹²⁶ *Statistics Direction* (n 10) s 3(4).

¹²⁷ *Safeguards Act* (n 73) s 2. This delay was caused, in part, by the *Wilkie* litigation. Parliament waited for the High Court’s decision in this matter before proceeding with the safeguards law.

¹²⁸ Woodward et al (n 96).

further difficulty with the *Safeguards Act* was that it contained gaps of its own and showed signs of being rushed — it was, after all, introduced, debated and passed in a single day. The Act failed, for instance, to address legitimate concerns about ballot secrecy (an issue that is picked up below). And it is concerning that members of Parliament applied so little scrutiny to basic integrity matters, such as secrecy, ballot security and a process for challenging the result.

Moreover, the relatively benign use of executive discretion over regulation needs to be put in context. As noted, the government's primary aim in 2017 was not victory for a particular position (Yes/No) but was instead the resolution of internal government tensions. As such, the mere conduct of the poll served the government's interests. This fact, combined with the absence of a single government standpoint on same-sex marriage, reduced any incentive the government might have had to manipulate procedural matters to deliver a favoured outcome. Had the incentives lined up differently, the government would have been free to tweak the process in its favour and, if it wished, could have decided to press ahead without enacting supplementary safeguard laws. We can contrast these circumstances with those that apply to a plebiscite, where the executive government relies on Parliament's cooperation (in the form of an enabling law) to proceed with the vote, such that process rules must be negotiated and cannot be ignored.

In short, the legal framework that applied to the AMLPS was not suitable as it left important matters entirely in the hands of the executive government and, despite the enactment of supplementary safeguards, failed to address some matters that we would expect to be regulated in a popular vote process.

C Equal Participation

The key question with respect to the first dimension of equal participation — an equal opportunity to participate — is whether the unusual adoption of an all-mail process (supplemented by 'paperless options' for certain groups)¹²⁹ fostered or impeded access to the ballot. Overall, the heavy reliance on postal voting did not present a significant barrier to access. However, there remain questions about levels of participation in rural and remote areas.

The ABS decided to conduct the survey by post, rather than online, after concluding that it would better foster participation and fast responses.¹³⁰ This conclusion seems intuitive, in that many people find participation by post straightforward and convenient. The ABS's assessment is also in line with some studies that suggest that all-mail votes can increase turnout, at least in

¹²⁹ *Report on the Conduct of the AMLPS* (n 2) 15.

¹³⁰ *Ibid.*

jurisdictions that practice voluntary voting.¹³¹ The use of an all-mail process is uncommon in Australia but not without precedent: in 1997, the election of delegates to the Constitutional Convention was conducted entirely by mail,¹³² and local government elections in South Australia and Tasmania are also by post.¹³³ Nonetheless, the postal dimension of the AMLPS is worthy of scrutiny given that it departs from ordinary practice in referendums and plebiscites, where a mix of modalities is offered, including voting at a polling station.

One indication that the AMLPS provided voters with an equal opportunity to participate was the high turnout. As noted, 79.5% of eligible people returned their survey form, exceeding the turnout recorded for the Constitutional Convention postal ballot (46.93%).¹³⁴ By comparison, 91% of electors voted at the 2016 federal election, while 95.1% of eligible people voted in the most recent constitutional referendum in 1999, both of which featured compulsory voting and multiple voting options.¹³⁵ Clearly, many Australians were able to participate in the marriage survey despite the adoption of an all-mail process.

One risk with postal voting is that it can disadvantage young people, who tend to move address relatively frequently and are therefore less likely to receive ballot papers.¹³⁶ This risk does not seem to have been borne out in the marriage survey. The response rate among young people was below the national average — it was 72.4% among 20–24 year olds, and 71.9% among those in the 25–29 year old bracket (the lowest of any age group) — but this is in line with research on the voting patterns of this age cohort. Notably, the youngest group of eligible persons (those aged 18–19 years) participated at a rate close to the average (78.2%), perhaps reflecting enthusiasm for the issue and, for some, the opportunity of voting for the first time.¹³⁷

Another risk with postal voting is that it can disenfranchise voters who live in rural and remote areas with unreliable post services.¹³⁸ For the marriage survey,

131 See generally Toby James, 'Electoral Administration and Voter Turnout: Towards an International Public Policy Continuum' (2010) 46(4) *Representation* 369, 373–4.

