

POLYGAMY: PROPER OR PRIMITIVE? POSSIBLE PATHWAYS TO PERMITTING THE PRACTICE IN AUSTRALIA

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This article examines the history of polygamy, globally and particularly within Australia. It traces the emergence of marriage as an institution, including the institutionalisation of monogamy and displacement of polygamy as a social norm in most parts of the Western world. It finds that polygamy can be an egalitarian practice when its foundations are not religious, regardless of whether those enjoying the practice are themselves religiously motivated. The article proposes for the legalisation of polygamy under the Marriage Act 1961 (Cth) and Family Law Act 1975 (Cth) — the two primary Australian statutes governing marriages. Modelled on the Supreme Court of New Zealand's decision in Mead v Paul [2023] NZFLR 75, this article proposes to recognise polygamous marriages — those between three or more persons — as sets of couples.

I INTRODUCTION

Polygamy is akin to bestiality,¹ 'deplorable'², 'inconsistent with [Australian] culture'³ and would 'destabilise and alter society'.⁴ Words of this calibre are used in Australian public discourse about polygamy⁵ to shoot down the prospect of it ever making its way into Australia and, by association, the Australian legal system. True it is that, historically and at present, states which legally recognise polygamy tend

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¹ See Bridie Jabour, 'Cory Bernardi Links Same-Sex Marriage to Polygamy and Bestiality Again', *The Guardian* (online, 18 June 2013) <<https://www.theguardian.com/world/2013/jun/18/cory-bernard-i-same-sex-bestiality>>.

² Frederick John Nile, 'Polygamy Un-Australian Says Rev Nile' (Media Release, Christian Democratic Party, 24 June 2008).

³ See Peter Veness, 'Polygamous Relationships Unlawful: Govt', *The Age* (online, 25 June 2008) <<https://www.theage.com.au/national/polygamous-relationships-unlawful-govt-20080625-2wix.html>>.

⁴ See Edward M Gomez, 'Polygamous Marriages, in Australia?', *SFGate* (online, 26 June 2008) <<https://web.archive.org/web/20171009093329/http://blog.sfgate.com/worldviews/2008/06/26/polygamous-marriages-in-australia/>>.

⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 26 October 1905, 4188 (King O'Malley).

to foster relationships which are sexually discriminatory, oppressive or abusive.⁶ But such circumstances represent only a few strokes of a painting composed over the course of millennia. There is no universally accepted relationship structure, neither in Australia nor elsewhere.⁷ Indigenous Australians have customarily practised polygamy, only to have their customs suppressed by the imposition of Christian doctrine.⁸ Muslim migrant communities and, potentially, polyamorous groups also make use of polygamy.⁹ With a person being allowed to enter multiple de facto relationships simultaneously¹⁰ and to have their foreign polygamous marriages recognised for the purpose of initiating proceedings,¹¹ it would not be so great a leap to legalise polygamy.

To make an informed judgement as to whether polygamy should be legalised, one must appreciate the history of polygamy. This includes the manner through which it has been moulded to suit a particular social group, for better or worse. An examination of multiple-partner relationships and marriages throughout selected historical periods shows polygamy's rise and fall from being a widely socially and legally acceptable relationship structure. This article asks whether polygamy in Australia can be legalised so as to take the form of an egalitarian relationship structure. In posing this question, the article posits that the 'law should not inhibit the formation of family relationships'.¹² People should be at liberty to choose their relationship structure, so long as all parties involved fully consent and nobody's fundamental rights or freedoms are encroached upon.¹³ Hence, in part, the need for it to be conducive to egalitarianism, whether or not monogamy is. In fact, monogamous marriages can be egalitarian, but, in

⁶ Thom Brooks, 'The Problem with Polygamy' (2009) 37(2) *Philosophical Topics* 109, 111; Daniel Seligson and Anne EC McCants, 'Polygamy, the Commodification of Women, and Underdevelopment' (2022) 46(1) *Social Science History* 1, 13; Tsoaledi Daniel Thobejane and Takayindisa Flora, 'An Exploration of Polygamous Marriages: A Worldview' (2014) 5(27 P2) *Mediterranean Journal of Social Sciences* 1058, 1060.

⁷ Walter M Gallichan, *Women Under Polygamy* (Holden & Hardingham, 1914) 13.

⁸ Ann McGrath and Winona Stevenson, 'Gender, Race, and Policy: Aboriginal Women and the State in Canada and Australia' (1996) 71 *Labour History* 37, 49.

⁹ 'Polygamy: How Common Is Polygamy in Australia? And How Does It Work?', *Insight* (Special Broadcasting Service, 29 May 2012) <<https://web.archive.org/web/20171020085449/http://www.sbs.com.au/news/insight/tvepisode/polygamy>> ('Polygamy: How Common?'); Samantha Maiden, 'Wedded Welfare Bliss for Muslims', *The Daily Telegraph* (Sydney, 11 December 2016) 7; Maria Pallotta-Chiarolli, Peter Haydon and Anne Hunter, "'These Are Our Children": Polyamorous Parenting' in Abbie E Goldberg and Katherine R Allen (eds), *LGBT-Parent Families: Innovations in Research and Implications for Practice* (Springer, 2013) 117, 125.

¹⁰ *Family Law Act 1975* (Cth) s 4AA(5)(b) ('FLA').

¹¹ *Ibid* s 6.

¹² Australian Law Reform Commission, *Multiculturalism: Family Law* (Discussion Paper No 46, January 1991) ix [3].

¹³ *Ibid*.

practice, are not always so.¹⁴ Polygamy deserves attention because, though it is a relationship structure favoured by few, its adoption may grow in time. Its legalisation would place it on equal footing with monogamous marriage and grant the polygamous the same rights as the monogamous. In addition, with legalisation there may be a societal shift in people's perception of polygamy and willingness to outwardly adopt a polygamous lifestyle.¹⁵ This article grounds the discussion in an Australian context, though never losing sight of those states where polygamy is a legally recognised and acceptable relationship structure.

The answer to the question posed above is developed across six substantive parts. Part II lays out the structure of the article, provides a set of definitions for the essential terms used throughout and explains Australia's secular order. Part III presents a brief and selective history of polygamy. Because a complete history of polygamy is beyond the scope of this article, only the most pivotal periods and events through which polygamy was shaped are considered. Part IV establishes the social history of polygamy in an Australian domestic context. Particular attention is given to the customary relationships of Indigenous Australians. In Part V, the reader is asked to reflect on the information so far presented and consider whether proposing to legalise polygamy is a fanciful suggestion which, if implemented, would bring immoral and undesirable consequences. On the assumption that polygamy is to be legalised in Australia, Part VI suggests how that reform could be enacted. Part VII concludes by answering the question posed by this article: whether polygamy in Australia can take the form of an egalitarian relationship structure and, if so, how. This article finds that polygamy in Australia can be an egalitarian practice and should be legalised by amending the *Marriage Act 1961* (Cth) ('*Marriage Act*') and *Family Law Act 1975* (Cth) ('*FLA*'), the two primary statutes overseeing marriage law. The proposed reform is based upon the Supreme Court of New Zealand's decision in *Mead v Paul*.¹⁶ Polygamy's legalisation is nevertheless subject to a proviso. There is a need for further study of polygamy's (not legally recognised) prevalence and effects on families, including children, in Australia, as well as the interest of polyamorists and others to engage in polygamy, should it be legal.

¹⁴ Christine R Schwartz and Hongyun Han, 'The Reversal of the Gender Gap in Education and Trends in Marital Dissolution' (2014) 79(4) *American Sociological Review* 605, 608, 623–4; John K Antill, Sandra Cotton and Susan Tindale, 'Egalitarian or Traditional: Correlates of the Perception of an Ideal Marriage' (1983) 35(2) *Australian Journal of Psychology* 245, 254.

¹⁵ Noting the differences between polygamous and same-sex marriage, see, eg, Lixia Qu and Jennifer Baxter, 'Rise in Same-Sex Couples Living Together since Changes to Marriage Act' (Media Release, Australian Institute of Family Studies, August 2023) <<https://aifs.gov.au/media/rise-same-sex-couples-living-together-changes-marriage-act>>. See also MV Lee Badgett et al, 'A Review of the Effects of Legal Access to Same-Sex Marriage' [2024] *Journal of Policy Analysis and Management* 1, 18.

¹⁶ *Mead v Paul* [2023] NZFLR 75 ('*Mead*').

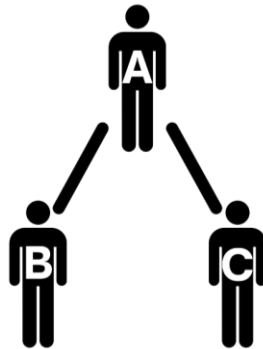
II PREFACE

This article only concerns itself with the potential for legalising polygamy in Australia. Reference is made to other jurisdictions in order to consider the nature of the practice elsewhere and how it could affect Australian society if legalised. Yet, the argument advanced applies only to the social and legal systems of Australia. Importantly, this article does not extensively explore bigamy; rather, it is discussed only insofar as it showcases the perception of, and its historical conflation with, polygamy. Bigamy is also mentioned in Part V due to its necessary reform if polygamy were to be legalised. In order properly to address the argument advanced in this article, key terms must be defined.

A ‘Polyamory’

‘Polyamory’ refers to a relationship, other than a multiple-spouse marriage, between three or more persons, regardless of the persons’ sex or sexuality.¹⁷ The term also includes the practice of participating in multiple separate relationships simultaneously.¹⁸ For instance, person A has a relationship with person B and, at the same time, a separate relationship with person C (see Figure 1). The distinction between polyamory and polygamy is particularly important for the historical discussion that follows because of the references made to multiple-partner relationships that existed prior to the institution of marriage having been formed.

Figure 1: An example of a polyamorous relationship



¹⁷ *Macquarie Dictionary* (online at 9 August 2023) ‘polyamory’ (def 1); Theodore Bennett, ‘The Inclusion of Others? Polygamy and Australian Law’ (2019) 32(3) *Australian Journal of Family Law* 266; Nikó Antalffy, ‘Polyamory and the Media’ (2011) 8(1) *Scan: Journal of Media Arts Culture* 7:1–13 <<http://scan.net.au/scn/journal/vol8number1/Niko-Antalffy.html>>.

¹⁸ Leehee Rothschild, ‘Compulsory Monogamy and Polyamorous Existence’ (2018) 14(1) *Graduate Journal of Social Science* 28, 42.

B ‘Polyanthropy’

Inconsistent and differing terminology surrounds polygamy.¹⁹ For the purposes of this article, ‘polyanthropy’ defines the practice of simultaneously having multiple spouses, regardless of the spouses’ sex or sexuality. For example, if a man marries another man and a woman, that is referred to as an instance of polyanthropy. Polyanthropy, therefore, falls under the umbrella of polygamy, alongside polygyny and polyandry.

C ‘Polygyny’ and ‘Polyandry’

‘Polygyny’ is the practice of a man simultaneously having multiple wives,²⁰ whereas ‘polyandry’ is the practice of a woman simultaneously having multiple husbands.²¹

D ‘Polygamy’

‘Polygamy’, then, means a legally- or customarily-recognised marriage between three or more persons,²² whether it be polygynous, polyandrous or polyanthropous. ‘Polygamy’ is the umbrella term and refers to any multiple-spouse marriage.²³

E ‘Monogamy’ and ‘Bigamy’

‘Monogamy’, on the other hand, means a legally- or customarily-recognised marriage between only two spouses.²⁴ It also means the practice of being in a relationship, other than marriage, with only one person.²⁵ Lastly, ‘bigamy’ means

¹⁹ Brooks (n 6) 116; Seligson and McCants (n 6) 3; Shelley Park, ‘Polyamory Is to Polygamy as Queer Is to Barbaric?’ (2017) 20(1) *Radical Philosophy Review* 1, 3–4; Vanessa von Struensee, ‘The Contribution of Polygamy to Women’s Oppression and Impoverishment: An Argument for Its Prohibition’ (2005) 12(1–2) *Murdoch University Electronic Journal of Law* 1, 1.

²⁰ Stephanie Kramer, ‘Polygamy Is Rare around the World and Mostly Confined to a Few Regions’, *Pew Research Center* (Web Page, 7 December 2020) <<https://www.pewresearch.org/short-reads/2020/12/07/polygamy-is-rare-around-the-world-and-mostly-confined-to-a-few-regions/>>; *Macquarie Dictionary* (n 17) ‘polygyny’ (def 1).

²¹ Gerald D Berreman, ‘Pahari Polyandry: A Comparison’ (1962) 64(1) *American Anthropologist* 60, 60; *Macquarie Dictionary* (n 17) ‘polyandry’ (def 1).

²² *Macquarie Dictionary* (n 17) ‘polygamy’ (def 1); Emily J Duncan, ‘The Positive Effects of Legalizing Polygamy: Love Is a Many Splendored Thing’ (2008) 15(2) *Duke Journal of Gender Law & Policy* 315, 315.

²³ Bennett (n 17) 266; Erin Fowler, ‘A Queer Critique on the Polygamy Debate in Canada: Law, Culture, and Diversity’ (2012) 21 *Dalhousie Journal of Legal Studies* 93, 93.

²⁴ Rothschild (n 18) 29; *Macquarie Dictionary* (n 17) ‘monogamy’ (def 1).

²⁵ *Macquarie Dictionary* (n 17) ‘monogamy’ (def 2).

the criminal offence of purporting to marry a person whilst simultaneously being in a marriage with another person.²⁶

F 'Sex' and 'Sexuality'

For the avoidance of doubt, when used, the term 'sex' refers to 'the quality of being male, female or intersex'.²⁷ The term 'sexuality' refers to one's sexual preference; for example: heterosexuality, homosexuality or bisexuality.²⁸

G 'Indigenous'

When reference is made to 'Indigenous Australians', or the 'Indigenous', that means those persons who were, or are descendants of, the first inhabitants of Australia.²⁹ The term, used in this context, includes Aboriginal Australians and Torres Strait Islanders.³⁰

H Secular State

To preface the historical discussion of polygamy, it is pertinent to note the legal foundations for secularism in Australia.³¹ The term 'secular', as used in this article, denotes the separation, albeit not the prohibition, of religion from the state's establishment of societal order.³² Secularism remains a difficult to define concept and its operation in Australia has been the subject of academic debate.³³ Australia, as a secular state, cannot be isolated from the religious tenets of British colonial law, which led to the state's establishment.³⁴ Australian secularity operates to normalise those religious tenets.³⁵ Section 116 of the *Australian*

²⁶ Bennett (n 17) 266; *Macquarie Dictionary* (n 17) 'bigamy'; Theodore Bennett, 'Why the Bigamy Offence Should Be Repealed' (2019) 41(3) *Sydney Law Review* 359, 359.

²⁷ *Macquarie Dictionary* (n 17) 'sex' (def 2).

²⁸ *Macquarie Dictionary* (n 17) 'sexuality' (def 2).

²⁹ 'Indigenous Australians: Aboriginal and Torres Strait Islander People', *Australian Institute of Aboriginal and Torres Strait Islander Studies* (Web Page, 12 July 2020) <<https://aiatsis.gov.au/explore/indigenous-australians-aboriginal-and-torres-strait-islander-people>>.

³⁰ *Ibid*.

³¹ For a comprehensive discussion of secularity in Australia, see Tom Frame, *Church and State: Australia's Imaginary Wall* (UNSW Press, 2006).

³² *Macquarie Dictionary* (n 17) 'secular' (def 5).

³³ Holly Randell-Moon, 'The Secular Contract: Sovereignty, Secularism and Law in Australia' (2013) 23(3) *Social Semiotics* 352, 352.

³⁴ *Ibid* 355.

³⁵ *Ibid*.

