Why the Bigamy Offence Should be Repealed

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Abstract

The offence of bigamy may have a long history within the Western legal tradition, but this article argues that bigamy should no longer be recognised as a specific offence within Australian law. Currently bigamy is a federal offence in Australia under s 94 of the *Marriage Act 1961* (Cth). This article begins by setting out the history, scope and limitations of this section, and situates bigamy within its broader context of related civil and criminal federal laws. The article then demonstrates that the bigamy offence lacks a compelling rationale in contemporary Australia and that it operates in both practically and symbolically problematic ways. Because of these deficiencies, the bigamy offence provisions should be repealed and situations involving bigamous marriages should instead be regulated through other parts of the existing legal framework.

I Introduction

The offence of bigamy places prohibitions on situations where a married person purports to marry again. It has a long history within the Western legal tradition.[1] The offence existed first within 'the ecclesiastical courts' before being enshrined as a 'felony' within English statute law by the passage of the *Bigamy Act 1603*.[2] Bigamy was initially treated as a capital crime.[3] The offence has persisted over the intervening years even though aspects of it, such as the applicable penalty, have changed. Australian judges in the mid-20th century continued to regard the bigamy offence as being of 'vast importance'[4] and as dealing with a 'serious matter from the point of view of society'.[5] Australia's current formulation of the bigamy offence is found in s 94 of the *Marriage Act 1961* (Cth) ('*Marriage Act*'), where it carries a

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1 For some of the history of bigamy and the bigamy offence, see generally S W Bartholomew, 'The Origin and Development of the Law of Bigamy' (1958) 74(2) *Law Quarterly Review* 259; Ralph Slovenko, 'Legal Essay: The De Facto Decriminalization of Bigamy' (1978) 17(2) *Journal of Family Law* 297; Bernard Capp, 'Bigamous Marriage in Early Modern England' (2009) 52(3) *The Historical Journal* 537; Henry Finlay, *To Have But Not To Hold: A History of Attitudes to Marriage and Divorce in Australia 1858–1975* (Federation Press, 2005) 12, 29–34.

2 1 Jac 1, c 11; Bartholomew, 'The Origin and Development of the Law of Bigamy' (n 1) 260.

3 Cox identifies that although bigamy in England had historically been 'designated as a Class One (Offences Against the Person) indictable felony' and 'was therefore theoretically punishable by death by hanging', the penalty was often reduced 'in practice': David J Cox, '"Trying To Get A Good One": Bigamy Offences in England and Wales, 1850–1950' (2012) 4 *Plymouth Law and Criminal Justice Review* 1, 2. Though executions for bigamy certainly did still occur: Capp (n 1) 554–5.

4 *Thomas v R* (1937) 59 CLR 279, 316 (Evatt J).

5 *R v Bonnor* [1957] VR 227, 240 (O'Bryan J).

maximum penalty of imprisonment for five years.[6] This level of penalty means that although bigamy is an indictable offence,[7] it falls within the lower-tier category of indictable offences that can be dealt with summarily.[8]

In recent years, bigamy has become a 'rare' crime,[9] and has 'attracted little attention from both criminologists and historians'[10] or legal academics. The bigamy offence has not, however, fallen entirely into disuse. Although '[i]t appears' that 'bigamy is not regularly prosecuted in Australia',[11] prosecutions do still take place.[12] Over the last decade, however, bigamy has taken on particular importance within the Australian family court system. As will be discussed in Part II below, in a growing number of nullity of marriage cases family court judges have referred the papers before them to other legal authorities for consideration for prosecution for bigamy. In making these referrals, some judges have described the contemporary s 94 bigamy offence as being a 'serious crime',[13] and a 'serious offence'.[14] Thus, despite bigamy's relative rarity, it still retains a position of contemporary practical significance.