132 Antony Green, 'The Constitutional Convention Election' in John Warhurst and Malcolm Mackerras (eds), *Constitutional Politics: The Republic Referendum and the Future* (University of Queensland Press, 2002) 29.

133 Ryan Goss, 'Voting Rights and Australian Local Democracy' (2017) 40(3) *University of New South Wales Law Journal* 1008, 1019–20.

134 *Report on the Conduct of the AMLPS* (n 2) 3; John Warhurst, 'From Constitutional Convention to Republic Referendum: A Guide to the Processes, the Issues and the Participants' (Research Paper No 25, Parliamentary Library, Parliament of Australia, 29 June 1999) 7.

135 Muller (n 35) 3; '1999 Referendum Report', *Australian Electoral Commission* (Web Page, 24 October 2012) <https://www.aec.gov.au/elections/referendums/1999_referendum_reports_statistics/index.htm>.

136 See Green (n 132).

137 Australian Bureau of Statistics, 'Australian Marriage Law Postal Survey: Participation', *ABS.Stat* (Web Page, 11 December 2017) <http://stat.data.abs.gov.au/Index.aspx?DataSetCode=AMLPS_PART_2017> ('AMLPS: Participation').

138 Australian Government, *Electoral Reform Green Paper: Strengthening Australia's Democracy* (Consultation Paper, September 2009) 164.

response rates were lower in some of the more remote regions of the country. Among the five electorates that recorded the lowest response rates, four were rural¹³⁹ — Lingiari (50.1%), Leichhardt (67.8%), Durack (67.9%) and Kennedy (70.5%) — and the sparsely populated Northern Territory recorded the lowest turnout of any jurisdiction (58.4%).¹⁴⁰ By contrast, the highest participation rates were recorded in inner metropolitan electorates. Having said that, many of these same rural and remote areas record below average turnout for federal elections, and it is difficult to reach firm conclusions in the absence of a recent national, voluntary poll capable of serving as a meaningful comparator. Given that, it is not possible to conclude with any confidence that the absence of alternative voting options (such as attendance voting and mobile voting) impacted survey participation in rural and remote Australia.

Turning to the second dimension of equal participation — freedom to form an opinion — I am interested in the extent to which the AMLPS framework regulated the use of public and private funds in the campaign. This aspect of the marriage survey is rather straightforward, as neither the ordinary survey laws nor the *Safeguards Act* imposed any limits on campaign finance. The absence of any prohibition on government advocacy is notable given that the Commonwealth is, with some limited exceptions, prohibited by law from spending money promoting arguments for or against referendum proposals.¹⁴¹ That particular limitation is arguably *more* necessary in a process such as the AMLPS where the executive alone holds the trigger power. The fact that the survey imposed no restrictions on private campaign finance is consistent with the *laissez-faire* approach adopted for referendums and elections.

The survey framework therefore left it open to both state and private actors to spend lavishly and interfere with voters' freedom to reach an opinion on marriage. Ultimately, the Turnbull government did not exploit its financial freedom to bankroll one side or the other. This is not surprising given that ministers lacked a uniform position on same-sex marriage. The absence of restrictions on private finance was more noticeable. Media reports suggest that both sides benefited from large donations. For instance, Qantas CEO Alan Joyce donated \$1 million to the Yes side, while the Archdiocese of Sydney gave the same amount to the No campaign.¹⁴² Australian Marriage Equality benefited from in kind gifts from

139 Here I adopt the AEC's electorate classifications: 'Maps and Spatial Data', *Australian Electoral Commission* (Web Page, 16 February 2021) <<https://www.aec.gov.au/Electorates/maps.htm>>.

140 AMLPS: Participation (n 137).

141 *Referendum Act* (n 28) s 11(4).

142 Siobhan Kenna, 'Qantas CEO Alan Joyce Donates \$1 Million to "Yes" Same-Sex Marriage Campaign', *Huffington Post* (online, 13 September 2017) <https://www.huffingtonpost.com.au/2017/09/12/qantas-ceo-alan-joyce-donates-1-million-to-yes-same-sex-marriage-campaign_a_23206762/?ec_carp=1822989285492631490>; Rachel Browne, 'Anglican Diocese of Sydney Donates \$1 Million to Oppose Same-Sex Marriage', *The Sydney Morning Herald* (online, 10 October 2017) <<https://www.smh.com.au/national/nsw/anglican-diocese-of-sydney-donates-1-million-to-oppose-samesex-marriage-20171010-gyxj6p.html>>.

the City of Sydney council (such as free office space and mailouts) and SMS Broadcast (the distribution of 10 million SMS messages urging a Yes vote).¹⁴³ We cannot know the full picture as campaign participants have not released financial returns, and nor were they required to do so.