Constitution establishes a secular order for the Commonwealth, albeit not the State governments:³⁶

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.³⁷

Section 116 was, in part, a result of the numerous denominations of Christianity present in Australia following settlement.³⁸ It was not necessarily a sign of secularism; indeed, the *Constitution's* Preamble expresses the States' reliance 'on the blessing of Almighty God'.³⁹ Australians still celebrate Christmas as a public holiday⁴⁰ and the Lord's Prayer is read in Parliament by the President each day.⁴¹ The relationship between state and religion is one moulded by Christian conceptions of that relationship.⁴² Australia is not secular in the sense of being areligious ('laicism'); rather, its *Constitution* ensures religious equality and prevents one religion from dominating the rest, establishing the state and its laws as neutral in matters of religion.⁴³ Still, this secularity allows the state to mould laws based on religious conviction.⁴⁴ Invariably, the Church interacts with the state, though there is no established state church.⁴⁵ Tom Frame terms this a 'religiously pluriform', rather than secular, state.⁴⁶

In *Hyde v Hyde*,⁴⁷ Lord Penzance in the Court of Probate and Divorce of England and Wales held that 'marriage, as understood in *Christendom*, may ... be defined as the voluntary union for life of one man and one woman, to the exclusion of all others', such that a polygamous union was not a 'marriage' under English law.⁴⁸ Despite not being law in Australia, the definition in *Hyde v Hyde* has been largely adopted, whereby the 'Christian ideal of monogamous lifelong union' has formed the basis of marriage laws.⁴⁹

³⁶ Ibid 356; Gonzalo Villalta Puig, 'Parliamentary Prayers and Section 116 of the *Australian Constitution*' (Papers on Parliament No 51, Parliamentary Library, Parliament of Australia, July 2009) 78.

³⁷ *Australian Constitution* s 116.

³⁸ Randell-Moon (n 33) 357.

³⁹ *Australian Constitution* Preamble; Frame (n 31) 51.

⁴⁰ Randell-Moon (n 33) 358.

⁴¹ Puig (n 36) 1; Carolyn Evans, 'Religion and the Secular State in Australia' in Javier Martínez-Torrón, W Cole Durham and Donlu D Thayer (eds), *Religion and the Secular State: National Reports* (Complutense University of Madrid Faculty of Law, 2015) 87, 87.

⁴² Frame (n 31) 11.

⁴³ Ibid 52, 83; *Attorney-General (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559, 613.

⁴⁴ Evans (n 41) 95.

⁴⁵ Frame (n 31) 7, 94.

⁴⁶ Ibid 83.

⁴⁷ *Hyde v Hyde* (1866) LR 1 P&D 130.

⁴⁸ Ibid 133.

⁴⁹ Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, 11 June 1986) 140–1 [234]–[235]; Michael Quinlan, 'Marriage, Tradition, Multiculturalism and the Accommodation of Difference in Australia' (2016) 18(1) *University of Notre Dame Australia Law Review* 71, 84.

As the 2021 Census shows, there is an increasing diversity of religions in Australia, with 10% of Australians following a religion other than Christianity, up 5.1% from 2001.⁵⁰ At the same time, 38.9% of Australians do not follow any religion — a 22.2% increase since 2001⁵¹ — whereas 43.9% are affiliated with Christianity — a 24.1% decrease since 2001⁵² — demonstrative of an increasingly secular society. It is with understanding this secularism that the history of polygamy in Australia as described in Part III can be truly appreciated. Yet, in comprehending what polygamy and monogamy truly mean, it is necessary to establish how they came about historically beyond Australia.

III PRIMATES AND POLYGAMY: A BRIEF HISTORY

This Part provides a brief overview of polygamy. One could dedicate multiple tomes to the exploration of the practice and the possible reasons for its emergence. This Part by no means aims to cover every aspect of the history of polygamy. Rather, it concisely considers: (A) the prehistorical existence of multiple-partner relationships; (B) the emergence of marriage as an institution, going back to the time of the Babylonian Empire in Mesopotamia; (C) the role of theism in shaping conceptualisations of polygamy, and; (D) the extent and effects of polygamy at present. All of these areas are relevant to the law reform proposed in Part V to the extent that they show how polygamy is shaped by the circumstances in which it is found.

A Prehistoric Partnerships

In *The Descent of Man*, Charles Darwin hypothesised that:

the most probable view is that [man] aboriginally lived in small communities, each with a single wife, or if powerful with several, whom he jealously guarded against all other men. Or he may not have been a social animal, and yet have lived with several wives, like the gorilla.⁵³

Darwin's view is generally supported by anthropological studies conducted since.⁵⁴ The Australopithecus who lived between 5 million–1.8 million BCE, for

⁵⁰ 'Religious Affiliation in Australia', *Australian Bureau of Statistics* (Web Page, 7 April 2022) <<https://www.abs.gov.au/articles/religious-affiliation-australia>>.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Charles Darwin, *The Descent of Man, and Selection in Relation to Sex* (Princeton University Press, 1981) 362.

⁵⁴ Marina E Adshade and Brooks A Kaiser, 'The Origin of the Institutions of Marriage' (Working Paper No 1180, Department of Economics, Queen's University, August 2008) 3; Wataru Nakahashi and Shiro Horiuchi, 'Evolution of Ape and Human Mating Systems' (2012) 296 *Journal of Theoretical Biology* 56, 57.

instance, is said to have had multiple sexual partners without any long-term pair bonding.⁵⁵ Monogamy suited some, such as those inhabiting savannahs, where the safety of a group unit would have otherwise been difficult to ensure.⁵⁶ That was so because a man's protection of his harem and their children in an arid environment would have been far more burdensome than if the man were in a monogamous relationship.⁵⁷ The existence of prehistoric polyamory (as marriage did not exist) is understood by some to have resulted from a disproportionality between the sexes.⁵⁸ Namely, the greater number of women than men in polygynous communities and the preponderance of men in polyandrous communities.⁵⁹ The contemporary prevalence of polyandry in hunter-gatherer societies suggests it might have existed in similar prehistoric societies.⁶⁰ The existence of polyamory in humans can, perhaps, also be explained by the sexual dimorphism of men.⁶¹ Where the males of a certain species are bigger in comparison to the females, there is a correlation with that species being more polygynous (though not necessarily polyandrous) than monogamous.⁶² However, the sexual dimorphism of a human is lower than that of our primate relatives.⁶³ For instance, human males are approximately 15% heavier than females, whereas male gorillas are approximately 100% heavier than females.⁶⁴ This lower human sexual dimorphism correlates to a monogamous tendency.⁶⁵ Serial monogamy is thought to have existed amongst hunter-gatherer societies; but that must be distinguished from polyamory to the extent that if, for example, a man had five sexual partners in a year, those partners would not have necessarily known each other.⁶⁶ Invariably, monogamy and polyamory would have each been represented throughout history.⁶⁷

Though it seems to have been a part of human life since its inception, one can never know the extent to which our oldest ancestors were polyamorous.⁶⁸ A more

⁵⁵ Adshade and Kaiser (n 54) 3; Nakahashi and Horiuchi (n 54) 57.

⁵⁶ Adshade and Kaiser (n 54) 4.

⁵⁷ Ibid.

⁵⁸ Gallichan (n 7) 13.

⁵⁹ Ibid.

⁶⁰ Katherine E Starkweather and Raymond Hames, 'A Survey of Non-Classical Polyandry' (2012) 23(2) *Human Nature* 149, 153.

⁶¹ Walter Scheidel, 'A Peculiar Institution? Greco-Roman Monogamy in Global Context' (2009) 14(3) *The History of the Family* 280, 281.

⁶² Ibid.

⁶³ Ryan Schacht and Karen L Kramer, 'Are We Monogamous? A Review of the Evolution of Pair-Bonding in Humans and Its Contemporary Variation Cross-Culturally' (2019) 7 *Frontiers in Ecology and Evolution* 230:1–10, 4.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid 7.

⁶⁸ Edward Adamson Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (Harvard University Press, 1954) 290; Schacht and Kramer (n 63) 1.

recent practice which humanity better understands and which is central to this article is that of marriage.

B Marriage in Mesopotamia

Marriage has always been underpinned by economic factors, such as the title to property and division of labour.⁶⁹ As an institution, marriage has historically served the wealthy who wished to pass on their status and property.⁷⁰ In the Babylonian Empire, the 18th century BCE Code of Hammurabi permitted polygamy and concubinage.⁷¹ Wife purchase was allowed and each wife was ranked by superiority.⁷² Nevertheless, the concubines and children of a Babylonian husband were held in high regard and were to be supported if a husband separated from his concubine.⁷³

During the 5th century BCE, marriage in Mesopotamia was noticeably different based on social class.⁷⁴ Whereas the non-elite often cohabitated and had children before marriage, the elite never did.⁷⁵ For the elite, a father would marry off his daughters and make sure they did not have children before marriage, because that could cast legal doubts over whether they are the father's true heirs.⁷⁶ The written record of a marriage, which formed its contractual nature, stemmed from a need to clarify the rights of each person.⁷⁷

In Ancient Greece, multiple simultaneous sexual partnerships by both men and women were socially acceptable.⁷⁸ At that time, descent was matrilineal.⁷⁹ Polygamy was present in Greece in the 8th century BCE, as well as throughout Eurasia and Africa in the 5th century BCE, though by that time it was no longer documented in Greece.⁸⁰ During the Hellenistic Era (323 BCE–30 BCE), after the collapse of the Greco-Macedonian Empire, the Seleucid and Ptolemaic dynasties

⁶⁹ Stephanie Coontz, *Marriage, a History: How Love Conquered Marriage* (Penguin Books, 2006) 65–6, 69; John Witte Jr, *Church, State, and Family: Reconciling Traditional Teachings and Modern Liberties* (Cambridge University Press, 2019) 13 ('Church, State, and Family').

⁷⁰ Belinda Hewitt and Michelle Brady, 'Marriage Has Changed Dramatically throughout History, but Gender Inequalities Remain', *The Conversation* (online, 15 November 2018) <<http://theconversation.com/marriage-has-changed-dramatically-throughout-history-but-gender-inequalities-remain-106346>>; Joseph Henrich, Robert Boyd and Peter J Richerson, 'The Puzzle of Monogamous Marriage' (2012) 367(1589) *Philosophical Transactions of the Royal Society B* 657, 657.

⁷¹ Gallichan (n 7) 26–7.

⁷² *Ibid*; *Code of Hammurabi* arts 138, 145.

⁷³ Gallichan (n 7) 30–1; *Code of Hammurabi* art 137.

⁷⁴ Caroline Waerzeggers, 'Changing Marriage Practices in Babylonia from the Late Assyrian to the Persian Period' (2020) 7(2) *Journal of Ancient Near Eastern History* 101, 109.

⁷⁵ *Ibid* 116.

⁷⁶ *Ibid*.

⁷⁷ *Ibid* 114.

⁷⁸ Frederick Engels, *The Origin of the Family, Private Property, and the State* (Pathfinder Press, 1972) 30.

⁷⁹ *Ibid*.

⁸⁰ Seligson and McCants (n 6) 10.

each employed polygamy as a diplomatic measure.⁸¹ Kings established ties with other rulers when they acquired multiple wives.⁸² Jealousy and deceit stained such marriages and led to numerous fatal conflicts between spouses.⁸³

As farming emerged, slavery was born.⁸⁴ The fruit of that slave labour, including the slaves themselves, was vested in the man.⁸⁵ The man thus held a superior status, wherein a patrilineal system was conducive to him passing down his inheritance to his children.⁸⁶ In a matrilineal family, the man's children did not inherit his property.⁸⁷ Instead, the deceased's siblings, nieces or nephews were the inheritors.⁸⁸ This problem effectively put an end to matriliney and the associated superiority of the woman as the person through whom a child's parentage could be traced.⁸⁹ With the end of matriliney, polygamy could no longer be a widespread practice.⁹⁰ For, to ensure that a man's children were his heirs, he exercised dominance over his wife and demanded her obedience, so that he could guarantee her fidelity.⁹¹

C Theism and Polygamy

The establishment of monogamy as the norm throughout Europe was further shaped by the widespread institutionalisation of Christianity. Before the introduction of Christianity, European states were mostly monogamous in practice.⁹² Yet, in Roman law, a man could elect between having one wife or several concubines.⁹³ Christianity's emergence in Greco-Roman law led to the adoption of an exclusively monogamous and life-long definition of marriage.⁹⁴ Christianity sought to encourage lasting and equal marriages, thus denouncing divorce and polygamy.⁹⁵ It then became the official religion of the Roman Empire under Theodosius I's rule in 380 CE.⁹⁶ In this way, monogamy was strengthened and institutionalised, leading to its acceptance throughout much of the world,

⁸¹ Coontz (n 69) 60.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Engels (n 78) 65–6.

⁸⁵ Ibid 66–7.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid 67.

⁸⁹ Ibid 60–1.

⁹⁰ Ibid 68.

⁹¹ Ibid 69.

⁹² Martha Bailey and Amy J Kaufman, *Polygamy in the Monogamous World: Multicultural Challenges for Western Law and Policy* (Praeger, 2010) 70.

⁹³ Witte Jr, *Church, State, and Family* (n 69) 18.

⁹⁴ Ibid.

⁹⁵ Coontz (n 69) 86; Witte Jr, *Church, State, and Family* (n 69) 18.

⁹⁶ Coontz (n 69) 87.

which continues today.⁹⁷ Augustine of Hippo's teachings were fundamental in shaping the Christian idea of marriage throughout Europe, the Americas and Australasia.⁹⁸ Having had several concubines himself, Augustine converted to Christianity in 386 CE and thereafter wrote some of the most important texts on the ideals of Christian life.⁹⁹ One of Augustine's relevant maxims was that 'all that is born of concubinage is sinful flesh'.¹⁰⁰

As theologian Ron Du Preez finds, across the Old and New Testaments, there are 33 cases of polygamy.¹⁰¹ In the Old Testament, six of Israel's leaders were said to have more than one wife: Abraham, Jacob, Gideon, Saul, David and Solomon.¹⁰² Of these Biblical characters, most were negatively affected by their polygamous ways and God sought to reform them.¹⁰³ It is, therefore, only logical that Christian missionaries would condemn polygamy, in the same way that God has in the Bible.¹⁰⁴ Still, some defend polygamy on the basis of its biblical history.¹⁰⁵ Even with polygamy gaining the religious acceptance of Islam, Judaism and certain Christian denominations, polyandry has not been so fortunate.¹⁰⁶

Polygamy is often associated with the Muslim population; and for good reason.¹⁰⁷ Under the Quran, Muslim men are permitted to have up to four wives.¹⁰⁸ Polyandry, however, is not allowed.¹⁰⁹ It is trite to observe that this inherently renders the practice inequalitarian.¹¹⁰ Moreover, to the extent that it is practised at all, it is a right exercised mostly by those who can afford having multiple wives.¹¹¹

⁹⁷ Scheidel (n 61) 289.

⁹⁸ Witte Jr, *Church, State, and Family* (n 69) 41.

⁹⁹ Ibid 30, 41; Augustine of Hippo, *Confessions and Enchiridion*, ed Albert C Outler (Christian Classics Ethereal Library, 2006) 38, 44.

¹⁰⁰ Phillop Schaff (ed), *Nicene and Post-Nicene Fathers* (Christian Classics Ethereal Library, 2008) ser 1, vol 5, 774.

¹⁰¹ Ron Du Preez, 'Polygamy in the Bible with Implications for Seventh-Day Adventist Missiology' (DMin Dissertation, Andrews University, 1993) 135.

¹⁰² Ibid 134; Kramer (n 20).

¹⁰³ Du Preez (n 101) 285; John Witte Jr, 'The Legal Challenges of Religious Polygamy in the USA' (2009) 11(1) *Ecclesiastical Law Journal* 72, 73.