But what, exactly, is the nature of the wrong that justifies the continued existence of the bigamy offence in contemporary Australia? This article demonstrates that this question cannot be satisfactorily answered and argues that the bigamy offence not only lacks a compelling rationale, but is also both practically and symbolically problematic. Accordingly, it proposes that bigamy no longer be recognised as a specific offence in Australian law, that the existing bigamy offence provisions be repealed and that factual situations involving bigamous marriages be regulated through other parts of the existing legal framework. This argument is developed across the next three Parts. In Part II, the scope and operation of the offence of bigamy within Australian law is set out and explained. Part III begins by demonstrating that the bigamy offence lacks a compelling rationale because the various justifications that have been put forward for it are outdated, do not properly explain the scope of the bigamy offence and are already addressed by other laws. That Part ends by showing how the current operation of the bigamy offence is also problematic in a number of ways, namely that it generates tensions in the law around personal relationships, is practically unenforceable and is culturally insensitive. Part IV outlines what this article's proposal for repealing the bigamy offence does and does not entail in terms of Australian law, and highlights the key role that the

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6 *Marriage Act* ss 94(1), (4).

7 *Crimes Act 1914* (Cth) s 4G.

8 Ibid s 4J, if this is agreed to by both the prosecutor and defendant: s 4J(1). If a bigamy offence is dealt with summarily the maximum sentence of imprisonment that can be imposed is 12 months: s 4J(3)(a).

9 Keith Soothill et al, 'The Place of Bigamy in the Pantheon of Crime?' (1999) 39(1) *Medicine, Science and the Law* 65, 65.

10 Cox (n 3) 1.

11 Angela Campbell, *Sister Wives, Surrogates and Sex Workers: Outlaws by Choice?* (Ashgate, 2013) 72 ('*Sister Wives*').

12 See, eg, Elizabeth Byrne, 'Marriage Celebrant Escapes Jail Sentence for Bigamy after Failing to Divorce First Wife', *ABC News* (online), 5 August 2014 <https://www.abc.net.au/news/2014-08-05/marriage-celebrant-escapes-jail-sentence-for-bigamy/5650000>; Commonwealth Director of Public Prosecutions, *Annual Report 2009–2010* (2010) <https://www.cdpp.gov.au/publications/2009-2010-annual-report> 86.

13 *Hiu v Ling* [2010] FamCA 743, [31].

14 *Chhibber v Kudva* [2014] FamCA 499, [11]; *Kailash v Manjalkar (No 2)* [2013] FamCA 592, [20].

offence of giving defective notice could play in the future regulation of situations involving bigamous marriages.

Before continuing, an important qualification needs to be made about the scope of the argument to come: this article is concerned with bigamy and not with polygamy. Under Australian law, a person can only be validly married to one person at a time and any second or subsequent concurrent marriages are legally void.[15] However, for certain limited purposes, Australian law does recognise foreign polygamous marriages and does allow a person to be both married and in one or more de facto relationships simultaneously — this will be discussed further in Part III below. Whether polygamous marriages should be granted full legal recognition as valid marriages is nevertheless a distinctly different issue from whether they should be criminalised through the bigamy offence. If Australian law were to allow for polygamy, this would necessarily require repealing the offence of bigamy. However, the reverse is not true. It would be logically coherent for Australian law to refuse to recognise polygamous marriages as valid and also to simultaneously refuse to condemn them through the specific criminal offence of bigamy.[16] Thus, this article will focus on the bigamy offence and, in doing so, will not engage directly with polygamy.[17]

II The Bigamy Offence Explained

This Part explains the operation of the offence of bigamy within Australian law. To this end, it sets out the history and scope of s 94 of the *Marriage Act*, canvasses the limitations of the offence and the defences available to it, and contextualises the offence in relation to its intersecting laws and court processes.