In summary, the AMLPS process was mostly effective at fostering an equal opportunity to participate, despite concerns that an all-mail ballot would preclude access for some people. However, the survey's permissive approach to campaign finance left it vulnerable to the influence of well-resourced actors and in this way, it failed to protect the freedom of voters to form an opinion.

D Integrity

In many respects the AMLPS was conducted with high levels of integrity. The ABS put in place a range of measures to ensure, among other things, the accurate counting of responses, the detection of fraudulent activity, the security of data, and the separation of a voter's response from their personal information.¹⁴⁴ And, looking at the survey as a whole, both sides accepted the result and neither side called into question the integrity of the process.

There are nonetheless two areas where the AMLPS process fell short of integrity standards: the use of an all-mail process, which jeopardised ballot secrecy and created potential for fraudulent activity; and the absence of a mechanism to challenge the survey outcome. It is important that these two areas be acknowledged, as they point to underlying shortcomings that derive from the use of a survey instrument to conduct a referendum-like process.

1 The Use of an All-Mail Process

The use of an all-mail process rendered the AMLPS susceptible to activities capable of corrupting the voting process. While it is unreasonable to expect any electoral process to be entirely free of such activity, the design of the AMLPS increased its vulnerability.

It is widely understood that the use of postal voting makes it virtually impossible to guarantee ballot secrecy and that this, in turn, brings an increased susceptibility

143 Michael Koziol, 'City of Sydney to Grant Gay Couples Free Weddings if Same-Sex Marriage Legalised', *The Sydney Morning Herald* (online, 23 October 2017) <<https://www.smh.com.au/politics/federal/city-of-sydney-to-grant-gay-couples-free-weddings-if-samesex-marriage-legalised-20171023-gz6l3c.html>>; Ben Grubb, 'SMS Company's \$500k Gift Boosted "Yes" Campaign in Same-Sex Marriage Push', *The Sydney Morning Herald* (online, 16 November 2017) <<https://www.smh.com.au/technology/sms-companys-500k-gift-boosted-yes-campaign-in-same-sex-marriage-push-20171116-gzmgj6.html>>.

144 *Report on the Conduct of the AMLPS* (n 2) ch 11.

to electoral fraud and undue influence.¹⁴⁵ This makes sense when we consider that electors at polling stations collect, mark, and deposit their ballots under the supervision of independent electoral officials, while postal votes are recorded in unofficial, unsupervised settings.¹⁴⁶ Once the ABS settled on a postal ballot, this threat to its integrity was inescapable. The ABS sought to address integrity concerns by assigning a unique barcode to each survey form; when officials received a completed form, they scanned the barcode and then transferred the form to counting officials.¹⁴⁷ While this measure ensured that counting officials had no way of connecting a form to a specific individual, and thus protected the privacy of respondents, it did nothing to ensure secrecy during the act of voting, and was not capable of detecting or deterring coercion or vote-buying. A more robust measure, employed for postal voting at federal elections, would have asked voters to mark their survey response in the presence of an authorised witness and further asked them to provide an answer to a security question that they previously specified on their postal ballot application form.¹⁴⁸ This measure was not adopted for the AMLPS, and it is difficult to imagine such a requirement being mandated for an all-mail ballot involving 16 million electors.

The Parliament sought to address these integrity vulnerabilities through the *Safeguards Act*. The Act made it an offence to engage in bribery or intimidation to influence either the content of a person's marriage survey response, or a person's decision on whether to respond.¹⁴⁹ The passage of these supplementary measures was welcome, but could never be a complete response to the possibility of coercion in an all-mail process. As Elklit and Maley acknowledge, legal regulation is unlikely to protect voters from the sorts of pressures that 'fall into something of a gray area between illegal coercion and legitimate persuasion', such as those that are exerted within families.¹⁵⁰

The use of an all-mail process also enhanced the risk of multiple voting — that is, of individuals completing and returning more than one survey form. In a mass postal process, even one conducted with great care, it is inevitable that some ballot papers will not reach their intended recipients. They might be sent to the wrong address, left in unsecure locations or deliberately intercepted. Other ballot papers that are successfully delivered, but into the hands of an uninterested elector, may be left lying around. The opportunities for wrongdoing are obvious, ranging

145 Sarah Birch and Bob Watt, 'Remote Electronic Voting: Free, Fair and Secret?' (2004) 75(1) *Political Quarterly* 60, 69–71; Gerry Newman, 'Analysis of Declaration Voting' (Research Paper No 3, Australian Electoral Commission, June 2004) 11.