¹⁰⁴ Preez (n 101) 285.

¹⁰⁵ Charles Amone, 'Polygamy as a Dominant Pattern of Sexual Pairing Among the Acholi of Uganda' (2020) 24(3) *Sexuality & Culture* 733, 745.

¹⁰⁶ Rothschild (n 18) 33.

¹⁰⁷ Thobejane and Flora (n 6) 1059.

¹⁰⁸ Du Preez (n 101) 4; Omar M Khasawneh, Abdul Hakeem Yacin Hijazi and Nassmat Hassan Salman, 'Polygamy and Its Impact on the Upbringing of Children: A Jordanian Perspective' (2011) 42(4) *Journal of Comparative Family Studies* 563, 564; Kramer (n 20); *Quran*, Surah An-Nisa 4:3.

¹⁰⁹ Thobejane and Flora (n 6) 1061.

¹¹⁰ Ibid 1062.

¹¹¹ Bailey and Kaufman (n 92) 7.

An oft-cited reason for the allowance of polygamy in the Quran is the inequality which the Prophet Muhammad lived in and sought to overcome.¹¹² Concerned that men were taking as many women as they could, the Prophet (being polygynous Himself) imposed the limit of four wives — a number that is itself conditional on the man being able to treat each of them justly.¹¹³ The status of women was thus improved.¹¹⁴ The reputation of polygamy is inextricably tied with the perception of the Sharia law in Islamic jurisprudence as oppressive and patriarchal which allows for discriminatory practices, such as a women's incapacity to contract, where the value of a man's life is greater than a woman's.¹¹⁵ It would nevertheless be ignorant to think that most Muslim women oppose polygamy.¹¹⁶ Many find love in polygamy.¹¹⁷

The history of polygamy in the United States of America ('USA'), where, since colonisation, it has been illegal,¹¹⁸ is of particular note. At present, an estimated 60,000 individuals in the USA engage in polygamy.¹¹⁹ First recorded amongst the Indigenous people of Florida in the 16th century, multiple rebellions occurred because of conflicts between the polygamous ways of the Indigenous peoples and its opposition by Franciscan missionaries and Spanish colonisers.¹²⁰ Pressured by colonial governments throughout North America, the Indigenous largely stopped practising polygamy.¹²¹

In 1830, Joseph Smith established the Church of Jesus Christ of Latter-day Saints, and with it, Mormonism.¹²² Smith claimed to have experienced a revelation that a man should have at least three wives to have a fulfilled afterlife.¹²³ The practice of polygamy was broadly adopted by the Mormons after the establishment of a Mormon population in Illinois in 1839, even more so after Utah

¹¹² Michèle Alexandre, 'Lessons from Islamic Polygamy: A Case for Expanding the American Concept of Surviving Spouse So as to Include De Facto Polygamous Spouses' (2007) 64 *Washington and Lee Law Review* 1461, 1465 ('Lessons from Islamic Polygamy'); Sasha Marie Holden, 'The Polygamy Paradox: A Feminist Re-Understanding of Polygamy, Human Movement and Human Rights' (PhD Thesis, King's College London, 2018) 51.

¹¹³ *Quran*, Surah An-Nisa 4:3; Alexandre, 'Lessons from Islamic Polygamy' (n 112) 1465; Michèle Alexandre, 'Big Love: Is Feminist Polygamy an Oxymoron or a True Possibility' (2007) 18(1) *Hastings Women's Law Journal* 3, 22 ('Big Love'); Bailey and Kaufman (n 92) 9.

¹¹⁴ Gallichan (n 7) 47.

¹¹⁵ Alexandre, 'Big Love' (n 113) 12–13.

¹¹⁶ *Ibid* 4; Angela Campbell, 'How Have Policy Approaches to Polygamy Responded to Women's Experiences and Rights? An International, Comparative Analysis: Final Report for Status of Women Canada' in Angela Campbell et al, *Polygamy in Canada: Legal and Social Implications for Women and Children* (2005) 1, 10.

¹¹⁷ Campbell (n 116) 10.

¹¹⁸ Shayna M Sigman, 'Everything Lawyers Know about Polygamy Is Wrong' (2006) 16(1) *Cornell Journal of Law and Public Policy* 101, 108.

¹¹⁹ Alexandre, 'Lessons from Islamic Polygamy' (n 112) 1463.

¹²⁰ Bailey and Kaufman (n 92) 39, 47–8.

¹²¹ *Ibid* 7.

¹²² Duncan (n 22) 317–18; Sigman (n 118) 111.

¹²³ Duncan (n 22) 315; Gallichan (n 7) 300–1.

church elder Orson Pratt publicly endorsed it in 1852.¹²⁴ This led to widespread condemnation by the media¹²⁵ and a systematic effort by successive governments to suppress the practice.¹²⁶ Amidst an increase in polygamy amongst the Mormons, the *Morrill Anti-Bigamy Act of 1862* was passed.¹²⁷ It penalised polygamy and restricted the Mormon Church's ability to hold land.¹²⁸ The first Republican presidential candidate, John Charles Fremont, focused his campaign on overcoming the 'twin relics of barbarism — polygamy and slavery'.¹²⁹

Mormon polygamy was more than a condemned religious practice — it was framed as a threat to 'white' civilisation.¹³⁰ Jurist Francis Lieber, for example, objected to polygamy for making Caucasians act Asiatic or African.¹³¹ The Supreme Court of the United States adopted this view in the seminal case of *Reynolds v United States*¹³² which established that religious belief cannot excuse a criminal indictment.¹³³

In Canada, some Mormons of British Columbia practise polygamy, albeit illegally.¹³⁴ Canada sought to prevent a flow of the persecuted American Mormons by outlawing polygamy in 1892.¹³⁵ Polygamy was also practised by Indigenous Canadians who were prosecuted — or rather, persecuted — for entering into more than one marriage.¹³⁶ Today, polygamy in Canada is associated with the Fundamentalist Church of Jesus Christ of Latter-Day Saints, a Mormon sect, led by convict Warren Jeffs who is serving a life sentence for a number of heinous sexual offences.¹³⁷

The influence of Christian missionaries across the world cannot be understated. Societies like the Church of England Zenana Missionary Society, which spread Christianity through India, Japan and China, condemned 'Mohammedanism' (Islam) as 'carnal' and 'gross'.¹³⁸ Polygamy, by association, received the same treatment.¹³⁹ The 20th century saw widespread prohibitions of

¹²⁴ Sigman (n 118) 112; Bailey and Kaufman (n 92) 83.

¹²⁵ Sigman (n 118) 113.

¹²⁶ Ibid 118.

¹²⁷ Duncan (n 22) 317.

¹²⁸ Ibid 318; *Morrill Anti-Bigamy Act of 1862*, ch 126, §§ 1–2, 12 Stat 501, 501.

¹²⁹ Duncan (n 22) 317; Sigman (n 118) 114.

¹³⁰ Martha M Ertman, 'Race Treason: The Untold Story of America's Ban on Polygamy' (2010) 19(2) *Columbia Journal of Gender and Law* 287, 295; Suzanne Lenon, 'Intervening in the Context of White Settler Colonialism: West Coast LEAF, Gender Equality and the Polygamy Reference' (2016) 6(6) *Oñati Socio-Legal Series* 1324, 1331.

¹³¹ Sigman (n 118) 127.

¹³² *Reynolds v United States*, 98 US 145, 164 (1878) ('*Reynolds*'); Lenon (n 130) 1330.

¹³³ *Reynolds* (n 132) 166–7.

¹³⁴ Fowler (n 23) 94.

¹³⁵ Ibid 98; Lenon (n 130) 1332.

¹³⁶ Fowler (n 23) 99; Bailey and Kaufman (n 92) 76.

¹³⁷ Bailey and Kaufman (n 92) 95. See also *Reference re: Section 293 of the Criminal Code of Canada* [2011] BCSC 1588, where Bauman CJ declared that the prohibition of polygamy is consistent with the Canadian Charter of Rights and Freedoms due to polygamy's 'harm to women, to children, to society and to the institution of monogamous marriage': at [5].

¹³⁸ Gallichan (n 7) 122.

¹³⁹ Ibid 123.

polygamy, with states like Thailand, China and India forbidding the practice.¹⁴⁰ Though it is illegal in some Muslim-majority states including Türkiye and Tunisia, it remains legal in others, including Saudi Arabia, the United Arab Emirates, Iran, Pakistan, Indonesia and Malaysia.¹⁴¹

D Polygamy at Present

Polygamy is estimated to exist among 83% of societies in the world.¹⁴² Pew Research Center nevertheless estimates that only 2% of the world's population currently lives in a polygamous household.¹⁴³ Polygamy, today, is most common throughout Africa, particularly sub-Saharan Africa.¹⁴⁴ It is also legal throughout much of the Middle East.¹⁴⁵ It is imperative to note that most studies of polygamy relate solely to polygyny.¹⁴⁶ For that reason, polygyny and polyandry are discussed separately below. All the other references to 'polygamy' are solely to polygyny.

In Africa, polygamy is most common throughout the 'polygamy belt' which stretches from Senegal to Tanzania.¹⁴⁷ Within the polygamy belt, the rates of polygamy (almost exclusively polygyny) vary from about 20–40%,¹⁴⁸ partly because of the differing rates of Islam.¹⁴⁹ Polygamy is generally in decline.¹⁵⁰ Its decline is partly attributable to colonial and missionary education and people's conversion to Christianity, both of which discouraged polygamy.¹⁵¹ In former French West Africa, for instance, a 'dual church–state education system' operated to eliminate the practice.¹⁵² In Zimbabwe, the end of colonial rule led to increased education of the native population, which improved their understanding of HIV/AIDS, but did not affect the rates of polygamy.¹⁵³ Similarly, the increased education of the Kenyan population in the 1980s did not have an

¹⁴⁰ Thobejane and Flora (n 6) 1060; John Witte Jr, 'Why Two in One Flesh? The Western Case for Monogamy over Polygamy' (2015) 64 *Emory Law Journal* 1675, 1701 ('Why Two in One Flesh?').

¹⁴¹ Khasawneh, Hijazi and Salman (n 108) 568; Bailey and Kaufman (n 92) 7.

¹⁴² Du Preez (n 101) 3; Fowler (n 23) 96; Thobejane and Flora (n 6) 512; Witte Jr, 'Why Two in One Flesh?' (n 140) 1700.

¹⁴³ Kramer (n 20).

¹⁴⁴ Thobejane and Flora (n 6) 1060; Bailey and Kaufman (n 92) 8.

¹⁴⁵ Scheidel (n 61) 284.

¹⁴⁶ Fowler (n 23) 93.

¹⁴⁷ Kramer (n 20); Witte Jr, 'Why Two in One Flesh?' (n 140) 1701; James Fenske, 'African Polygamy: Past and Present' (2015) 117 *Journal of Development Economics* 58, 58.

¹⁴⁸ Luca Maria Pesando, 'Polygyny and Women's Status: Myths and Evidence' in Walter Leal Filho et al (eds), *Gender Equality* (Springer, 2021) 975, 975; Witte Jr, 'Why Two in One Flesh?' (n 140) 1701; Bailey and Kaufman (n 92) 14.

¹⁴⁹ Bailey and Kaufman (n 92) 19, 30.

¹⁵⁰ Pesando (n 148) 975.

¹⁵¹ Fenske (n 147) 58, 70; Bailey and Kaufman (n 92) 14.

¹⁵² Fenske (n 147) 70.

¹⁵³ *Ibid* 59.

effect on polygamy.¹⁵⁴ Areas close to Catholic or Protestant missions have a lower incidence of polygamy,¹⁵⁵ but higher education is not an impediment to its practice.¹⁵⁶ As such, education does not inherently reduce polygamy — rather, colonial and missionary education does.¹⁵⁷

1 Polygyny and its Problems

Property and land ownership laws in polygynous societies have consistently been found to discriminate against women.¹⁵⁸ Part of that discrimination stems from the bride price paid to the bride's father, which causes the bride to enter a polygynous marriage and bear children at an early age.¹⁵⁹ In most polygynous societies, women also have no say as to whether their husband marries another, which, in turn, leads to women's opposition to polygyny.¹⁶⁰ Indeed, absent a wife's consent, the addition of another wife causes lasting trauma.¹⁶¹ Competition and conflict is often rife in such marriages.¹⁶² Women and their children compete for resources within the family.¹⁶³ Infertility, too, leads to rivalry.¹⁶⁴

By virtue of their young marrying age, women in polygynous marriages are commonly less educated than their husbands and have fewer financial resources.¹⁶⁵ Yet, a polygynous wife might have more control over her earnings than a monogamous one.¹⁶⁶ Studies on the impact of polygyny on the mental well-being of children have not demonstrated any significant relationship between the two variables, although there is a slightly higher incidence of mental health issues in the children of polygyny.¹⁶⁷ In two studies of 210 and 182 Bedouin adolescents in Israel, respectively, Elbedour et al found that adolescents from monogamous families generally experienced a higher level of family cohesion and fewer psychopathological problems than those in polygamous families.¹⁶⁸ As to learning disabilities and intelligence, there is no difference between the children of

¹⁵⁴ Ibid.

¹⁵⁵ Ibid 63.

¹⁵⁶ Ibid 67.

¹⁵⁷ Ibid 70.

¹⁵⁸ Seligson and McCants (n 6) 13.

¹⁵⁹ Ibid 16.

¹⁶⁰ Pesando (n 148) 977.

¹⁶¹ Thobejane and Flora (n 6) 1060.

¹⁶² Pesando (n 148) 977.

¹⁶³ Ibid.

¹⁶⁴ Ibid 980.

¹⁶⁵ Seligson and McCants (n 6) 16; Pesando (n 148) 978.

¹⁶⁶ Pesando (n 148) 977.

¹⁶⁷ Mohammad Al-Sharfi, Karen Pfeffer and Kirsty A Miller, 'The Effects of Polygamy on Children and Adolescents: A Systematic Review' (2016) 22(3) *Journal of Family Studies* 1, 7.

¹⁶⁸ Salman Elbedour, William Bart and Joel Hektner, 'The Relationship between Monogamous/Polygamous Family Structure and the Mental Health of Bedouin Arab Adolescents' (2007) 30(2) *Journal of Adolescence* 213, 224.

monogamy and polygyny.¹⁶⁹ Family dysfunction is, however, higher in polygynous families.¹⁷⁰ In an analysis of 22 cross-sectional studies on the impact of polygyny on women's mental health, 15 studies found a higher prevalence of conditions such as anxiety, hostility and somatisation in polygynous wives.¹⁷¹ Studies have also found children in polygynous families to be more nutritionally deficient due to a worse intrafamilial distribution of resources.¹⁷²

What must be borne in mind is that studies into these matters are primarily carried out in Arab societies.¹⁷³ In sub-Saharan Africa, polygyny has been associated with higher levels of paternal education, unlike Arab societies.¹⁷⁴ In Arab culture, a man's first marriage is often arranged, so subsequent wives are shown more affection.¹⁷⁵ Further rejection of polygamy stems from its occurrence in societies which endorse female genital mutilation and discrimination against women.¹⁷⁶ That is to say, polygamy is shaped by custom, whether discriminatory or otherwise.¹⁷⁷ It is not an inflexible object. It is a creature which adapts to its environment. Its image reflects the social context in which it is grounded.

2 Polyandry

Through that process of adaptation comes polyandry. It is most common in Tibet, Nepal, parts of India and amongst the Sinhalese people of Sri Lanka.¹⁷⁸ In polyandrous marriages, wives are commonly shared between brothers.¹⁷⁹ This most common form of polyandry is termed 'fraternal polyandry'.¹⁸⁰ The prevalence of polyandry in Tibet has been rationalised on the basis of a house being seen as a 'moral person'.¹⁸¹ Kinship is formed around the house which is

¹⁶⁹ Al-Sharfi, Pfeffer and Miller (n 167) 8.