Prior to the introduction of the *Marriage Act* by the Australian Parliament in 1961, bigamy was a matter for state and territory criminal legislation. Thus, in addition to providing a nationally uniform system of marriage law, the *Marriage Act* also provided a nationally uniform 'regulatory' approach to bigamy.[18] The s 94 bigamy offence contained within the *Marriage Act* was designed to operate 'to the exclusion of any law of a State or Territory' once it came into effect.[19] The commencement date for the offence was 1 September 1963[20] and, given the passage of time, it seems quite unlikely that any historical state or territory-based bigamy prosecutions would now be commenced today. Accordingly, a number of jurisdictions have repealed their bigamy offences, such as Western Australia, Tasmania and the Australia Capital Territory,[21] though some jurisdictions have

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15 *Marriage Act* (n 6) s 23B(1)(a).

16 Indeed, it is entirely possible to 'sugges[t] decriminalization while remaining skeptical about and resistant to the legal recognition of polygamous spousal relationships': Campbell, *Sister Wives* (n 11) 73.

17 For a detailed discussion of the legal and policy issues around polygamy in the Australian context, see Theodore Bennett, 'The Inclusion of Others? Polygamy and Australian Law' (2019) 32(3) *Australian Journal of Family Law* 263.

18 Campbell, *Sister Wives* (n 11) 72.

19 *Marriage Act* (n 6) s 94(8).

20 Ibid s 2(2); Commonwealth, *Gazette*, No 48, 30 May 1963, 1977.

21 Western Australia repealed s 339 of the *Criminal Code* (WA) in 2004: *Criminal Law Amendment (Simple Offences) Act 2004* (WA) s 24. Tasmania repealed s 193 of the *Criminal Code* (Tas) in 1989:

chosen to retain theirs, such as New South Wales, Victoria, Queensland and South Australia.[22]

When the *Marriage Act* was enacted, it was the subject of immediate constitutional challenge and s 94 was caught up in the process of judicial review. While the Australian Parliament is given clear power under the *Australian Constitution* to legislate for 'marriage',[23] the State of Victoria argued that a number of the provisions of the *Marriage Act* exceeded the scope of this power.[24] The provisions called into question were those within pt VI of the *Marriage Act* dealing with the legitimation of children of marriages as well as the bigamy offence under s 94. The State of Victoria contended that these particular provisions were not laws with respect to marriage per se, but were instead laws that dealt with issues that were ancillary to marriage: namely, parentage and public order and morals. The 1962 decision saw a split in the High Court of Australia, with each of the seven justices in *Attorney-General (Victoria) v Commonwealth* writing their own separate decision and reaching multiple different conclusions about the validity of the legitimation provisions.[25] The particular issue of s 94, however, 'caused the Court no difficulty',[26] and all justices found that this section fell within the scope of the 'marriage' power and was thus valid.[27] As Menzies J noted, for example, the bigamy offence is 'a law which clearly upon its face is for the protection of marriage' and is thus also clearly a law to do with marriage.[28]

With the validity of s 94 clearly confirmed by the High Court, we can turn now to determining how exactly this section operates. Section 94 sets out two different ways that bigamy can be committed. The twin forms of this offence are:

> (1) A person who is married shall not go through a form or ceremony of marriage with any person.
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> …
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> (4) 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.

Both forms carry the same penalty of imprisonment for five years.[29]

The phrase 'form or ceremony of marriage' appears within both forms of the bigamy offence and requires further elaboration. This phrase is shared with some,

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Criminal Code Amendment Act 1989 (Tas) s 4. The Australian Capital Territory repealed s 93 of the *Crimes Act 1900* (ACT) in 1971: *Crimes Act 1971* (ACT) s 4.

22 *Crimes Act 1900* (NSW) s 92; *Crimes Act 1958* (Vic) s 64; *Criminal Code Act 1899* (Qld) sch 1 ('*Criminal Code* (Qld)') s 360; *Criminal Law Consolidation Act 1935* (SA) s 78.

23 *Australian Constitution* s 51(xxi).

