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Gay Rights and the Marriage Equality Vote in Australia

Alienation through Plebiscite

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If ever there was a situation where everyone would lose, some more heavily than others, it would be a plebiscite about lesbian, gay, bisexual, transgender and intersex (LGBTI) rights on the marriage equality issue.

Australia is facing that very point, with a conservative government keen to force the matter after pressure from various circles, not least of all its leadership's refusal to permit party members a free vote on the subject. The Australian Christian Lobby has similarly been pressing for such action, as have been a few marriage equality groups keen to provide some political ballast. Such a political move risks becoming political dynamite, a point already being made by a few election watchers.

Certain moral and ethical questions should never be put to the vote. To have a plebiscite, for instance, on the death penalty, would be unthinkably foolish. Given the right circumstances, a vengeful vote is always possible. Questions can be shaped, as can their responses.

Groups such as Australian Marriage Equality have opposed the plebiscite move, largely because Parliament is already capable of enacting such legislation. "Even if Australians overwhelmingly vote for marriage equality, it will still lie in the hands of politicians to actually change the law."[1]

Such plebiscites, the group argues, are not compulsory, and tend to be "open to political manipulation because it isn't regulated by strict rules like a referendum or an election."

Even some government figures have expressed the view that such a plebiscite will not be binding. A reactionary Eric Abetz, for one, has argued that every Coalition MP, notwithstanding the results, will still be allowed to cast their vote on same-sex marriage. "I would have to determine whether [the plebiscite] really is an accurate reflection [of the national view], whether it is all above board or whether the question is stacked, whether all sides received public funding."[2]

The legal evolution towards the concept of single-sex unions has been evident in a spate of decisions in Australian law. But the High Court has generally preferred legislative intervention on the issue, accepting in 2013 that the Australian Commonwealth has the power to legislate on marriage, whatever its form. Judges have been shown to be cognisant of the fact that the nature of unions has changed.

Politicians in Australia have, by way of contrast, stalled on the issue, with the main parties

reluctant to take a strong legislative stance and tamper with a constitutional provision that is silent on the issue of what modern unions tend to look like. It is false to assume, on that score, that Australia's Parliament is hamstrung on the issue as its Irish counterpart, which could only pass a law on same-sex marriage after constitutional tinkering via a referendum.

The Irish constitution of 1937 reads like a sociological document in time, noting how a woman's role is "within the home… without which the common good cannot be achieved," while also affording recognition of "the family as the natural primary and fundamental unit group of society". There is no such equivalent provision in Australia, which has retained a rather dull language for most of its constitutional provisions.

Instead of taking the high ground and assuming that such silence would have easily allowed for legislative change, it has been left to the states to develop the law on civil-unions and registered partnerships.

Those familiar with the Australian constitution will just as well know that the marriage power was purposely inserted to allow the Commonwealth power to prevent various unions from being recognised in the first place. A favourite target in 1901, rather than being same-sex unions, were the polygamous alliances of Mormons. It was always assumed that Parliament could alter the constitution of marriage at any given time to reflect the community expectations of the day.

It would, however, take the Howard government, fearing the erosions posed the evolution of family, to define the content of marriage as being between a man and a woman to the exclusion of others. This incorporated at once the common law definition of marriage, a definition that looks mustier with each passing year.

The situation has not been helped even in the supposed left of the political spectrum. Social conservatives in the Australian Labor Party have previously baulked at the issue of removing gender from the issue of determining what a marriage might be. Legislative bills have tended to float around in Parliament without resolution, becoming moribund.

Then there is a pure economic issue at stake. Plebiscites cost far more than a parliamentary vote. The costs gauged by a study from PricewaterhouseCoopers (PWC) comes to a figure of $525 million. (Running the 1999 referendum cost $66.8 million.) $280 million in lost productivity is also factored into this amount. Increased anxiety from members of the LGBTI community, seen as a measure of stresses on mental health, and a range of other losses, are also considered.

The most impressive point against such a plebiscite lies in its estranging value. As the veteran constitutional lawyer George Williams explains, "In putting a yes/no proposition to the community, referendums necessarily polarise debate. As a result, even if the referendum did succeed, it may leave bitterness and division in its wake."[3] Such a move is ultimately set to alienate, and this is a point the Australian Christian Lobby know only too well.

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Notes:

1. http://www.australianmarriageequality.org/wp-content/uploads/2015/08/AME-Fact-Sheet

-Plebiscite.pdf
2. http://www.theguardian.com/australia-news/2016/jan/27/eric-abetz-coalition-mps-will-not-be-bound-by-plebiscite-on-marriage-equality
3. http://www.smh.com.au/federal-politics/political-opinion/samesex-marriage-five-reasons-why-a-plebiscite-is-a-dud-idea-20150812-gix5xx.html

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