¹⁷⁰ Ibid 9.

¹⁷¹ LD Shepard, 'The Impact of Polygamy on Women's Mental Health: A Systematic Review' (2013) 22(1) *Epidemiology and Psychiatric Sciences* 47, 50.

¹⁷² Pesando (n 148) 982.

¹⁷³ Al-Sharfi, Pfeffer and Miller (n 167) 13; Campbell (n 116) 6.

¹⁷⁴ Al-Sharfi, Pfeffer and Miller (n 167) 13.

¹⁷⁵ Campbell (n 116) 3.

¹⁷⁶ Struensee (n 19) 4; Holden (n 112) 65.

¹⁷⁷ Struensee (n 19) 8.

¹⁷⁸ Berreman (n 21) 60; ER Leach, 'Polyandry, Inheritance and the Definition of Marriage' (1955) 55 *Man* 182, 183; Binod Pokharel, 'Changing Practices of Polyandry among the People of West-Northern Frontier of Nepal' (2018) 5 *Keanean Journal of Arts* 50, 51; Youba Raj Luintel, 'Agency, Autonomy and the Shared Sexuality: Gender Relations in Polyandry in Nepal Himalaya' (2004) 31(1) *Contributions to Nepali Studies* 43, 43 ('Agency, Autonomy and the Shared Sexuality'); Youba Raj Luintel, 'Locating Power in Polyandry: Sexuality and Property Regimes in Gender Relations in the Nepal Tibet Frontier Households' (M.A. Thesis, International Institute of Social Studies, 2000) ('Locating Power in Polyandry').

¹⁷⁹ Leach (n 178) 182; Berreman (n 21) 60.

¹⁸⁰ Berreman (n 21) 60.

¹⁸¹ Eveline Bingaman et al, 'Kinship and the State in Tibet and Its Borderlands: Introduction' (2021) 23(1) *Inner Asia* 2, 12.

shared by a set of brothers and their wife.¹⁸² The extent of polyandry in these societies is unclear,¹⁸³ although it is likely not as uncommon as it is often thought.¹⁸⁴ A study by anthropologists Katherine Starkweather and Raymond Hames found polyandry in 53 societies outside of those in the Himalayas between India, Nepal and Tibet.¹⁸⁵ It is a practice found in a range of climates: deserts, tropics and the Arctic.¹⁸⁶ Julius Caesar, for instance, reported that groups of ‘ten or twelve’ Briton males, particularly brothers, would possess their wives in common; that is, the Britons practised polyandry.¹⁸⁷ The accuracy of this account has been debated,¹⁸⁸ but it shows that the discussion of polyandry is not limited only to the people inhabiting the Himalayas. As with polygyny, missionaries have historically sought to abolish polyandry. This is true of the Kagoro in Northern Nigeria, the Sinhalese of Sri Lanka and the Tibetans.¹⁸⁹

Polyandry is generally a result of economic factors. When, say, two brothers share the same wife, their children would have a joint, rather than separate, interest in the inheritance.¹⁹⁰ If one of the brothers is in a polygynous or monogamous marriage, their property retention is eliminated.¹⁹¹ Studies of polyandry in the Himalayas consistently cite the commonality of property as the main motivating factor.¹⁹² The Pahari people practise polyandry as a patrilineal system where the husbands jointly hold all the property.¹⁹³ The wife refers to each of her spouses as ‘husband’ and the children refer to all of the men as ‘father’.¹⁹⁴ The children’s inheritance is derived from the spouses as a whole, not solely from their biological parents.¹⁹⁵ In contrast, amongst the Nyinba people of Nepal only one man is identified as a child’s father.¹⁹⁶ Given that a birth certificate shows only one father

¹⁸² Ibid.

¹⁸³ Pokharel (n 178) 51.

¹⁸⁴ Starkweather and Hames (n 60) 150; Adshade and Kaiser (n 54) 3.

¹⁸⁵ Starkweather and Hames (n 60) 150.

¹⁸⁶ Ibid 153; Juddha Bahadur Gurung, ‘Rapid Cultural Change: A Case Study of Polyandry Marriage System among the Gurung Community from Upper Mustang, Nepal’ (2013) 6 *Dhaulagiri Journal of Sociology and Anthropology* 75, 76.

¹⁸⁷ Julius Caesar, *Cæsar’s Commentaries on the Gallic and Civil Wars* (Harper & Brothers, 1859) 113; Engels (n 78) 34.

¹⁸⁸ Eleanor Scott, ‘Polyandry in Late Iron Age and Roman Britain: Myth or Reality?’, *Eleanor Scott Archaeology* (Blog Post, 30 April 2018) <<https://eleanorscottarchaeology.com/els-archaeology-blog/2018/3/6/polyandry-in-late-iron-age-and-roman-britain-myth-or-reality>>.

¹⁸⁹ Nancy E Levine and Walter H Sangree, ‘Conclusion: Asian and African Systems of Polyandry’ (1980) 11(3) *Journal of Comparative Family Studies* 385, 405.

¹⁹⁰ Nancy E Levine and Joan B Silk, ‘Why Polyandry Fails: Sources of Instability in Polyandrous Marriages’ (1997) 38(3) *Current Anthropology* 375, 376; Berreman (n 21) 62.

¹⁹¹ Berreman (n 21) 64.

¹⁹² Gurung (n 186) 82.

¹⁹³ Berreman (n 21) 61; Luintel, ‘Agency, Autonomy and the Shared Sexuality’ (n 178) 54.

¹⁹⁴ Berreman (n 21) 62.

¹⁹⁵ Ibid.

¹⁹⁶ Levine and Silk (n 190) 379; Luintel, ‘Locating Power in Polyandry’ (n 178) 26.

and one mother, a child of polyandry cannot claim the property of a polyandrous marriage.¹⁹⁷ Such a division of property instead occurs customarily.¹⁹⁸

For the Lama people of Nepal, fraternal polyandry is an extant, but declining, practice.¹⁹⁹ Likewise, as agriculturalism has declined amongst the Nyinba, who now have a broader variety of job offerings, so has polyandry.²⁰⁰ For the Lama and Nyinba, property is held by the eldest brother, while all the brothers engage in the pastoral work.²⁰¹ If one brother is to abandon the polyandrous marriage, they would lose any claim to the property held by the eldest brother.²⁰² Notwithstanding the eldest brother's position, they are not superior to the other spouses; it is the wife who is the head of the family.²⁰³ Indeed, Nyinba women are more marginalised in monogamous than polyandrous marriages.²⁰⁴ They are more economically independent than their monogamous counterparts because their property is owned and inherited in common.²⁰⁵ Polyandrous wives also have greater sexual freedom because the 'identification of individual fatherhood' does not matter.²⁰⁶ Sex is also treated as a pleasurable, rather than purely reproductive act.²⁰⁷ In Sinhalese customary marriages, the sexual rights of each husband and the proprietary rights of each child are indistinguishable.²⁰⁸ Such marriages have been found to reduce sexual jealousy between partners,²⁰⁹ although findings to the contrary have also been made.²¹⁰

Another form of polyandry is the 'secondary marriage'.²¹¹ A secondary marriage requires a wife to be in a primary monogamous marriage and then to enter into a secondary monogamous marriage without exiting the first-mentioned monogamous marriage.²¹² The secondary marriage model allows, in essence, a woman to have a series of concurrent monogamous marriages.²¹³ It can also coexist with polygyny, such that each man may have multiple wives, whereas

¹⁹⁷ Leach (n 178) 184.

¹⁹⁸ *Ibid.*

¹⁹⁹ Pokharel (n 178) 55.

²⁰⁰ Levine and Silk (n 190) 385.

²⁰¹ Pokharel (n 178) 56.

²⁰² *Ibid.*

²⁰³ Luintel, 'Locating Power in Polyandry' (n 178) 27–9; Luintel, 'Agency, Autonomy and the Shared Sexuality' (n 178) 50; Gurung (n 186) 85–6.

²⁰⁴ Luintel, 'Locating Power in Polyandry' (n 178) 51.

²⁰⁵ *Ibid.*; Levine and Sangree (n 189) 390; Luintel, 'Agency, Autonomy and the Shared Sexuality' (n 178) 59.

²⁰⁶ Luintel, 'Agency, Autonomy and the Shared Sexuality' (n 178) 71.

²⁰⁷ *Ibid.*

²⁰⁸ Leach (n 178) 183.

²⁰⁹ *Ibid.* 184; Berreman (n 21) 65; Pokharel (n 178) 55; Luintel, 'Agency, Autonomy and the Shared Sexuality' (n 178) 57.

²¹⁰ Levine and Silk (n 190) 377; Henrich, Boyd and Richerson (n 70) 664.

²¹¹ Levine and Sangree (n 189) 400.

²¹² *Ibid.*

²¹³ *Ibid.*

each wife may have multiple husbands in separate concurrent secondary marriages.²¹⁴ It is most common in Northern Nigeria,²¹⁵ despite having been abolished in 1968.²¹⁶ The secondary marriages of Northern Nigerians serve as a diplomatic tool, wherein members of tribal sub-groups are able to form a connection.²¹⁷ Inheritance, as in the Himalayas, is patrilineal.²¹⁸

Where there is polyandry, there is polygyny.²¹⁹ The inverse cannot be said.²²⁰ This complex history shows that polygamy is a flexible practice and one which has been moulded throughout history to accommodate the differences in values and proprietary interests of a particular society.²²¹ No one relationship structure suits all.

IV POLYGAMY IN AUSTRALIA

This Part provides a social, as opposed to legal, history of polygamy in Australia. It does not deal with law in substance; rather, it highlights the political rhetoric and socio-economic, cultural and religious factors that have led to the current state of the law, which is explored in Part V. It is important to appreciate this history because, if any law is to be reformed, one must reflect on how the present was shaped by the past and whether any reform is necessary to accommodate interests previously neglected.

A Indigenous Australians and Polygamy

Indigenous Australians traditionally practise polygamy, though it is almost exclusively polygyny.²²² A significant limitation in considering the historical rates of polygyny amongst Indigenous Australians is the absence of pre-settlement data.²²³ There have, nevertheless, been some exceptional reports of polyandry.²²⁴

²¹⁴ Ibid 400–1.

²¹⁵ Ibid 399.

²¹⁶ Walter H Sangree, 'The Persistence of Polyandry in Irigwe, Nigeria' (1980) 11(3) *Journal of Comparative Family Studies* 335, 337.

²¹⁷ Levine and Sangree (n 189) 401.

²¹⁸ Ibid 406.

²¹⁹ Ibid 403; Henrich, Boyd and Richerson (n 70) 659.

²²⁰ Henrich, Boyd and Richerson (n 70) 659.

²²¹ Campbell (n 116) 8.

²²² Ronald M Berndt and Catherine H Berndt, *The World of the First Australians: Aboriginal Traditional Life Past and Present* (Aboriginal Studies Press, 5th ed, 1996) 197; Adolphus Peter Elkin, *Australian Aborigines: How to Understand Them* (Angus & Robertson, 4th ed, 1970) 161.

²²³ Jeremy Long, 'Polygyny, Acculturation and Contact: Aspects of Aboriginal Marriage in Central Australia' in Ronald M Berndt and Australian Institute of Aboriginal Studies (eds), *Australian Aboriginal Anthropology: Modern Studies in the Social Anthropology of the Australian Aborigines* (University of Western Australia Press, 1970) 296 ('Aspects of Aboriginal Marriage in Central Australia').

²²⁴ Lorimer Fison and AW Howitt, *Kamilaroi and Kurnai* (Anthropological Publications, 1967) 147.

The Dieri of Central Australia historically presented such an example.²²⁵ Amongst the Dieri, a husband would lend his wife to his tribal brothers, with each tribal brother bearing responsibility to care for her children.²²⁶

Each polygynous marriage is considered a new ‘social unit’ in the overall structure.²²⁷ The number of wives can vary greatly.²²⁸ Men commonly have secondary wives who, in turn, are the primary wives of the men’s tribal brothers.²²⁹ On Bathurst and Melville islands, reports show a maximum of twenty-nine wives.²³⁰ In desert regions and Arnhem Land, the maximum is around six wives.²³¹ Monogamy is nevertheless the norm.²³² In 1933, Professor Adolphus Peter Elkin recognised ‘social and economic ends’, rather than sexual motivations, as leading to polygyny.²³³ Those with many wives were given access to ‘special trading monopolies’.²³⁴ This, in turn, led to what would generally be considered undesirable practices. For instance, husbands could lend their wives without the wife’s consent.²³⁵ In such marriages, the wives were not equal to their husbands.²³⁶

An 1895 article in *The Queenslander* claimed that women in Indigenous polygamous marriages were subordinates and regarded ‘as articles of personal property’.²³⁷ The husband, the article stated, would kill his wives in fits of anger.²³⁸ The article drew a comparison with ‘civilised’ European marriages in which husbands chastised their wives.²³⁹ Anthropological studies of polygynous marriages from that time do not support such claims. With regard to wives being considered ‘chattels’, Professor Elkin notes that women abide by the scheme of being wedded to the members of other tribes.²⁴⁰ He draws a comparison between that system and the historical arranging of marriages amongst European nobility.²⁴¹ In anthropologist Lorimer Fison’s 19th century studies of the Gamilaraay and Gunaikurnai people (referred to by Fison as ‘Kamilaroi and

²²⁵ Starkweather and Hames (n 60) 155.

²²⁶ Ibid.

²²⁷ Berndt and Berndt (n 222) 206.

²²⁸ Ibid 202.

²²⁹ Elkin (n 222) 161.

²³⁰ Berndt and Berndt (n 222) 202.

²³¹ Ibid.

²³² Ibid.

²³³ ‘Legal Polygamy’, *The Daily Telegraph* (Sydney, 20 April 1933) 1; ‘Person: Elkin, Adolphus Peter’, *The University of Sydney* (Web Page, 2016) <<https://uniarchivesonline.sydney.edu.au/#/records/person/80>>.

²³⁴ Berndt and Berndt (n 222) 202.

²³⁵ Ibid 189.

²³⁶ Ibid 208.

²³⁷ ‘The Australian Aborigines’, *The Queenslander* (Brisbane, 1 June 1895) 1031.

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ Elkin (n 222) 157.

²⁴¹ Ibid.

Kurnai'), he recognised marriage not as a contract, but as 'a natural state' of classes in a system of kinship.²⁴² It is not a system founded on the rights of a man or woman, but on those of a tribe's class structure.²⁴³ Those classes then guide matters such as land inheritance.²⁴⁴

Fison summarised the laws of marriage in four points. First, marriage is communal — the men in one class of a tribe marry all the women in another class of that tribe.²⁴⁵ Second, all tribe classes are exogamous — one cannot marry within the same tribal class.²⁴⁶ Exogamous group marriages were the norm.²⁴⁷ Spouses cohabited and marriages were not limited to two or three spouses.²⁴⁸ Third, the wife remains in her tribal class after marriage.²⁴⁹ Fourth, descent is traced maternally.²⁵⁰ Fison's laws of marriage, which sought to explain kin classification through the concept of 'group marriage', have since been criticised.²⁵¹ It is now accepted, as Hiatt describes, that group marriage was not a widespread practice, although de facto group marriage did occur, albeit not as a 'total system', in regimes practising polygyny and wife-sharing (which amounted to polyandry).²⁵²

Looking to the Areyonga, Haasts Bluff–Papunya and Yuendumu people of Alice Springs, anthropologist Jeremy Long recorded varying rates of polygyny in 1970, with the number of wives per husband ranging from one to six.²⁵³ Noting Lutheran mission evangelists' influence and contact with settlers for over thirty years, Long found a decline in polygyny rates, albeit not 'a very marked' one.²⁵⁴ The Warlpiri people, who had contact with cattle stations and mining camps in the 1930s, remained more polygynous than the Papunya who had been acculturated through their additional contact with Lutheran mission evangelists during that period.²⁵⁵ For the Warlpiri, where 'polygyny is the ideal', the percentage of polygynist

²⁴² Fison and Howitt (n 224) 127–8; Elkin (n 222) 144; Engels (n 78) 56–8.