24 *A-G (Vic) v Commonwealth* (1962) 107 CLR 529. For a useful synopsis of this case, see Zelman Cowen, 'Legitimacy, Legitimation and Bigamy: A Commentary on *Attorney-General for Victoria v Commonwealth of Australia*' (1963) 36(9) *Australian Law Journal* 239.

25 *A-G (Vic) v Commonwealth* (n 24).

26 Cowen (n 24) 248.

27 *A-G (Vic) v Commonwealth* (n 24) 547 (Dixon CJ); 551 (McTiernan J); 557–8 (Kitto J); 559–60 (Taylor J); 575 (Menzies J); 600 (Windeyer J); 601 (Owen J).

28 Ibid 575.

29 *Marriage Act* (n 6) ss 94(1), (4).

but not all, earlier bigamy offences.[30] Alternative possible phrasing includes that found in New South Wales law: 'Whosoever, being married, marries another person during the life of the former spouse (including husband or wife), shall be liable to imprisonment for seven years'.[31] See also the phrasing found in English law: 'Whosoever, being married, shall marry any other person during the life of the former husband or wife … shall be guilty of felony'.[32] These alternative phrasings are awkward because when they are given their natural meaning, they make it impossible for bigamy to be committed due to the longstanding legal position that if a person is already validly married, then they cannot legally marry again. This prima facie impossibility has historically been circumvented via statutory interpretation, with courts having held that 'marriage' is being used in two different senses within these types of alternative phrasing: the first-mentioned marriages are marriages that are 'perfect and binding' and the second-mentioned marriages are marriages that 'would be good but for the existence of the first'.[33] The chosen wording of s 94 obviates the need for this kind of interpretative intervention by making a more explicit distinction between: marriages that are legally-recognised as valid, as indicated by 'a person who is married'; and bigamous purported 'marriages' that are not legally-recognised as valid, which are merely 'a form or ceremony of marriage'.[34]

Section 94's phrasing does, however, raise its own problem: namely, the lack of clarity about the exact scope of 'form or ceremony of marriage'. If any and all such forms and ceremonies were cognisable under s 94, then this offence would seem to capture even those forms and ceremonies of marriage that were incapable of giving rise to a legal marriage quite apart from their bigamous character. If s 94 were to be understood this broadly, then it may even prohibit purely religious or customary marriages that are not intended by the parties to be legally recognised. However, the Australian Law Reform Commission has considered and dismissed this kind of concern. In a 1986 report, the Commission observed that '[t]he "form or ceremony of marriage" to which s 94 refers is a form or ceremony of marriage under the Act' and thus concluded that certain kinds of polygamous 'traditional Aboriginal marriage[s] would not infringe the prohibition'.[35] In a 1992 report, the Commission reiterated that the bigamy offence involves 'going through a form or ceremony of marriage which purport[s] to be a ceremony of marriage under Australian law'.[36] While there is no Australian case authority on this exact point, the Commission's 1992 report cited the English case of *R v Bham*,[37] which concerned the appeal against

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30 Such as those in *Crimes Act 1958* (Vic) s 64 and *Criminal Law Consolidation Act 1935* (SA) s 78.

31 *Crimes Act 1900* (NSW) s 92.

32 *Offences Against the Person Act 1861* (UK) 24 & 25 Vict, c 100, s 57.

33 *R v Allen* (1872) LR 1 CCR 367, 373–4.

34 Indeed, the *Marriage Act* consistently uses the phrase 'form or ceremony of marriage' in relation to purported marriages that could not be legal marriages, such as underage marriages: *Marriage Act* (n 6) s 95(1). Drummond draws a similar distinction in relation to the Canadian offence of bigamy: Susan G Drummond, 'Polygamy's Inscrutable Criminal Mischief' (2009) 47(2) *Osgoode Hall Law Journal* 317, 339.

35 Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, 1986) [317].