146 Jørgen Elklit and Michael Maley, 'Why Ballot Secrecy Still Matters' (2019) 30(3) *Journal of Democracy* 61, 69.

147 *Report on the Conduct of the AMLPS* (n 2) 45.

148 *Commonwealth Electoral Act* (n 32) s 194(1); *Referendum Act* (n 28) s 65(1). The postal vote application form can be accessed at <<https://www.aec.gov.au/Elections/files/pva-form.pdf>>.

149 *Safeguards Act* (n 73) ss 13–14.

150 Elklit and Maley (n 146) 66.

from the opportunistic completion of an extra survey form, to the submission of batches of forms.

For the AMLPS, the measures adopted to counter multiple voting were both administrative and regulatory. The unique barcode on each survey form potentially dissuaded both survey theft and multiple voting. A person who knew or suspected that their form had been stolen and/or completed by somebody else could request another form and any prior response recorded against that person's barcode was invalidated.¹⁵¹ This worthwhile measure did not, however, offer any assurance that the identities of the recipient and completer of the form were the same, nor that it was the recipient's voting intention that was recorded.¹⁵² As to regulatory measures, the completion of multiple forms was covered by the *Census and Statistics Act*: as noted in Part II, it renders it unlawful to make a false or misleading statement, and this arguably captured the completion and submission of another person's survey form.¹⁵³

Notwithstanding these measures, the AMLPS saw numerous reports of insecure ballots. Some forms were sent to an address at which the intended recipient was no longer resident, others were apparently stolen, and whole piles of forms were found dumped outside apartment blocks or left out in the rain.¹⁵⁴ The ABS concluded that these were isolated incidents that did not affect the outcome of the survey. It found that 'issues reported to the ABS accounted for fewer than 500 individual survey forms (less than 0.0032 per cent of over 16 million forms issued)' and that there were 'no known incidents of fraudulent responses being counted in the survey'.¹⁵⁵ A Senate committee tasked with reviewing the conduct of the marriage survey reached a similar conclusion.¹⁵⁶

The conclusions of the ABS and the Senate committee are reassuring to some degree, but ultimately it is not possible to know the extent to which the reported incidents were indicative of a wider problem. We cannot know how many survey

151 *Report on the Conduct of the AMLPS* (n 2) 18.

152 Judith Brett, 'A Travesty of Process', *The Monthly* (online, November 2017) <<https://www.themonthly.com.au/issue/2017/november/1509454800/judith-brett/travesty-process>>.

153 *Census and Statistics Act* (n 57) s 15. Also relevant is the fact that it is a criminal offence to open someone else's mail, so anyone engaged in the deliberate interception of another person's survey form risks prosecution: *Criminal Code Act 1995* (Cth) s 471.1.

154 Bob Gosford, 'I Could've Committed Voter Fraud in the Marriage Equality Postal Vote', *Crikey* (online, 18 September 2017) <<https://www.crikey.com.au/2017/09/18/i-couldve-committed-voter-fraud-in-the-gay-marriage-postal-vote>>; Andrew Brown, 'Same-Sex Marriage Postal Survey Forms Sent to Dead People in Canberra', *The Canberra Times* (online, 23 September 2017) <<https://www.canberratimes.com.au/national/act/samesex-marriage-postal-survey-forms-sent-to-dead-people-in-canberra-20170920-gyl7e4.html>>; Kate Mani and Robyn Grace, 'Second Pile of Same-Sex Marriage Surveys Found Dumped in Melbourne Laneway', *The Sydney Morning Herald* (online, 19 September 2017) <<https://www.smh.com.au/national/second-pile-of-samesex-marriage-surveys-found-dumped-in-melbourne-laneway-20170919-gyklh2.html>>; James Fettes and Jordan Hayne, 'SSM Postal Surveys Left Out in the Rain, Damaged at Canberra Apartments', *ABC News* (online, 16 September 2017) <<https://www.abc.net.au/news/2017-09-16/same-sex-marriage-postal-surveys-left-out-in-the-rain/8952156>>.

