

The Conversation

Explainer: what is parliament's role in the marriage equality debate?

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Australia's political representatives have the ability to legislate on a wide range of matters. Marriage is one of them. AAP/Mick Tsikas

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Before the last federal election, the Turnbull government [committed](#) to holding a plebiscite on marriage equality. Although [it had suggested](#) the vote might be held in 2016, [recent reports](#) indicate the government may delay the plebiscite until 2017 on advice from the Australian Electoral Commission.

Reports of a delay have emerged at the same time as criticism of the plebiscite plan intensified. Former High Court judge Michael Kirby [has warned](#) against the precedent a plebiscite might set:

It will mean any time that there is something that is controversial, that's difficult for the parliamentarians to address or they don't want to address, they'll send it out to a plebiscite.

Various [opposition and crossbench politicians](#) have also criticised the plebiscite. This indicates it may be hard for the government to get the [new Senate's approval](#) for the legislation required to set up any plebiscite.

And so there are growing suggestions parliament itself should decide the marriage equality question, rather than a nationwide vote.

One of the defining features of Australia's democracy is that it is, [for the most part](#), a system of [representative government](#). This means we elect representatives to do the business of governing for us, rather than doing it directly ourselves.

Australians recently engaged in a [national election](#) to select our representatives for the next three years. Now that those representatives are [making their way](#) to Canberra for the first

sitting of the new parliament, what is parliament's role on marriage equality? And how should the parliament exercise that role?

The plebiscite is not constitutionally required

In December 2013, the [High Court ruled](#) that the federal parliament already has the ability to legislate for marriage equality.

The plebiscite is not required by the [Australian Constitution](#). There is no need for a constitutional amendment, nor is there any constitutional need for a nationwide vote before parliament can vote on marriage equality.

A plebiscite on marriage would therefore be a constitutionally unnecessary and [expensive](#) vote, with [potentially harmful consequences](#) for many [Australians](#).

Parliament has changed marriage law before

Australia's political representatives have the ability to legislate on a [wide range](#) of matters. Marriage is one of them.

It is worth remembering that Australia's parliament has changed fundamental aspects of [marriage law](#) on many occasions, but has never put those changes to a plebiscite. Here are some examples.

Until the 1960s, each Australian state and territory had its own law on marriage. [Different states](#) had different ages at which people could get married; different states even had [different archaic laws](#) on when Indigenous Australians could get married and who they could marry. These rules were all changed without a plebiscite.

Then, in 1961, the federal parliament passed the Menzies Liberal government's [Marriage Act](#). The act was a major reform to standardise how marriage worked in Australia. The minister responsible, Garfield Barwick, [said in May 1960](#) the government hoped the legislation would be "a contribution towards the stability of marriage".

Despite the immense importance and lofty goals of this reform, no plebiscite was required and no plebiscite was held. The parliament simply legislated.

In the 1970s, parliament approved the Whitlam Labor government's [Family Law Act](#). Among other things, that legislation [allowed](#), for the first time in Australia, "no-fault ground of divorce based on one year's separation".

This was a crucial change to a defining feature of marriage: when a marriage could be ended. Prime Minister Gough Whitlam [told parliament in November 1974](#) it was "a change of enormous significance". Notwithstanding this "enormous" change to the very nature of marriage, no nationwide vote was required. Instead, parliament passed a law.

And in 2004, under Liberal Prime Minister John Howard, the parliament legislated [to insert a definition of marriage](#) into the existing Marriage Act. There had not been such a statutory definition before; the new definition limited marriage to between "a man and a woman".

Introducing that amendment, Attorney-General Philip Ruddock [described](#) the reform as reflecting the "fundamental importance" of marriage, which was "vital to the stability of our society". Despite this change to the law regarding such an important matter, no plebiscite was thought necessary. Parliament simply made the law.

Parliament has legislated on marriage many times without first holding a plebiscite. It can do so again.

If a plebiscite is held, what will parliament's role be?

If the government continues with the planned plebiscite, however, the parliament still has a role to play.

It [seems likely](#) any plebiscite could only go ahead if parliament passes a law to set it up. Every MP will have a crucial role in scrutinising the law that sets up any plebiscite and deciding whether a plebiscite is desirable or appropriate.

And so the fate of the plebiscite could turn, in part, on the views of the [newly elected crossbench senators](#).

This means a stalemate is possible: if the Turnbull government fails to win parliament's support for the plebiscite, and the opposition parties fail to win support to legislate directly for marriage equality, the matter may wait to be resolved by a future parliament.

But if the current parliament debates any proposed plebiscite, it should bear in mind Britain's recent vote on leaving the European Union. One of the truly [remarkable features](#) of that vote was it took place without any clear proposal on what would actually happen in the event of a vote to leave the EU, and when it would take effect. As a result, two months later the UK is still figuring out what "Leave" means.

So, if a national vote is worth having on marriage equality, parliament must ensure that Australia avoids this "[Brexit trap](#)".

There are [different ways](#) to design a plebiscite. But [if we must have a plebiscite](#) and we want to avoid the Brexit trap, Australian voters need to know what they are getting if they vote "Yes". They should know their vote will have an effect and what that effect will be.

The plebiscite is unnecessary. But if it is to occur, the parliament should ensure it is more than an "advisory" in-principle poll.