²⁴³ Fison and Howitt (n 224) 127–8; Quinlan (n 49) 102.

²⁴⁴ Fison and Howitt (n 224) 127–8.

²⁴⁵ Ibid 50.

²⁴⁶ Ibid 52; Elkin (n 222) 147.

²⁴⁷ Fison and Howitt (n 224) 159–60.

²⁴⁸ Ibid.

²⁴⁹ Ibid 52.

²⁵⁰ Ibid 52, 108, 119, 156.

²⁵¹ Lester Richard Hiatt, *Arguments about Aborigines: Australia and the Evolution of Social Anthropology* (Cambridge University Press, 1996) 55.

²⁵² Ibid 54–5.

²⁵³ Long, 'Aspects of Aboriginal Marriage in Central Australia' (n 223) 292–3.

²⁵⁴ Ibid 295.

²⁵⁵ Ibid.

individuals ranged from 19% to 53%.²⁵⁶ Again, the incidence of polygyny was dependent on economic, as well as sexual, incentives.²⁵⁷

Australia, as a secular state which was religiously neutral, chose to deny and exclude the sovereignty and customs of the Indigenous population, which it framed as a competing authority.²⁵⁸ As irony would have it, the *secular* Australian state forcibly separated Indigenous children from their families in order for *Christian churches* to ‘civilise’ them with *Christian values*.²⁵⁹ To the extent that it can be ascertained from publications of the time, Christian missions exerted their ‘greatest influence through the women and children’.²⁶⁰ They acted as the government’s vehicle to drive the Indigenous into assimilation.²⁶¹ In 1934, *Age* published an article titled ‘Christianing the Aborigines’, which emphasised the missionary influence upon the Indigenous, as well as the ‘chief difficulties’ of tackling polygamy²⁶² — a repeated sentiment.²⁶³

In 1960, Secretary for Aborigines of the Church Missionary Society, JB Montgomerie, expressed his mission to assimilate the Indigenous: ‘Our chief concern is to get on with the job and train and prepare these native peoples for assimilation so that they can become normal citizens of the Commonwealth.’²⁶⁴ To that end, missionaries were largely successful in reducing polygyny.²⁶⁵ A search of every issue of the Christian mission newsletters *Our Aim* and *Evangel* reveals two articles substantially discussing polygamy. From 1943, ‘Aboriginaldom’ describes polygyny as a ‘curse which blights the lives of these people’.²⁶⁶ It highlights the plight of girls as young as five years of age who are taken as wives by young men.²⁶⁷ In 1944, in ‘The Liberation of Needa’, WA Long shared the story of Needa, a young woman and ‘victim’ of polygamy, which was described as ‘the Satanic bondage of heathen customs’.²⁶⁸ ‘[T]he “war” against polygamy and other heathen customs has been approaching a climax’, Long says, recounting how Needa was taken by the missionaries from her husband,

²⁵⁶ MJ Meggitt, ‘Marriage among the Walbiri of Central Australia: A Statistical Examination’ in Ronald M Berndt and Catherine H Berndt (eds), *Aboriginal Man in Australia: Essays in Honour of AP Elkin* (Angus & Robertson, 1965) 146, 148–9.

²⁵⁷ *Ibid* 148–9, 155.

²⁵⁸ Randell–Moon (n 33) 360.

²⁵⁹ *Ibid* 360–1; McGrath and Stevenson (n 8) 49.

²⁶⁰ ‘Bathurst Island: Polygamous Aborigines’, *The Sydney Morning Herald* (Sydney, 19 April 1934) 8.

²⁶¹ Laura Rademaker, ‘The Polygamy Question: Missions, Marriage, and Assimilation’ (2019) 43(2) *Journal of Religious History* 251, 252; McGrath and Stevenson (n 8) 47.

²⁶² ‘Christianing the Aborigines’, *The Age* (Melbourne, 5 December 1934) 15.

²⁶³ ‘Bathurst Island: Polygamous Aborigines’ (n 260) 4.

²⁶⁴ Rademaker (n 261) 252.

²⁶⁵ McGrath and Stevenson (n 8) 47.

²⁶⁶ WA Long, ‘Aboriginaldom: Second Article on Old Customs Versus New Life’ (1943) 37(3) *Our Aim* 13, 13.

²⁶⁷ *Ibid*.

²⁶⁸ WA Long, ‘The Liberation of Needa’ (1944) 37(9) *Our Aim* 11, 11.

Charlie.²⁶⁹ Although the truthfulness of these stories cannot be proven, they show the fraught history Australia has had with polygamy. Acculturation, in general, contributed to a decline in polygyny.²⁷⁰ As geographer Fay Gale found in her study of the impacts of city life on Indigenous Australians in Adelaide, urbanisation decreased rates of polygyny and marriage more broadly.²⁷¹

B Polygamy Across the Populace

There is no established history of polygamy as a standard practice within the non-Indigenous Australian population. The number of non-legally recognised polygamous marriages in Australia cannot be identified and, to that end, there have not been any noteworthy studies.²⁷² In 1991, the Australian Law Reform Commission said of polygamy that it ‘is alien to mainstream Australian culture and to the western European culture from which it derives.’²⁷³

For over forty years, large groups of Muslims have been migrating to Australia and Islam continues to grow.²⁷⁴ In the 2021 Census, 813,392 individuals identified as Muslim.²⁷⁵ Muslim Australians are not homogenous in terms of their background²⁷⁶ and some may favour polygamy. Even with monogamy, many Muslim marriages entered into may not be registered because there is no such requirement under Islamic law, or simply because of a miscommunication or lack of initiative by the spouses.²⁷⁷ The general media, such as the Special Broadcasting Service’s *Insight*, has examined the existence of polygamy in Australia and reported on instances of polygamy in Indigenous, Lebanese Muslim and Sierra Leonean communities, as well as in the broader public.²⁷⁸ Anecdotal evidence of weekly requests made to a Muslim Sheikh in Sydney for polygamous marriages

²⁶⁹ Ibid.

²⁷⁰ Long, ‘Aspects of Aboriginal Marriage in Central Australia’ (n 223) 296.

²⁷¹ Fay Gale, ‘The Impact of Urbanization on Aboriginal Marriage Patterns’ in Ronald M Berndt and Australian Institute of Aboriginal Studies (eds), *Australian Aboriginal Anthropology: Modern Studies in the Social Anthropology of the Australian Aborigines* (University of Western Australia Press, 1970) 305, 315; Witte Jr, ‘Why Two in One Flesh?’ (n 140) 1701.

²⁷² Ann Black and Kerrie Sadiq, ‘Good and Bad Sharia: Australia’s Mixed Response to Islamic Law’ (2011) 34(1) *University of New South Wales Law Journal* 383, 409; Quinlan (n 49) 100.

²⁷³ *Multiculturalism: Family Law* (n 12) 27 [3.43].

²⁷⁴ Jenny Richards and Hossein Esmaeili, ‘The Position of Australian Muslim Women in Polygamous Relationships under the Family Law Act 1975 (Cth): Still “Taking Multiculturalism Seriously”?’ (2012) 26(2) *Australian Journal of Family Law* 142, 146; Australian Bureau of Statistics, ‘2021 Census Shows Changes in Australia’s Religious Diversity’ (Media Release, 28 June 2022) <<https://www.abs.gov.au/media-centre/media-releases/2021-census-shows-changes-australias-religious-diversity>>.

²⁷⁵ ‘Religious Affiliation in Australia’ (n 50).

²⁷⁶ Black and Sadiq (n 272) 385; Quinlan (n 49) 104.

²⁷⁷ Ann Black, ‘Adaptations of Islamic Family Law for the Australian Context’ (2016) 30(3) *Australian Journal of Family Law* 159, 169, 171–2.

²⁷⁸ ‘Polygamy: How Common?’ (n 9).

further supports the existence of legally unrecognised polygamous arrangements.²⁷⁹ Such relationships generally involve a legal marriage and an additional de facto partner who is treated as another spouse.²⁸⁰ Despite calls for the recognition of polygynous marriages by the President of the Islamic Friendship Association of Australia, in 2008, former federal Attorney-General Robert McClelland vehemently denied any such possibility: ‘There is absolutely no way that the Government will be recognising polygamist relationships’.²⁸¹

A 2016 article in the *Sunday Telegraph* quoted a ‘Muslim leader’ who claimed to know Islamic sheikhs who had multiple legally unrecognised wives, but did not identify them out of fear.²⁸² Those who practise polygamy (albeit not legally) may fear condemnation, though it is otherwise legal to have multiple de facto partners.²⁸³ The attitudes so far described are consistent with this sentiment.

Curiously, however, polyamory appears to be generally socially acceptable in Australia amongst young and middle-aged Australians, particularly those in the LGBT+ community who are open to exploring mutually- and consensually-polyamorous relationships with their partners.²⁸⁴ The presence of polyamorous groups at the Sydney Gay and Lesbian Mardi Gras is, to an extent, a public display of its acceptability.²⁸⁵ In saying this, the rates of polyamory in Australia are not clear. A 2014 Commonwealth Scientific and Industrial Research Organisation-published study found that just under 1% of its 5,323 respondents were in polyamorous relationships.²⁸⁶ Polyamorist groups exist in every major city and they attract consistent media attention.²⁸⁷ Ostracism of polyamorists occurs too and remains a social issue.²⁸⁸ A chapter of *LGBT-Parent Families* presents a study of thirteen Australian parents who are part of polyamory support group

²⁷⁹ Richards and Esmaeili (n 274) 157.

²⁸⁰ ‘Polygamy: How Common?’ (n 9).

²⁸¹ ‘No Recognition for Polygamous Marriage: A-G’, *ABC News* (online, 25 June 2008) <<https://www.abc.net.au/news/2008-06-25/no-recognition-for-polygamous-marriage-a-g/2483724>>.

²⁸² Maiden (n 9) 7.

²⁸³ *FLA* (n 10) s 4AA(5)(b).

²⁸⁴ Nell Geraets, ‘What It’s Really like to Be Non-Monogamous in Australia’, *The Sydney Morning Herald* (online, 28 June 2024) <<https://www.smh.com.au/lifestyle/life-and-relationships/what-it-s-really-like-to-be-non-monogamous-in-australia-today-20240611-p5jlkx1.html>>; Kellie Scott, ‘Is One Romantic Partner Enough for You?’, *ABC News* (online, 24 October 2017) <<https://www.abc.net.au/news/2017-10-25/open-relationships-is-one-romantic-partner-enough-for-you/9034330>>; Samantha Selinger-Morris, ‘Easy as One, Two, Three: Are Throuples Becoming More Mainstream?’, *The Sydney Morning Herald* (online, 2 February 2023) <<https://www.smh.com.au/lifestyle/life-and-relationships/easy-as-one-two-three-are-throuples-normal-now-20230201-p5ch3i.html>>.

²⁸⁵ Antalfy (n 17).

²⁸⁶ Juliet Richters et al, ‘Who’s Cheating? Agreements about Sexual Exclusivity and Subsequent Concurrent Partnering in Australian Heterosexual Couples’ (2014) 11(6) *Sexual Health* 524, 528.

²⁸⁷ Bennett (n 17) 269; Antalfy (n 17).

²⁸⁸ Antalfy (n 17).

PolyVic.²⁸⁹ The study found that polyamorous parents were hesitant to tell their children about their polyamorous lifestyle for fear of their children spreading word of it and being forcibly separated from their families.²⁹⁰ Australian polyamorous families are often gay, lesbian or bisexual,²⁹¹ such that, if they were married, they would be polyanthropous. The stigmatisation of such families is one of the chief problems faced by the children of the polyamorous.²⁹² Polyamorous parents, nevertheless, enjoy the benefits of this structure, finding a 'greater ease of parenting'.²⁹³ Still, children in polyamorous families can experience 'separation anxiety and grief' over their parents' partners if they leave.²⁹⁴ Parents have sought to ameliorate that consequence by ensuring that their partners commit to their children's upbringing.²⁹⁵ This anxiety, though less likely to occur in a polygamous family because of each spouse's long-term marital commitment (unlike a polyamorous family, where partners may be transient), is perhaps least likely to be found in a monogamous family.

Bigamy, too, has been a part of Australia's history. Often a case of individuals leading a double life or abandoning their current spouse and marrying another, it came into existence partly due to the inaccessibility of divorce for lower- and middle-class Australians.²⁹⁶ Bigamy has been reported historically,²⁹⁷ often wrongly referred to as polygamy,²⁹⁸ which could have furthered the negative perception of polygamy. Courts in the mid-20th century framed it as a serious offence 'of vast importance'²⁹⁹ — a sentiment which is faintly echoed today.³⁰⁰ The introduction of the offence, like the prohibition on polygamy, was motivated and justified by reference to civilisation³⁰¹ and Christian conceptions of marriage.³⁰² It was seen as 'akin to blasphemy'.³⁰³

²⁸⁹ Pallotta-Chiarolli, Haydon and Hunter (n 9) 117–18.

²⁹⁰ *Ibid* 121, 123.

²⁹¹ *Ibid* 117.

²⁹² *Ibid* 118, 120.

²⁹³ *Ibid* 125.

²⁹⁴ *Ibid* 126.

²⁹⁵ *Ibid*.

²⁹⁶ Bennett (n 26) 371.

²⁹⁷ 'A Case of Polygamy', *The Age* (Melbourne, 18 June 1883) 1.

²⁹⁸ *Ibid*; 'Alleged Polygamy', *Sunday Times* (Sydney, 20 December 1908) 12; 'Charge of Polygamy', *Albury Banner and Wodonga Express* (Albury, 25 December 1908) 41.

²⁹⁹ Bennett (n 26) 359; *Thomas v The King* (1937) 59 CLR 279, 316 (Evatt J) ('*Thomas*'); *R v Bonnor* [1957] VR 227, 240 (O'Bryan J) ('*Bonnor*').

³⁰⁰ Bennett (n 26) 360; *Meena & Meena* [2021] FamCA 161, [10] (Macmillan J); *Chhibber & Kudva* [2014] FamCA 499, [11] (Macmillan J).

³⁰¹ *Thomas* (n 299) 316.

³⁰² Bennett (n 26) 377; *Bonnor* (n 299) 249.

³⁰³ Bennett (n 26) 369.

To this day, people continue to be charged with bigamy, albeit seldom.³⁰⁴ The important distinction between bigamy and polygamy is the knowledge and, ideally, consent of one spouse in relation to the other.

There have not been any notable recent studies of traditional Indigenous or Islamic marriage practices in Australia.³⁰⁵ Polygyny has continuously declined, partly because it was never legally recognised.³⁰⁶ It is fair to say that polygamy is practised by few Australians,³⁰⁷ but that should not, in and of itself, justify its illegality. Of course, if any reform is to occur, it must be approved by Federal Parliament.

C Perceptions in Parliament

In 1905, King O'Malley said that war is 'inseparable from a low state of civilization' and placed it in 'the same category as cannibalism, polygamy, and slavery'.³⁰⁸ Then, in 1977, Edward Robertson, with respect to recognising Aboriginal law, aligned polygamy with child brides and killing.³⁰⁹ In 2019, debates about Muslim migrants placed polygamy next to female genital mutilation and wife beating.³¹⁰ It is evident that polygamy has been used as an example of uncivilised and undesirable behaviour in multiple contexts.