155 *Report on the Conduct of the AMLPS* (n 2) 45.

156 *Arrangements for the Postal Survey* (n 17) 34, 42.

forms failed to reach their intended recipients,¹⁵⁷ nor how many of those forms were filled out by persons engaged in opportunistic or organised multiple voting. Much of that conduct, by its very nature, will go undetected. Similarly, we cannot know the extent to which ballot secrecy was breached, including through more subtle forms of persuasion exercised in the home. Ultimately, the administrative and regulatory measures adopted for the AMLPS were not capable of ameliorating the integrity challenges presented by a voluntary postal ballot. The public cannot have the same level of confidence in the integrity of a postal survey as it might in a referendum or plebiscite in which most ballots are collected and submitted at a supervised polling place.

2 No Mechanism for Challenging the Result

The AMLPS also fell short against integrity standards by failing to provide an avenue for challenging the result in a court or before any other body. Indeed, there was no ‘result’ to be challenged — as the marriage survey was formally a statistical exercise, its outcome was merely the publication of information. In short, there is no equivalent of a ‘disputed returns’ process for a survey.¹⁵⁸ By contrast, the Commonwealth, States and Territories and the AEC have standing to petition the High Court to dispute the validity of a referendum, and the Court may declare a referendum to be void where the result is shown to have been affected by certain conduct, such as breaches of the *Referendum Act*.¹⁵⁹ The same arrangement was enshrined in the Turnbull government’s Plebiscite Bill.

It might be objected that successful petitions are rare because referendum results are seldom decided by margins so small that instances of misconduct or administrative error could reverse the outcome. But the ability to challenge a result is nonetheless important to the integrity of a popular vote process. It provides a formal means of ensuring that illegal practices may not sway the result, and acts as a mild deterrent to those who might engage in such conduct.

The absence of a disputed returns mechanism did not prove problematic for the AMLPS. The survey recorded a clear majority of responses in favour of same-sex marriage and neither side objected to the outcome. But, in the interests of appreciating the underlying weaknesses of the survey as a popular vote process, it is worth considering what might have occurred in the event of a close result.

157 Undoubtedly some electors, having not received their form, would have reported this to the ABS — but, equally, others may not have done so.

158 *Referendum Act* (n 28) pt VIII. In undertaking research for this article, I was unable to find any instances of ABS statistics being challenged in a court or tribunal. The AMLPS did feature processes for individuals to make complaints to the ABS, AEC and other responsible agencies about the general conduct of the survey: *Report on the Conduct of the AMLPS* (n 2) 50; *Arrangements for the Postal Survey* (n 17) 30–2.

159 *Referendum Act* (n 28) ss 103(2), 103(4), 108. This applies to plebiscites where the Parliament requires it. The Turnbull government’s Plebiscite Bill invested the High Court with authority to hear petitions challenging the result: Plebiscite Bill (n 125) ss 26–8.

Had the marriage survey turned on a few hundred responses, claims about various illegal practices — such as individuals filling out and returning multiple survey forms — would have taken on new significance. Under the survey's legal framework, authorities could have pursued the perpetrators of these acts, but there would have been no avenue for potential litigants to argue that the outcome was affected by those unlawful activities and should therefore be overturned. Even if evidence had been produced to show that a group mobilised to retrieve hundreds of uncollected survey forms from letterboxes and filled them out, there would have been no prospect of petitioning a court to have the result overturned on that basis. Instead, the dispute over the survey outcome would have been staged in the political arena, likely in the form of a fierce debate, inside and outside Parliament, over the legitimacy of the published statistics and their reliability as an indicator of community opinion. Such a debate would almost certainly have turned a spotlight on the various process shortcomings examined in this article, including the degree of executive control and the use of an all-mail ballot. The probable outcome of this dispute would have been a refusal by the 'losing' side to accept the survey outcome. Had this occurred, it is difficult to see how the survey result could have legitimately informed Parliament's lawmaking on same-sex marriage.