36 Australian Law Reform Commission, *Multiculturalism and the Law* (Report No 57, 1992) [5.11].

37 [1966] 1 QB 159, 163.

conviction of a man charged under the *Marriage Act 1949* (UK)[38] with solemnising a marriage in a place other than a church or other specific building. The 'marriage' in question was a purely religious marriage ceremony that was not intended to give rise to a legally-recognised marriage and that was not conducted in a way that could give rise to a legally-recognised marriage. The English Court of Criminal Appeal held that the *Marriage Act 1949* (UK), 'and its predecessors in dealing with marriage and its solemnisation', only applied to ceremonies of marriage that were 'in a form … capable of producing, when there performed, a valid marriage'.[39] Because a purely religious marriage ceremony is not a ceremony that 'will prima facie confer the status of husband and wife on the two persons',[40] the man had not solemnised a 'marriage' in the relevant sense and so the Court allowed the appeal and quashed his conviction.[41] Campbell has suggested that there is a similar state of affairs in Australia in relation to bigamy, in that 'the crime of bigamy' here is also 'limited to circumstances involving multiple state-sanctioned marriages'.[42] Indeed, such a limitation to the scope of the bigamy offence does seem practically necessary to avoid inappropriately criminalising not only purely religious or customary marriages, but also a whole range of forms or ceremonies of marriage that may take place for a variety of reasons, including those that are 'part of a charade' for the purpose of 'advertising, the theatre, child's play'.[43]

Section 94 of the *Marriage Act* also contemplates the kinds of evidence that may need to be adduced in order to establish the bigamy offence. Prosecutions for bigamy may very likely involve witnesses giving evidence about their marriage or spouse in the context of a criminal proceeding and so s 94(6) clarifies that the spouse of an accused person is both a competent and compellable witness in such cases.[44] Because many marriage systems are like Australia, in that they operate on the basis of solemnisation and formal registration, s 94(7A) allows courts to 'receive as evidence of the facts stated in it a document purporting to be either the original or a certified copy of a certificate, entry or record of a marriage alleged to have taken place whether in Australia or elsewhere'. However, s 94(7) maintains that such a marriage 'shall not be taken to have been proved if the only evidence of the fact is the evidence of the other party to the alleged marriage'.

Section 94 of the *Marriage Act* also sets out a number of limitations to the bigamy offence. Section 94(5) provides that the bigamy offence is not committed in situations where a person 'go[es] through a form or ceremony of marriage with that person's own spouse.' This particular limitation is necessary because both the first and second forms of the bigamy offence, when given their natural meaning, would seem to prohibit situations where a married couple purport to marry each other again

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38 12 13 & 14 Geo 6, c 76.

39 *R v Bham* [1966] 1 QB 159, 169.

40 Ibid.

41 Although Bartholomew concluded from his earlier analysis of English law that 'any ceremony, whether defective as a ceremony to create the status of marriage or not, is a sufficient second marriage for the purposes of the law of bigamy': G W Bartholomew, 'Polygamous Marriages and English Criminal Law' (1954) 17(4) *Modern Law Review* 344, 357.

42 Campbell, *Sister Wives* (n 11) 72.

43 *In the Marriage of V K and V Kapadia* (1991) 14 Fam LR 883, 886,though this case was discussing the meaning of 'marriage' for the purposes of s 113 of the *Family Law Act 1975* (Cth) ('*FLA*').

44 See, otherwise, the operation of *Evidence Act 1995* (Cth) s 18.

— perhaps for the purpose of renewing their vows or celebrating their relationship in a second location. These so-called 'second marriage ceremonies' are more specifically dealt with under s 113 of the *Marriage Act*, which 'discourages' these ceremonies, but 'which does not set out any penalty' if they do occur.[45] In the 2016 case of *Lieu v Antcliff*,[46] such a situation arose when a couple who had married in Australia in 2005 then remarried each other in Fiji in 2013. When considering the validity of each marriage, and thus whether they should be brought to an end by way of divorce or decree of nullity, Watts J noted that the bigamy offence did not apply to second marriage ceremonies and also pointedly observed that '[s]ubsection 94(5) would not have been necessary if ss 94(1) had used the expression "with some *other* person".'[47]