In 1973, then-Minister for Aboriginal Affairs Gordon Bryant noted that the 'problem' of polygyny is 'solving itself'.³¹¹ Recognising the Christian missionary influence, he claimed a decline in polygyny, largely due to it falling out of fashion.³¹² Some years later, in 2013, during the marriage equality debate, Penny Wong said that to 'link marriage equality with polygamy and bestiality [does] nothing other than [promote] bigotry'.³¹³ Ironically, one could equally say that to link polygamy with bestiality would be bigoted. Statements of this nature show

³⁰⁴ Daniel Jeffrey, 'This Man Allegedly Had Two Wives at the Same Time. He's Been Arrested for It', *Nine News* (online, 10 February 2023) <<https://www.9news.com.au/national/western-australia-crime-man-arrested-alleged-bigamy-two-wives-australia-federal-police/d71c064a-6ff7-47dd-bba8-1be67190b61d>>; Bennett (n 26) 360; *Bijarniya & Mahawal* [2022] FedCFamC1F 675, [10] (Strum J).

³⁰⁵ Quinlan (n 49) 107.

³⁰⁶ *Recognition of Aboriginal Customary Laws* (n 49) 136 [228].

³⁰⁷ Bennett (n 17) 268; Black and Sadiq (n 272) 409.

³⁰⁸ *Parliamentary Debates* (n 5) 4188.

³⁰⁹ Commonwealth, *Parliamentary Debates*, Senate, 20 October 1977, 1623 (Edward Robertson).

³¹⁰ Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 11 February 2019, 4 (Mohammad Tawhidi).

³¹¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 25 September 1973, 1444 (Gordon Bryant).

³¹² *Ibid.*

³¹³ Commonwealth, *Parliamentary Debates*, Senate, 20 June 2013, 3505.

one thing — that polygamy is scorned by the Australian public because of its association with inequality and discrimination.³¹⁴

So, it is with an understanding of this complex history that polygamy can be recognised as a fragment of Australian life which has, to some extent, always existed. Polygamy can be considered ‘Australian’ despite historical efforts to exterminate the practice. It is one that remains, but is condemned and likely hidden by those who engage in it for fear of that condemnation.

V POLYGAMIA PHANTASMAGORIA: THE PROBLEMS OF POLYGAMY AND MISGIVINGS OF MONOGAMY

It may well seem fanciful and naïve to encourage the adoption of polygamy in Australia. What the reader must bear in mind is that there is no universally accepted relationship structure.³¹⁵ As stated earlier, people should be afforded the opportunity to choose a relationship structure for themselves. This Part presents an overview of the deficiencies of monogamy. It also addresses a number of criticisms levelled at polygamy and shows that polygamy is not inherently inequalitarian, such that the deficiencies found within must be eliminated, rather than the practice as a whole. Additionally, a distinction is drawn between the effects polygamy would have in Australia and its effects in other states at present. It is with this knowledge that the reader must approach the question in Part V as to how the law should be reformed.

A *The Misgivings of Monogamy*

The subordination of women is by no means confined to polygamy. In monogamous marriages, practices including foot-binding in China, tooth discolouration in Japan and the punishment of adultery as far back as the 12th century BCE in Assyrian laws show that to be true.³¹⁶ Such practices reinforce the perception of the wife as property³¹⁷ — a view not limited by time, location or the number of spouses. Monogamy does not guarantee sex equality, nor does polygamy.³¹⁸ Through the 18th and 19th centuries, women were considered the

³¹⁴ ‘Gender Equality and Polygamy Are Not Compatible’, *The Sydney Morning Herald* (online, 26 June 2008) <<https://www.smh.com.au/politics/federal/gender-equality-and-polygamy-are-not-compatible-20080626-2xf5.html>>.

³¹⁵ Gallichan (n 7) 13.

³¹⁶ Coontz (n 69) 46–7; Gallichan (n 7) 252–3.

³¹⁷ Gallichan (n 7) 252–3.

³¹⁸ Zainab Naqvi, ‘It’s Women Who Suffer from a Lack of Recognition of Polygamous Marriage’, *The Conversation* (online, 11 May 2016) <<http://theconversation.com/its-women-who-suffer-from-a-lack-of-recognition-of-polygamous-marriage-56406>>.

property of their husbands.³¹⁹ Yet, today we permit monogamy. The former legality of marital rape throughout Europe and the USA, as well as the arguable existence of a common law immunity to that effect in Australia³²⁰ formed part of a monogamous marriage.³²¹ Yet, today we permit monogamy.

Professor of Law John Witte Jr finds monogamy to be natural because, throughout history, men have ‘been more prone to extramarital sex’, so marriages developed as ‘enduring and exclusive’ relationships.³²² It seems difficult to reconcile this idea with the reality of serial monogamy. In Australia, around 26% of marriages involve at least one spouse who has been in a previous marriage — a rate that has steadily increased since the late 1970s.³²³ Divorce rates, though slightly decreasing since the late 1990s, are roughly three times higher than one hundred years ago when divorces were not as accessible and no-fault divorces were not permitted.³²⁴ The nature of human relationships is changing.³²⁵ Many engage in a series of monogamous relationships.³²⁶ Likewise, polyamory in Australia (or at least its visibility) will continue to grow.³²⁷ In the USA, approximately 1 in 9 people have engaged in polyamory.³²⁸ Indeed, it is estimated that, in the USA, there are more polyamorists than gay or lesbian individuals.³²⁹ To be clear, many polyamorists are non-heterosexual.³³⁰

B Drawing a Distinction

The studies of polygamy’s social effects described in Part IID would not necessarily translate to an Australian context.³³¹ Unlike Australia, the Middle Eastern and African societies in which polygamy is found are not so ethnically or religiously diverse.³³² Additionally, unlike most states in which it is legal,

³¹⁹ Hewitt and Brady (n 70).

³²⁰ *PGA v The Queen* (2012) 245 CLR 355, 392–3 [100] (Heydon J).

³²¹ Rothschild (n 18) 36.

³²² John Witte Jr, ‘Why Monogamy Is Natural’, *The Washington Post* (Washington, 3 October 2012) 2.

³²³ Lixia Qu and Jennifer Baxter, ‘Marriages in Australia’, *Australian Institute of Family Studies* (Web Page, March 2023) <<https://aifs.gov.au/research/facts-and-figures/marriages-australia-2023>>.

³²⁴ Lixia Qu and Jennifer Baxter, ‘Divorces in Australia’, *Australian Institute of Family Studies* (Web Page, March 2023) <<https://aifs.gov.au/research/facts-and-figures/divorces-australia-2023>>.

³²⁵ Fowler (n 23) 100.

³²⁶ *Ibid*; Qu and Baxter, ‘Marriages in Australia’ (n 323); Qu and Baxter, ‘Divorces in Australia’ (n 324).

³²⁷ Bennett (n 17) 269.

³²⁸ Amy C Moors, Amanda N Gesselman and Justin R Garcia, ‘Desire, Familiarity, and Engagement in Polyamory: Results From a National Sample of Single Adults in the United States’ (2021) 12 *Frontiers in Psychology* 619640:1–12, 5.

³²⁹ Alicia N Rubel and Tyler J Burleigh, ‘Counting Polyamorists Who Count: Prevalence and Definitions of an under-Researched Form of Consensual Nonmonogamy’ (2020) 23(1–2) *Sexualities* 3, 22.

³³⁰ Moors, Gesselman and Garcia (n 328) 8.

³³¹ Quinlan (n 49) 108.

³³² *Ibid*.

polygamy in Australia would not be a product of religious law.³³³ Of course, as with monogamy, there would be instances of abuse and inequality.³³⁴ As with monogamy, it is the suppression of those adversities that must be sought, not the elimination of the practice in which they arise.³³⁵ If marriage is divorced from its religious foundations³³⁶ (whether or not the people entering monogamous or polygamous marriages are motivated by their religious beliefs) and it instead recognises the autonomy of the individuals wishing to be a part of that institution, then polygamy may well have a place in Australian society.³³⁷

Professor Thom Brooks presents several criticisms of polygamy which lead Brooks to conclude that it is inequalitarian in fact and theory.³³⁸ Brooks' first substantive argument is that polygamy promotes gender inequality, such that it should be opposed.³³⁹ He recognises in a note that 'pervasive gender inequality' may arise in monogamous marriages as well, albeit not to the extent found in polygamous marriages.³⁴⁰ The synonymous use of 'polygamy' and 'polygyny' in literature on the topic has not helped in this respect.³⁴¹ The economic factors that have led to the adoption of gender roles and discrimination in monogamous marriages are not a reason to do away with monogamy.³⁴² Rather, those factors must be addressed, as they have been, in order to ensure an institution of marriage which places both spouses on equal footing.³⁴³ Sex inequality is a result of disparities between the sexes which favour men in education, health and bargaining power.³⁴⁴ It is more prominent in poor than in rich states.³⁴⁵ The patriliney in states allowing polygamy furthers the sex inequality and shapes the nature of a marriage, whether monogamous or polygamous.³⁴⁶ Similarly, sex-based violence is more acceptable in poorer states.³⁴⁷ Women in the Middle East and North Africa have little freedom in controlling their lives and their labour

³³³ Andrew March, 'Is There a Right to Polygamy? Marriage, Equality and Subsidizing Families in Liberal Public Justification' (2011) 8(2) *Journal of Moral Philosophy* 246, 258.

³³⁴ *Ibid* 260.

³³⁵ *Ibid*.

³³⁶ Witte Jr, 'Why Two in One Flesh?' (n 140) 1729.

³³⁷ Quinlan (n 49) 108.

³³⁸ Brooks (n 6) 118.

³³⁹ *Ibid* 114–15.

³⁴⁰ *Ibid* 119 n 14.

³⁴¹ Seligson and McCants (n 6) 3; March (n 333) 258.

³⁴² Gregg Strauss, 'Is Polygamy Inherently Unequal?' (2012) 122(3) *Ethics* 516, 524; Bennett (n 17) 282.

³⁴³ Strauss (n 342) 524.

³⁴⁴ Seema Jayachandran, 'The Roots of Gender Inequality in Developing Countries' (2015) 7(1) *Annual Review of Economics* 63, 64.

³⁴⁵ *Ibid*.

³⁴⁶ *Ibid* 77.

³⁴⁷ *Ibid* 66.

force participation is low.³⁴⁸ These are not circumstances brought about by polygamy, but ones in which polygamy finds itself.³⁴⁹

Brooks is critical of polygynous wives' inability to divorce another wife, leaving the husband as the only spouse with a right to divorce one of the wives.³⁵⁰ This argument is true of polygynous marriage in fact, but it ignores the possibility for structural reform. Generally, in a polygamous marriage, only one central spouse can marry multiple others.³⁵¹ For example, in a polygamous marriage between three persons (A, B and C), person A, as the central spouse, is married to person B. Person A is also married to person C. Persons B and C, however, are not married to each other. This results in person A being the central spouse.³⁵² This issue can be overcome by requiring each spouse to be married to every other spouse (see Figure 2) in accordance with Strauss' 'polyfidelity' model.³⁵³ In striking a balance, this model may not suit all wishing to be polygamous or those seeking to follow religious or cultural custom.³⁵⁴ Nevertheless, it seems the most appropriate for a relationship structure conducive to egalitarianism which removes the concept of a central and peripheral spouse.³⁵⁵ Unlike traditional polygamy, this model would be most conducive to polygamous unions between people who all have, for example, sexual relations with one another, as well as the shared rearing of children.³⁵⁶ Alternatively, if a central spouse is to remain, Strauss' 'molecular polygamy' model could be used; whereby there remains a central spouse, but each peripheral spouse is allowed to have multiple spouses of their own.³⁵⁷ In this way, each peripheral spouse can also act as a central spouse in another marriage of theirs.³⁵⁸ The model's shortcoming lies in the lack of familial unity, as each spouse can keep their families separate.³⁵⁹

³⁴⁸ Ibid 66, 69.

³⁴⁹ Struensee (n 19) 12.

³⁵⁰ Brooks (n 6) 116.

³⁵¹ Strauss (n 34.2) 517.

³⁵² Ibid 524.

³⁵³ Ibid 534.

³⁵⁴ Ibid 525.

³⁵⁵ Ibid 517.

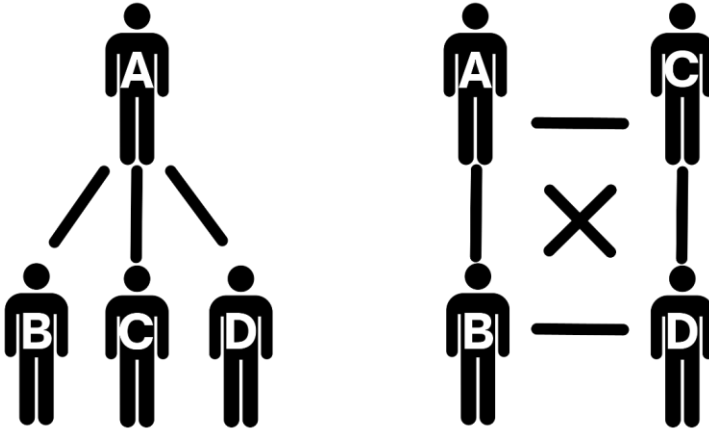
³⁵⁶ Ibid 536–7.

³⁵⁷ Ibid 534.

³⁵⁸ Ibid 540.

³⁵⁹ Ibid 542.

Figure 2: Two possible configurations of polygamy; the structure on the right being preferable, according to Strauss



The last substantial argument by Brooks worth noting is that polygamy discriminates against non-heterosexuals.³⁶⁰ In his view, polygamy ‘presuppose[s] that polygamous marriages are heterosexual marriages’.³⁶¹ That is true of societies where only polygyny is allowed, but the legalisation of polyandry would inherently change that. Legalising polygyny, whilst prohibiting polyandry and polyandry is inherently unequal and discriminatory.³⁶² But legalising polygamy as polyandry (covering all of its forms) would eliminate this issue.³⁶³ This is all to say that polygamy is not inherently unequal. We have made it so, but, in an Australian context, it can be fair and it can be conducive to ensuring Australians’ freedom to enter the relationship structure they desire.

Monogamy is not inherently a virtue and polygamy is not inherently a vice.³⁶⁴ Is it too awful to be lawful? Arguably, no. There is a need for more research of non-legal polygamous marriages in an Australian context to determine whether polygamy would necessarily bring about negative effects.³⁶⁵ It is likewise necessary to estimate how many Australians are polyamorous and how many of them, if any, would want to marry in a polyandrous manner. Discussions about polygamy’s legalisation will grow, so it is essential that the options for reform be properly considered.³⁶⁶

³⁶⁰ Brooks (n 6) 116.

³⁶¹ Ibid 116–17.

³⁶² Strauss (n 342) 518, 544; Bennett (n 17) 279.

³⁶³ Strauss (n 342) 518.

³⁶⁴ Fowler (n 23) 107.

³⁶⁵ Quinlan (n 49) 108.

³⁶⁶ Bennett (n 17) 265; Witte Jr, ‘Why Two in One Flesh?’ (n 140) 1706; Rothschild (n 18) 49.

VI PUTTING POLYGAMY INTO PRACTICE

Whatever the reader's view on polygamy may be, one should consider that it could be legal so that it provides an Australian the freedom to adopt a relationship structure of their choice. How polygamy is to be put into effect is of critical importance. If it would be contrary to the existing framework overseeing marriage, that is reason enough to resist its adoption. However, before any of the proposals discussed below can be put into effect, the implications of those proposals for other areas of law, such as social security, estate and taxation law, would need to be critically examined, although doing so is beyond the scope of this article.