In short, the absence of a mechanism for challenging the result did not prove problematic for the AMLPS, but it is a design flaw that could threaten the legitimacy of any popular vote process in which voter preferences are evenly divided and a close result is recorded.

E Effective Administration

The AMLPS, by its very nature, raised questions about effective administration. It charged a statistical authority (the ABS) with responsibility for administering a referendum-like process.¹⁶⁰ This was a major departure from ordinary practice in which the AEC fills this function, in line with its specialisation in providing professional, independent electoral administration.¹⁶¹ And the ABS, notwithstanding its long experience in conducting the five-yearly Census and collecting statistical information on demographic, economic, environmental and social issues, had no history of delivering popular vote processes. The closest precedent was a 1974 telephone survey of 60,000 Australians in which the ABS asked people for their preferences on the national anthem, but that was a far more modest exercise in terms of topic, reach and logistics. The ABS itself described the marriage survey as 'a unique undertaking in ABS history', an event with 'no

¹⁶⁰ The ABS's purpose is 'to inform Australia's important decisions' by delivering high quality statistics: *ABS Annual Report: 2017–18* (n 11) 11.

¹⁶¹ *Commonwealth Electoral Act* (n 32) s 7; *Referendum Act* (n 28); Australian Electoral Commission, *2019–2023 Corporate Plan* (Report, 2019) 2–4.

precedents or roadmaps; [we] had to start from scratch'.¹⁶²

The ABS was, in some respects, well placed to provide effective administration for the AMLPS. Certainly, it can claim to be independent, impartial and competent with respect to its core business of statistics collection.¹⁶³ Moreover, it could confidently assume responsibility for those aspects of the AMLPS that involved statistics collection, and it promoted itself as the lead agency in charge of the process. But the conduct of the AMLPS required additional skills and expertise and, as such, the ABS lacked competence to deliver the survey on its own. It was ultimately highly dependent on other agencies to get the job done: almost 30 different government departments and agencies were involved, and a designated Taskforce, comprising up to 500 staff, was established.¹⁶⁴ All electoral events require inter-agency coordination, but not to the degree evident during the marriage survey.

The most important partner organisation was the AEC. Its involvement was central to and, in some respects, legally required for, the effective administration of the AMLPS. Most critically, the AEC was responsible for ensuring that an accurate and up-to-date electoral roll was available for the marriage survey. This was necessary as the *Statistics Direction* specified that statistical information was to be collected from 'electors'.¹⁶⁵ There are a few more important tasks in electoral administration, ensuring as it does that persons who are eligible to vote can do so, and it is beyond the legal competence of the ABS. It also proved to be an immense undertaking in the lead up to the survey: prior to the close of the rolls, the AEC processed more than 900,000 enrolment transactions.¹⁶⁶ The need for AEC cooperation continued after the enrolment deadline. The ABS does not have a statutory right to access the electoral roll; in order to use the roll as a record of eligible participants, and to begin posting out survey forms to electors, the ABS had to request the AEC's permission to access the names and addresses on the roll.¹⁶⁷ Even then, the AEC remained responsible for organising the delivery of survey forms to approximately 120,000 silent electors; the ABS was not in a position to do this, as legislation prevents the AEC from disclosing information

162 *ABS Annual Report: 2017–18* (n 11) 4.

163 The ABS receives direction from government but operates independently from it in its undertaking of statistical collection activities. The Australian Statistician enjoys tenure of up to seven years. See 'ABS Statements of Expectations and Intent', *Australian Bureau of Statistics* (Web Page) <<http://www.abs.gov.au/websitedbs/D3310114.nsf/Home/ABS+Statements+of+Expectations+and+Intent?opendocument>>; *Report on the Conduct of the AMLPS* (n 2) 2.

164 *ABS Annual Report: 2017–18* (n 11) 19–20.

165 This was necessary as the *Statistics Direction* specified that statistical information was to be collected from 'electors': *Statistics Direction* (n 10) s 3(1).

166 In total the AEC processed 933,592 enrolment transactions: Australian Electoral Commission, *Annual Report: 2017–18* (Report, 2018) 38 ('*AEC Annual Report: 2017–18*').

