

***Submission to the Senate's Legal and Constitutional Affairs Reference
Committee***

Inquiry into the matter of a popular vote on the matter of marriage

Submission from James Allan, Garrick Professor of Law, University of Queensland. September 4th, 2015

Thank you for the invitation to make a submission to this Committee. I will be brief. I am strongly in favour of the plebiscite option for the reasons I give below. I leave the question of the actual wording of any plebiscite to others, though in my view the question put to electors ought to be as unambiguous as possible.

My comments are premised on the deeply held belief that social policy issues, including issues that divide the electors more-or-less down the middle, ought to be resolved by means of a democratic process. Such processes have the great advantage of counting all electors as equal, so that a plumber or secretary's moral views count for as much as a lawyer's or someone working for some United Nations' agency. This, in my view, is the appropriate way of resolving all divisive social policy issues, even if they have been translated into the language of rights or of human rights. On issues such as euthanasia, abortion, same-sex marriage and the rest there is no special expertise that a law degree and a decade working at the Bar provides to someone. Nor does employment with the United Nations or expertise in the finer points of international law make one's preferences and opinions somehow superior. Nor is there any persuasive reason for thinking that Australians need to follow the dictats of the European Court of Human Rights or any other committee of unelected ex-lawyers.

Turning now to conscience votes, I think it is important to understand the benefits of the rise of political parties. The usual references to Burke generally miss the fact that he was writing before political parties became cohesive and strong. For some this is a matter of regret. To me it is a very good thing indeed. It is the fact of strong political parties, together with our preferential (or indeed a First-Past-the-Post) voting system, that allows voters to make their choice with a solid idea of the program that will be pursued should the party

they choose prevail. In a parliament made up essentially of independents, perhaps loosely tied together by various shared outlooks, you find that considerably more issues are decided by the ‘consciences’ of the elected Members of Parliament. But of course such wider scope for action comes at the expense of the voters. In my view representative democracy is much improved where strong political parties exist, parties which can exercise a good degree of discipline over its MPs. The supposed ideal of a myriad of unconstrained MPs regularly exercising their consciences may be attractive to those MPs. It is not, however, attractive to voters who lose much of the ability to know just what it is that they are voting for when they go into the ballot box. This is relevant to any consideration of conscience votes.

Of course at the other extreme is the issue of whether a political party ought to be prepared to tolerate its MPs occasionally crossing the floor, and voting against the party whip. I think this is a good thing, personally. It is certainly the case that within the Westminster world that encompasses New Zealand, Canada, the United Kingdom and Australia that virtually all political parties do allow this safety valve, namely room for an MP to vote against the party line without being thrown out of the party. The Australian Labor Party is the only exception to that norm of which I am aware. There are reasons for such a hard line. Personally, I think they are outweighed by other reasons. But the issue is clearly open to reasonable disagreement and debate. What is odd, however, is taking the line that some political party will not allow any crossing-the-floor votes but at the same time that it is in favour of a conscience vote on some big ticket issue. Clearly for that party what is really being advanced is the view that the party’s position is to have a conscience vote. If it were not and an MP within that party voted his or her conscience then he or she would be expelled from the party.

To be clear, my above comments in no way run contrary to a situation in which a political goes into an election with a clear commitment to holding a conscience vote on some issue after the election. If the voters are clearly told this in advance, they can make their choice accordingly. If they vote for a party with that clear commitment then the voters have no cause for complaint afterwards if it is used to decide some issue.

Let me make one final comment. On the specific issue of same-sex marriage (and to lay my cards on the table in any plebiscite I would vote in favour of this extension), there is no doubt at all in my view that the way this issue was resolved in Ireland (count everyone as equal, give everyone a say, let the numbers count) was orders of magnitude better – or preferable – to the way it was decided in the United States. There, in *Obergefell*, nine unelected ex-lawyers decide this issue for 320 million people. And they decide it, on a 5 – 4 vote, with the majority Justices relying on the most implausible and unpersuasive interpretive approach (which is distinct from one’s first-order substantive preferences) imaginable. Basically they just made it up; they legislated from the Bench. We can expect dissatisfaction in the United States to continue for a long time on the losing side given that the proponents of the opposing view were not treated as having a right to participate in fundamental social policy decision-making.

Thankfully such a prospect is not on the table in Australia, largely because we have wisely shunned a bill of rights in this country. (And note that same-sex marriage was also decided by the judges in Canada, another jurisdiction with a strong bill of rights.) But advocates of a conscience vote, at least when such a position was not clearly and unambiguously signalled to the voters before the previous election, are also involved in attempting an end-run around the voters. I am against such ploys. If it means a few more years of convincing one’s fellow citizens to change their minds, so be it.

James Allan,

Garrick Professor of Law,

University of Queensland.