This Part sets out several ways by which polygamy could be legalised at the federal level, being the most appropriate level for such reform,³⁶⁷ and identifies one as the most appropriate. This is done across six sub-parts. First, (A) presents a brief overview of the main statutes overseeing marriages in Australia. Second, (B) addresses the Commonwealth's constitutional power to legislate for polygamy. Third, (C) discusses the existing system of relationship registration, with reference to polyamory and the implications for polygamy. Fourth, (D) presents the most appropriate reform to the offence of bigamy under the *Marriage Act*. Fifth, (E) presents the possibility of only recognising polygamy in customary marriages, but rejects that option for the reasons discussed. Sixth, (F) presents the most appropriate manner for legalising polygamy under the *Marriage Act*, based largely on the Supreme Court of New Zealand's decision in *Mead v Paul*.³⁶⁸ This part also notes the necessary safeguards to ensure that it is not an inegalitarian or illiberal practice. Seventh, (G) explores the current recognition of foreign polygamous marriages.

A The Acts

The *Marriage Act* and *FLA* are the two primary statutes at the federal level governing marriages and the disputes, settlements and related matters that might arise from them.³⁶⁹ The *Marriage Act* did not initially define 'marriage'.³⁷⁰ It was not until 2004 that 'marriage' was defined as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'.³⁷¹ This definition reinforced the Christian conception of marriage in line with the definition of marriage in *Hyde v Hyde* (as discussed in Part IH).³⁷² The definition was then amended in 2017 to 'the

³⁶⁷ Bennett (n 17) 278.

³⁶⁸ *Mead* (n 16).

³⁶⁹ Bennett (n 17) 270–1.

³⁷⁰ *Ghazel & Ghazel* (2016) 306 FLR 173, 176 [21] (The Court) ('*Ghazel*').

³⁷¹ See Marriage Amendment Bill 2004 (Cth) sch 1 item 1; *Ghazel* (n 370) 176 [24].

³⁷² Olivia Rundle, 'An Examination of Relationship Registration Schemes in Australia' (2011) 25 *Australian Journal of Family Law* 121, 175.

union of 2 people to the exclusion of all others, voluntarily entered into for life'.³⁷³ This definition accommodated same-sex marriage.³⁷⁴

Whereas the *Marriage Act* effectively forbids polygamy under s 94, which establishes the offence of bigamy, the *FLA* recognises foreign polygamous marriages under s 6 for the purpose of initiating proceedings under the *FLA*.³⁷⁵ The *FLA*'s recognition of foreign polygamous marriages, as well as multiple de facto relationships (which could include a combination of a de facto relationship and a marriage), is due to its remedial nature.³⁷⁶ The *FLA* allows for maintenance and property settlements, which would be otherwise unavailable to the polygamous or polyamorous.³⁷⁷ Those settlements are dealt with only between the two parties involved in each relationship, with consideration only of the interests of the two parties (rather than, for example, all parties in a polyamorous relationship).³⁷⁸

B The Constitutional Power

Before identifying any possibility for legalising polygamy, it must be established that the Commonwealth has the power to legislate. Section 51(xxii) of the *Australian Constitution* grants the Commonwealth the power to make laws with respect to 'marriage'.³⁷⁹

Shortly after the commencement of the *Marriage Act* in 1962, in *Attorney-General (Vic) v Commonwealth*,³⁸⁰ the Attorney-General for Victoria sought a declaration that several sections of the *Marriage Act* were invalid, including s 94, which prescribes the offence of bigamy (discussed below at (D)).³⁸¹ The High Court unanimously found s 94 to be a valid law.³⁸² In doing so, Windeyer J elected to 'express no view on whether, theoretically, it would be within the power of the Commonwealth Parliament to make polygamy lawful in Australia'.³⁸³ It nevertheless seemed to be within the scope of s 51(xxii) given that the Parliament merely chose to legislate for 'Christian marriage'.³⁸⁴

In the same year, then Attorney-General Sir Garfield Barwick said of the *Marriage Act* that it 'was devised to provide a modern code suitable to the condition of the Australian society and conformable to the Christian basis of the

³⁷³ *Marriage Act 1961* (Cth) s 5(1) (definition of 'marriage') ('*Marriage Act*').

³⁷⁴ Bennett (n 17) 263.

³⁷⁵ *FLA* (n 10) s 6; *Marriage Act* (n 373) s 94.

³⁷⁶ Bennett (n 26) 375.

³⁷⁷ *Ibid.*

³⁷⁸ See, eg, *FLA* (n 10) ss 79, 90SM.

³⁷⁹ *Australian Constitution* s 51(xxii).

³⁸⁰ (1962) 107 CLR 529.

³⁸¹ *Ibid* 539 (Dixon CJ).

³⁸² *Ibid* 547, 551 (Dixon CJ), 558 (Kitto J), 575 (Menziez J), 600 (Windeyer J), 601 (Owen J).

³⁸³ *Ibid* 577 (Windeyer J).

³⁸⁴ *Ibid* 600 (Windeyer J).

life of the nation'.³⁸⁵ He reasoned that polygamy would not be appropriate given 'the technical problems of adapting the machinery of English law to the polygamous marriage'.³⁸⁶ That was not to suggest that it is beyond the scope of s 51(xxi).

In the 2013 case of *Commonwealth v Australian Capital Territory*,³⁸⁷ the High Court had to determine whether the Commonwealth had the power to make a law with respect to same-sex marriage.³⁸⁸ In issue was the *Marriage Equality (Same Sex) Act 2013* (ACT) which defined 'marriage' as 'the union of 2 people of the same sex to the exclusion of all others, voluntarily entered into for life'.³⁸⁹ The *Marriage Equality (Same Sex) Act 2013* (ACT) was unanimously held to be inconsistent with the *Marriage Act*, such that the *Marriage Act* prevailed.³⁹⁰ Relevant to this article, the Court unanimously found that polygamy is within the scope of the s 51(xxi) marriage power:

Once it is accepted that 'marriage' can include polygamous marriages, it becomes evident that the juristic concept of "marriage" cannot be confined to a union having the characteristics described in *Hyde v Hyde* and other nineteenth century cases.³⁹¹

Section 51(xxi) thus empowers the Commonwealth to legislate for polygamy.³⁹² Legalising polygamy would not 'fracture a skeletal principle of our legal system' — to adopt the words of Brennan J,³⁹³ recognising that his Honour used them in the context of native title.³⁹⁴ If anything, polygamy would be consistent with Australia's secular order.³⁹⁵ That is not to advocate for a wholly secular practice of polygamy. On the contrary, if polygamy were permitted, the motivation behind it should not matter.

C Relationship Registration

Throughout Australia's jurisdictions, relationships can be formalised by way of registration.³⁹⁶ Registration serves the purpose of proving the existence of a

³⁸⁵ Sir Garfield Barwick, 'The Commonwealth Marriage Act 1961' (1962) 3(3) *Melbourne University Law Review* 277, 305.

³⁸⁶ *Ibid* 293.

³⁸⁷ (2013) 250 CLR 441.

³⁸⁸ *Ibid* 454 [9] (The Court).

³⁸⁹ *Ibid* 463 [39]; *Marriage Equality (Same Sex) Act 2013* (ACT) s 3 (definition of 'marriage' para (a)).

³⁹⁰ *Commonwealth v Australian Capital Territory* (n 387) 452 [1] (The Court).

³⁹¹ *Ibid* 461 [33] (The Court).

³⁹² Quinlan (n 49) 81.

³⁹³ *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 29.

³⁹⁴ *Ibid*.

³⁹⁵ *Australian Constitution* s 116.

³⁹⁶ *Domestic Relationships Act 1994* (ACT) s 37E; *Relationships Register Act 2010* (NSW) s 5; *Relationships Act 2011* (Qld) s 5; *Relationships Register Act 2016* (SA) s 5; *Relationships Act 2003* (Tas) s 11; *Relationships Act 2008* (Vic) s 6; Rundle (n 372) 49.

relationship.³⁹⁷ Importantly, as registration is governed by the states and territories, registration in one jurisdiction is not recognised in another.³⁹⁸ Polyamory is legal insofar as it is not a criminal offence to be in multiple simultaneous relationships (not marriages). Additionally, under s 4AA(5)(b) of the *FLA*, a de facto relationship can exist ‘even if one of the persons is legally married to someone else or in another de facto relationship’.³⁹⁹ Notwithstanding its legality, a person can only register one relationship at a time, thus excluding polyamorous relationships from being registered.⁴⁰⁰ This notion is consistent with the monogamous definition of marriage,⁴⁰¹ as well as the nature of a de facto relationship ‘as a couple’.⁴⁰²

For those opposed to polygamy forming part of the institution of marriage, a viable alternative would be the allowance of multiple de facto relationship registrations — an amendment to be carried out across the states and territories. However, this approach is not particularly appealing because it would create a situation where de facto polygamy is no different in a legal sense from polyamory. It would also keep polygamy separate from the institution of marriage and its associated statutes, such as the *Marriage Act*. In this way, it would represent a lacklustre effort towards recognising polygamy. Whether multiple relationships should be capable of being registered so as to formalise polyamory is not an issue for this article to resolve. Suffice to say that it is not a viable option for the allowance of polygamy.

D Breaking up with Bigamy

The legalisation of polygamy necessarily requires that the offence of bigamy be either reformed or repealed.⁴⁰³ The offence is contained in s 94 of the *Marriage Act*, which prescribes that: ‘A person who is married shall not go through a form or ceremony of marriage with any person.’⁴⁰⁴ Section 94(4) then prescribes that:

A person shall not go through a form or ceremony of marriage with a person who is married, knowing, or having reasonable grounds to believe, that the latter person is married.⁴⁰⁵

³⁹⁷ Rundle (n 372) 53.

³⁹⁸ Ibid 75.

³⁹⁹ *FLA* (n 10) s 4AA(5)(b).

⁴⁰⁰ Rundle (n 372) 66; Bennett (n 17) 292.

⁴⁰¹ *Marriage Act* (n 373) s 5(1) (definition of ‘marriage’).

⁴⁰² *FLA* (n 10) s 4AA(1)(c).

⁴⁰³ Bennett (n 26) 361.

⁴⁰⁴ *Marriage Act* (n 373) s 94(1). Note that ‘a form or ceremony of marriage’ has been interpreted as meaning the process ‘by which valid marriages may be solemnized’, such that, for example, customary Indigenous and solely religious marriages are unlikely to be captured by that concept: see *Attorney-General (Vic) v Commonwealth* (n 380) 557 (Kitto J); *Re Sambucco* [2022] VSC 699, [63] (Moore J).

⁴⁰⁵ *Marriage Act* (n 373) s 94(4).

The penalty for each offence carries a five-year imprisonment term.⁴⁰⁶ Importantly, s 94 operates to the exclusion of any State or Territory law prescribing the offence of bigamy.⁴⁰⁷ New South Wales, Victoria, South Australia and Queensland continue to provide for their own criminal offences, although s 94 of *Marriage Act* supersedes those State and Territory laws.⁴⁰⁸ This article is only concerned with the s 94 offence, as opposed to exploring each jurisdiction's offence. If any reform is to take place, the recommended changes to the *Marriage Act* would need to be reflected in existing State and Territory legislation so as to ensure that polygamy can be equally practised in each jurisdiction.

Relevantly, s 104 of the *Marriage Act* prescribes that: 'A person shall not give a notice to an authorised celebrant under section 42 ... if, to the knowledge of that person, the notice contains a false statement'.⁴⁰⁹ The offence carries a six-month imprisonment term or five-unit penalty.⁴¹⁰ Under s 42(1)(c), a marriage shall not be solemnised unless each party has made a declaration in writing as to, among other matters, 'the party's conjugal status' and 'the party's belief that there is no legal impediment to the marriage'.⁴¹¹ However, an unrecognised customary marriage, for example, might not be captured by the provision's mention of 'conjugal status' — in the same way that a *de facto* relationship would not be.⁴¹² Section 104 therefore prohibits, among others, the circumstance of a spouse lying about having another spouse, or their prospective spouse having another spouse. The section is broad enough in scope to cover both s 94 bigamy offences described above.⁴¹³ If polygamy is legalised, s 104 would be a sufficient safeguard to ensure that one prospective spouse does not mislead another as to their conjugal status. That is to say that s 94 could be repealed in its entirety, whilst maintaining s 104. In this way, polygamy would not constitute a criminal offence by encapsulating bigamy, but protection would still be afforded to those who, for example, make a false statement that they are not married to another when they, in fact, are.

As the Australian Law Reform Commission recognised in 1991, 'if polygamous marriages were recognised, careful consideration would have to be given to the consequences in areas of government policy, such as immigration, tax and social security.'⁴¹⁴ Those are areas beyond the scope of this article, but, undoubtedly, any legalisation of polygamy would indirectly affect each of them as it does the offence of bigamy.

⁴⁰⁶ *Ibid* ss 94(1), (4).

⁴⁰⁷ *Ibid* s 94(8); Bennett (n 26) 361.

⁴⁰⁸ *Crimes Act 1900* (NSW) s 92; *Criminal Code Act 1899* (Qld) sch 1 s 360; *Criminal Law Consolidation Act 1935* (SA) s 78; *Crimes Act 1958* (Vic) s 64; Bennett (n 26) 361–2.

⁴⁰⁹ *Marriage Act* (n 373) s 104.

⁴¹⁰ *Ibid*.

⁴¹¹ *Ibid* s 42(1)(c).

⁴¹² For a discussion of s 42(1)(c), see *Victor & Melway* [2009] FamCA 125; *Kirvan & Tomaras* [2018] FamCA 171.

⁴¹³ Bennett (n 26) 379.

⁴¹⁴ *Multiculturalism: Family Law* (n 12) 28 [3.43].

E Recognising Customary Marriages

Another option for recognising polygamy in Australia in light of its historical background (as described in Part III) is to limit its recognition only to the customary marriages of Indigenous Australians.

Customary marriages are already recognised in the Northern Territory for limited purposes. Section 67A of the *Administration and Probate Act 1969* (NT), for example, provides that when an intestate Aboriginal person is survived by more than one spouse, the intestate's estate 'shall be divided into a number of parts equal to the number of spouses of that intestate'.⁴¹⁵ Each spouse is then entitled to one of those parts.⁴¹⁶ Section 3(2) of the *De Facto Relationships Act 1991* (NT) likewise recognises an Aboriginal or Torres Strait Islander's customary spouse as their de facto partner.⁴¹⁷ Nevertheless, customary marriages are not fully recognised as valid.

South Africa is an example of a jurisdiction in which they are.⁴¹⁸ Section 2(1) of the *Recognition of Customary Marriages Act 1998* provides that: 'A marriage which is a valid marriage at customary law ... is for all purposes recognised as a marriage.'⁴¹⁹ And then at s 2(4): 'If a person is a spouse in more than one customary marriage, all valid customary marriages entered into ... are for all purposes recognised as marriages.'⁴²⁰ To enter a customary marriage, subject to certain exceptions, the prospective spouses must be above eighteen years of age and must both consent.⁴²¹ Customary marriages must then be registered.⁴²²

Papua New Guinea is another example of a jurisdiction in which, under s 3 of the *Marriage Act 1963*, polygynous customary marriages are recognised as 'valid and effectual for all purposes'.⁴²³ A 'customary marriage' is not defined; instead, it is to be valid where it complies with tribe custom to which either of the parties belongs.⁴²⁴ In Uganda, polygamy is expressly recognised in s 4(2) of the *Customary Marriage (Registration) Act 1973* and is also allowed under s 2 of the *Marriage and Divorce of Mohammedans Act 1906*.⁴²⁵ Uganda's approach would be problematic if

⁴¹⁵ *Administration and Probate Act 1969* (NT) s 67A.