167 *Commonwealth Electoral Act* (n 32) s 90B(4); *Electoral and Referendum Regulation 2016* (Cth) sch 1 cl 1 item 2.

about this category of voters.¹⁶⁸

The AEC also performed a range of other significant functions during the course of the marriage survey. When the Parliament enacted the *Safeguards Act*, it made the AEC, rather than the ABS, responsible for key aspects, including the enforcement of rules on the authorisation of survey-related communications.¹⁶⁹ In addition, the AEC assisted the ABS with IT security and remote area fieldwork strategy.¹⁷⁰

The AMLPS also imposed new pressures on the ABS. This was most evident in terms of the tight timeframe laid down by the government. The ABS was given approximately one month after the announcement of the AMLPS to commence the posting of survey forms, and then a period of two months was granted for the receipt and counting of responses. The ABS itself acknowledged that the survey was required to be delivered ‘within an unusually short lead time’.¹⁷¹ The need to deliver a nationwide poll at short notice is more the terrain of an electoral commission than a statistical agency which tends to have many months or years in which to plan its endeavours. The imposition of time pressure of this kind was not conducive to effective administration; on the contrary, it enhanced the risk of errors being made and public confidence being affected.

Finally, the AMLPS diverted the ABS from its core business. The Bureau’s annual report notes that

there was a significant resource impact on the organisation as a result of diverting a large number of highly skilled resources away from the core and transformation work program to deliver the AMLPS. The AMLPS delivery has had a direct impact on the transformation schedule and benefits realisation.¹⁷²

The need for the ABS to shift resources is not surprising given the obligation to deliver an unfamiliar referendum-like process within a short timeframe.

The ABS can accurately claim that the AMLPS was ‘designed, planned and delivered ... in less than 100 days and \$40 million under budget’¹⁷³ and delivered an outcome that was accepted as legitimate. However, the concerns outlined here suggest that a statistical agency is poorly equipped, both in terms of expertise and resources, to perform this role on an ongoing basis. A popular vote process is best administered by an electoral commission, as occurs for referendums and plebiscites.

¹⁶⁸ *Commonwealth Electoral Act* (n 32) s 90B(6).

¹⁶⁹ *Safeguards Act* (n 73) s 25.

¹⁷⁰ *AEC Annual Report: 2017–18* (n 166) 37.

¹⁷¹ *ABS Annual Report: 2017–18* (n 11) 52.

¹⁷² *Ibid* 27.

¹⁷³ *Ibid* 2.

IV CONCLUSION

The 2017 postal survey on same-sex marriage is notable for the federal government's innovative use of a statistical instrument to conduct a popular vote process. This article has examined the legal framework that applied to the AMLPS and highlighted how it differed from the laws that apply to referendums and plebiscites. In particular, it has drawn attention to executive control over survey initiation, the use of survey laws to regulate a referendum-like process, and the use of a voluntary postal process without the option of attendance voting.

The article has also evaluated the AMLPS as a popular vote process against five criteria: a balanced initiation procedure, suitable regulatory framework, equal participation, integrity, and effective administration. Overall, a critical assessment has been presented. The article has argued that there were insufficient checks on the power of the executive to initiate the marriage survey process; that the regulatory framework was ill-tailored to a popular vote and left too many important matters to be decided by the executive in the absence of parliamentary oversight; that the postal ballot was generally effective in providing an equal opportunity to participate but that the absence of campaign finance limits interfered with voters' freedom to form an opinion; that the adoption of a voluntary, all-mail process rendered the vote vulnerable to fraudulent activities such as multiple voting and undue influence, and left ballot secrecy insufficiently protected; that the absence of a mechanism to challenge the result further weakened the integrity of the process; and that the decision to put a statistical agency in charge of the process raised questions about effective administration.

The marriage survey can rightly be remembered for prompting Parliament to bring marriage laws more into line with public sentiment and for helping to break a long-standing deadlock on a divisive issue. That this is the case perhaps suggests that popular votes might prove similarly constructive on other policy issues. However, my close analysis of the marriage survey process demonstrates that any future votes should not be conducted in the same way. The AMLPS shows that a survey is a poor device for conducting a popular vote. Governments wishing to give the people a direct say on policy issues should confine themselves to the plebiscite. While the plebiscite is itself an imperfect device, it is superior to a survey. The reasons for this, outlined through this article, include Parliament's involvement in decisions about initiation and regulation, which serves to temper significant departures from electoral norms, and an expectation that the vote will be administered by the AEC. The plebiscite is therefore the better device for conducting popular votes for the purpose of measuring public opinion and informing law-making on contentious policy matters.