⁴¹⁶ *Ibid.*

⁴¹⁷ *De Facto Relationships Act 1991* (NT) s 3(2)(a).

⁴¹⁸ June Sinclair, 'Family Law Processes in South Africa: Multiculturalism in a Developing Country and Some Comparisons with Australia' (2004) 18 *Australian Journal of Family Law* 219, 248.

⁴¹⁹ *Recognition of Customary Marriages Act 1998* (South Africa) s 2(1).

⁴²⁰ *Ibid* s 2(4).

⁴²¹ *Ibid* s 3(1).

⁴²² *Ibid* s 4(1).

⁴²³ *Marriage Act 1963* (Papua New Guinea) s 3(2); Owen Jessep, 'The Governor-General's Wives: Polygamy and the Recognition of Customary Marriage in Papua New Guinea' (1993) 7(1) *Australian Journal of Family Law* 29, 30.

⁴²⁴ *Marriage Act* (n 423) s 3(1); Jessep (n 423) 31.

⁴²⁵ Amone (n 105) 734; *Marriage and Divorce of Mohammedans Act 1906* (Uganda) s 2 ('*Marriage and Divorce of Mohammedans Act*'); *Customary Marriage (Registration) Act 1973* (Uganda) s 4(2).

adopted in Australia because of the latter Act's application solely to persons 'professing the Mohammedan religion'.⁴²⁶ If polygamy is permitted in customary and Muslim marriages, then it may as well be allowed for all.

In 1991, the Australian Law Reform Commission recommended the recognition of customary marriages for the purposes of 'maintenance and property' orders, but not as valid marriages.⁴²⁷ Polygamous marriages, the Commission found, 'should not be recognised'.⁴²⁸ The Commission recognised that 'the law should not inhibit the formation of family relationships and should recognise as valid the relationships people choose for themselves,' and noted it as an argument favouring the recognition of polygamy.⁴²⁹ Indeed, this principle underpins this article's proposal for legalising polygamy. Nevertheless, the Commission refused to recognise polygamy on the basis of it being mostly an unequal practice and 'alien to mainstream Australian culture'.⁴³⁰

Part of the Commission's justification for refusing to recognise customary marriages as valid marriages was the difficulty in defining what a 'customary' marriage actually is.⁴³¹ This would require an inquiry into each Indigenous group in which a marriage was established, such that it would be a resource-consuming exercise.⁴³² This is a salient point and one which supports the legalisation of polygamy more broadly, rather than in a solely customary sense. That is, if polygamy is allowed more broadly, customary marriages can be incorporated into that structure without requiring an examination of each Indigenous group's specific customs. Further, the primary issue of recognising customary polygamous marriages remains — they are almost entirely polygynous, so their legalisation would be inherently discriminatory.⁴³³ As such, rather than recognising purely customary marriages, it is more appropriate for polygamy to be recognised, which would allow for the accommodation of some (but not all) polygamous customary marriages.

F Proposal

A simple way of allowing de facto polygamy would be the allowance of multiple relationship registrations.⁴³⁴ Though this would benefit those seeking to register a polyamorous relationship, it would not truly be allowing polygamy, because polygamy would still sit outside the institution of marriage, as same-sex

⁴²⁶ *Marriage and Divorce of Mohammedans Act* (n 425) s 2.

⁴²⁷ Sinclair (n 418) 235; *Multiculturalism: Family Law* (n 12) ix [4].

⁴²⁸ *Multiculturalism: Family Law* (n 12) ix [5].

⁴²⁹ *Ibid* ix [3].

⁴³⁰ *Ibid* 27–8 [3.43].

⁴³¹ *Ibid* 26 [3.37].

⁴³² *Ibid*.

⁴³³ Jessep (n 423) 38.

⁴³⁴ Bennett (n 17) 287.

relationships once did. So, while de facto polygamy should be allowed, so too should a registered polygamous marriage. Section 88D(2)(a) of the *Marriage Act*, which provides that a foreign marriage is not valid if either spouse was already in a marriage recognised in Australia,⁴³⁵ should necessarily be repealed to allow for the recognition of foreign polygamous marriages. Next, domestic polygamy must be addressed.

1 Mead v Paul

The Supreme Court of New Zealand case of *Mead v Paul*⁴³⁶ shows a realistic approach through which polygamous marriages could be recognised. There, Fiona, Brett and Lilach were in a three-way relationship.⁴³⁷ Brett and Lilach had married in 1993 and Fiona joined them in 2002 to form a polyamorous relationship.⁴³⁸ This was, in effect, an instance of de facto polygamy. Fiona was the legal titleholder of the family home at issue.⁴³⁹ The *Property (Relationships) Act 1976* (NZ), like the *FLA* in Australia, governs property settlements.⁴⁴⁰ Under s 2D, a de facto relationship is defined as ‘a relationship between 2 persons ... who live together as a couple’.⁴⁴¹ The Court was tasked with determining whether the *Property (Relationships) Act 1976* (NZ) governed the parties’ relationship property rights.⁴⁴² Finding that a triangular relationship is not a ‘qualifying relationship’ in its three-way structure,⁴⁴³ the Court held that a polyamorous relationship could be subdivided into couples to satisfy the definition of a de facto relationship.⁴⁴⁴ It was not necessary that the relationship be ‘exclusive’.⁴⁴⁵ As such, Fiona could be in a separate de facto relationship with each of Brett and Lilach.⁴⁴⁶ In the circumstances, Fiona did not have an intimate relationship with Brett, so it was unlikely they would be de facto partners, but the principle still remained.⁴⁴⁷ Though there has not been any comparable case in Australia’s courts, the Court’s findings of law in *Mead v Paul* would likely be equally applicable in the Australian context.

⁴³⁵ *Marriage Act* (n 373) s 88D(2)(a).

⁴³⁶ *Mead* (n 16).

⁴³⁷ *Ibid* 269 [2] (O’Regan, Williams and Kós JJ).

⁴³⁸ *Ibid* 269 [5].

⁴³⁹ *Ibid* 269 [2].

⁴⁴⁰ *Property (Relationships) Act 1976* (NZ) s 1C(1).

⁴⁴¹ *Ibid* s 2D(1)(b).

⁴⁴² *Mead* (n 16) 282 [47] (O’Regan, Williams and Kós JJ).

⁴⁴³ *Ibid* 283 [49].

⁴⁴⁴ *Ibid* 290 [82] (O’Regan, Williams and Kós JJ), 292 [94] (Glazebrook and Ellen France JJ).

⁴⁴⁵ *Ibid* 281 [42] (O’Regan, Williams and Kós JJ).

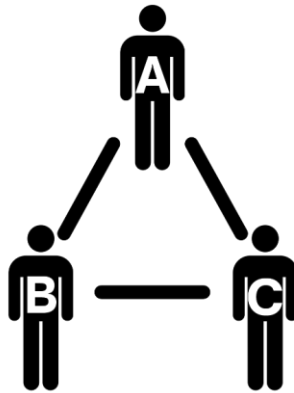
⁴⁴⁶ *Ibid* 288 [74].

⁴⁴⁷ *Ibid*.

2 Redefining Marriage

Mead v Paul shows that polygamy, like polyamory, can be seen as a collection of couples. In a three-way example: person A is with person B; person B is with person C; and person A is with person C (see Figure 3). Conceptualising polygamous marriages in this way would allow for a relatively straightforward addition to the existing institution based on coupledness. It would also prevent unnecessarily difficult divorces or property settlements since the spouses would be able to be divided into couples. In this way, if person A wishes to divorce person C but remain with person B, person A can divorce person C. Person A would have a property settlement with person C, but person B would not be involved in that settlement. Likewise, if person B divorces person C, their property settlement would not involve person A. That is to say, each property settlement would, as *Mead v Paul* contemplates, be dealt with through a division of couples.⁴⁴⁸ Notwithstanding this model, as Ellen France J acknowledges, where there is a ‘complex or varied relationship’ involving multiple properties acquired at different times, there remains an uncertainty as to how such properties will be settled.⁴⁴⁹

Figure 3: A polygamous structure based on the treatment of polyamorous relationships in *Mead v Paul*



The definition of ‘marriage’ under the *Marriage Act* would require amendment to allow polygamy in any form. This could be done quite simply by removing the words ‘to the exclusion of all others’ so that it reads as ‘the union of 2 people, voluntarily entered into for life’. In this way, a polygamous union could be subdivided into married couples. This would simplify the necessary legislative

⁴⁴⁸ Ibid 292 [89].

⁴⁴⁹ Ibid 294 [103] (Glazebrook and Ellen France JJ).

changes. The consequence of polygamy discriminating against the sexes can be avoided if polygamy as polyanthropy is allowed. In keeping with the definition referring to '2 people', there would not be any restraints on the sex or sexuality of the spouses — the ideal definition.

At present, under s 23(1)(a), a marriage is void where either party was, at the time of the marriage, lawfully married to another.⁴⁵⁰ This sub-section would also necessarily need to be repealed to allow for polygamy. Likewise, s 6 of the *FLA*, which recognises a foreign polygamous marriage as a 'marriage', should be extended to all polygamous marriages, regardless of where they were entered into. In this way, s 6 would allow for all polygamous marriages, whether domestic or foreign, to be accommodated into the revised definition of 'marriage' proposed above.

3 Consent and the Marriageable Age

The oft-cited concern that polygamy is not consensual would not be an issue in an Australian context, because the *Marriage Act* already renders void those marriages which are not consensual.⁴⁵¹ The definition of a 'marriage' incorporates the requirement that it be 'voluntarily entered into'.⁴⁵² Additionally, under the *Commonwealth Criminal Code*,⁴⁵³ causing a person to enter, or being a party to, a forced marriage is a criminal offence carrying an imprisonment term of seven years and nine years for an aggravated offence.⁴⁵⁴ A forced marriage is one which was entered into by a party 'without freely and fully consenting'.⁴⁵⁵ Needless to say, the concern of polygamous spouses being minors would also not be an issue. The *Marriage Act* prescribes an offence carrying a five-year imprisonment term for marrying a person under 18 years of age, except where the person is over 16 and has been authorised to marry by a judge.⁴⁵⁶ Likewise, the *Criminal Code* deems a marriage entered into when either party was under sixteen years of age to be a forced marriage.⁴⁵⁷

G Recognising Foreign Polygamy

In Australia, polygamous marriages entered into abroad are recognised only under s 6 of the *FLA* in order for the spouses to be granted the same relief as those in a monogamous marriage:

⁴⁵⁰ *Marriage Act* (n 373) s 23(1)(a).

⁴⁵¹ *Ibid* s 23(1)(d); Quinlan (n 49) 78.

⁴⁵² *Marriage Act* (n 373) s 5(1) (definition of 'marriage').

⁴⁵³ *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code*').

⁴⁵⁴ *Ibid* ss 270.7A–270.7B.

⁴⁵⁵ *Ibid* s 270.7A(1)(a).

⁴⁵⁶ See *Marriage Act* (n 373) ss 11, 12(1), 95(1).

⁴⁵⁷ *Criminal Code* (n 453) s 270.7A(1)(b).

For the purpose of proceedings under this Act, a union in the nature of a marriage which is, or has at any time been, polygamous, being a union entered into in a place outside Australia, shall be deemed to be a marriage.⁴⁵⁸

A *potentially* polygamous marriage can nevertheless be recognised as a marriage under the *Marriage Act* without recourse to s 6 of the *FLA*. In *Ghazel & Ghazel*,⁴⁵⁹ the Full Court of the Family Court of Australia recognised such a marriage. Mr and Mrs Ghazel married in Iran and then in England.⁴⁶⁰ Iranian law permitted a husband to have up to three additional wives, such that the Ghazels' marriage was *potentially* polygamous.⁴⁶¹ After migrating to Australia and attaining citizenship in 2007, the Ghazels lodged a joint divorce application.⁴⁶² This application only referred to their marriage in England.⁴⁶³ In 2014, Mrs Ghazel sought a declaration that their Iranian marriage was valid under s 88D of the *Marriage Act* which provides for the recognition of foreign marriages.⁴⁶⁴ The Court held that *potentially* polygamous marriages 'which are valid under the law of the place of celebration are prima facie required to be recognised'.⁴⁶⁵ This was the case before and after the introduction of the 2004 definition of 'marriage'.⁴⁶⁶ Mrs Ghazel's Iranian marriage was therefore declared valid.⁴⁶⁷

To extend that recognition to actually polygamous marriages would not be so burdensome. It would simply require that s 88D(2)(a), which prevents the recognition of a foreign marriage which was entered into while either spouse was already married,⁴⁶⁸ be repealed. In its current state, s 88D(2)(d) of the *Marriage Act* prohibits the recognition of a foreign marriage if 'the consent of either of the parties was not a real consent'.⁴⁶⁹ This is an appropriate safeguard that must remain and one which would bolster trust in polygamy, if it were legalised. It is by no means the case that if polygamy were legalised it would lead to the adversities found in states which permit it.⁴⁷⁰ If polygamy were legalised as polyanthropy and the systems described above remain in place, then there is a real possibility for an egalitarian practice of polygamy.

⁴⁵⁸ Bennett (n 17) 273; *FLA* (n 10) s 6.

⁴⁵⁹ *Ghazel* (n 370).

⁴⁶⁰ *Ibid* 174 [2]–[3] (The Court).

⁴⁶¹ *Ibid* 174 [2].

⁴⁶² *Ibid* 174 [4]–[5].

⁴⁶³ *Ibid* 174 [5].

⁴⁶⁴ *Ibid* 175 [8].

⁴⁶⁵ *Ibid* 180 [40].

⁴⁶⁶ *Ibid* 181 [50].

⁴⁶⁷ *Ibid* 181 [51].

⁴⁶⁸ *Marriage Act* (n 373) s 88D(2)(a).

⁴⁶⁹ *Ibid* s 88D(2)(d).

⁴⁷⁰ Bennett (n 17) 288.

VII PATH OF THE PENDULUM

As time passes, the pendulum continues to swing. What was once acceptable may go out of favour only to return later to acceptability. Change is inevitable. It is therefore necessary to consider how the Australian law can be reformed to accommodate the practice of polygamy. It is not a practice foreign to Australia, as shown through its history amongst the Indigenous and its adoption by certain Muslim migrants. Indeed, it may be well-placed as a marriage option for the polyamorous. From the time of the Australopithecus to Augustine of Hippo and to the present, polygamy has always played a part in human life. History has shown that, in a world in which there is no universally accepted relationship structure, polygamy is flexible and is moulded by the circumstances in which it is found. Admittedly, this has often been for the worse. The absence of consent and discrimination against women remain as adversities found in polygamous marriages across the Middle East. Yet, if people are to be afforded greater freedom in choosing their relationship structure, polygamy should be allowed. This article has shown that it can be legalised in a manner consistent with upholding every spouse's equality and wellbeing. Beyond merely recognising polygamy in customary or foreign marriages, it should be a right for all. It must take the form of polyanthropy so that any configuration of polygamy is possible. Bigamy must necessarily be done away with to bring those changes into effect. The notion of coupledness is so deeply entrenched in Australian family law, particularly in the *Marriage Act 1961* (Cth) and *Family Law Act 1975* (Cth), that a polygamous marriage would be best recognised as sets of couples. This would avoid a reworking of the current system. It would also likely simplify the resolution of any disputes, property settlements or divorces that may arise. Nevertheless, the implications for other areas of law — which are beyond the scope of this article — including social security, estate and taxation law must be assessed before any such proposal is enacted.

One substantive deficiency nevertheless supports the preservation of the equilibrium; namely, the absence of data as to the effects of polygamy on families in Australia. There is likewise a lack of information about who would want to practise polygamy. It is envisaged that, with a greater understanding of those matters, Parliament would be well-placed to determine the most appropriate method of allowing the practice.