In any event, the situation in *Lieu v Antcliff* could not have offended against s 94 due to another limitation on the bigamy offence. This offence has jurisdictional limitations that were specifically addressed in the case of *Zau v Ruk*.[48] On the facts of this case, a man married his first wife in Australia in 1997 and was granted a divorce order on 26 March 2013 through the Australian courts. The man then married his second wife on 1 April 2013 in a marriage solemnised outside Australia. However, the Australian divorce order for the first marriage only took effect on 27 April 2013, one month after the order was granted,[49] and thus the man was still lawfully married to his first wife when he married his second wife. When dealing with an application before the Family Court of Australia for a decree of nullity in relation to the second marriage, Macmillan J considered whether the papers in the case raised the issue of the husband's potential liability for bigamy.[50] In particular, Macmillan J noted the jurisdictional limitations on the bigamy offence:

> [P]ursuant to s 8 of the *Marriage Act*, Part VII of the *Marriage Act* — which includes the offence of bigamy contained in s 94 — 'applies to and in relation to:
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> (a) marriages solemnised, or intended or purporting to be solemnised, in Australia; and
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> (b) marriages solemnised, or intended or purporting to be solemnised, under Part V;
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> and, in relation to such marriages, applies both within and without Australia.'[51]

As such, for a prosecution for the bigamy offence under s 94 to be enlivened the form or ceremony of marriage in question must have either occurred in Australia or must fall within the pt V provisions dealing with overseas marriages involving members of the Australian Defence Force.[52] As neither of these considerations were

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45 *Lieu v Antcliff* [2016] FamCA 942, [19.3].

46 Ibid.

47 Ibid [16] (emphasis in original). Neither was bigamy considered as a possible issue in the mirror case of *In the Marriage of V K and V Kapadia* (n 43), in which a couple first married in Fiji and later remarried each other in Australia.

48 [2014] FamCA 709.

49 *FLA* (n 43) s 55(1).

50 *Zau v Ruck* (n 48) [21].

51 Ibid [22].

52 Australia, however, is not the only country with a bigamy offence and a person whose multiple marriages span across both Australia as well as another country may very well be liable for bigamy

relevant to the man's second marriage in the case before the Court, Macmillan J considered that bigamy could not have been committed.

A prosecution for bigamy under s 94 of the *Marriage Act* can also be defended in a number of ways.[53] Section 94(1a) specifies that in relation to 'an offence against subsection (1), strict liability applies to the physical element of circumstance, that the person was married when the form or ceremony took place'. The application of strict liability means that there are 'no fault elements for that physical element'[54] and also enlivens a particular form of mistake of fact defence in relation to that physical element, namely the form of that defence as found in s 9.2 of the *Criminal Code* (Cth). These provisions are aimed at resolving some of the difficult legal issues that have arisen in relation to the bigamy offence. In the past, courts have struggled with whether bigamy involves a mens rea element and with determining whether a person's mistaken belief that they were unmarried at the time of a bigamous marriage constitutes a mistake of fact or of law.[55] Another difficult issue has been how to deal with situations where a person's spouse deserts them, has not been heard from and cannot be located or contacted: can that person ever lawfully marry again? Historically, a person whose spouse had not been heard from for seven years could remarry without fear of incurring criminal liability for bigamy because this absence raised a legal 'presumption of death' in relation to the missing spouse.[56] Section 94 deals specifically with this eventuality under s 94(2), which provides that it is a defence to a prosecution under s 94(1) if the defendant proves that at the time of the offence they believed their spouse was dead, and that their spouse 'had been absent … for such time and in such circumstances as to provide … reasonable grounds for presuming that the defendant's spouse was dead'. A spouse's continual absence for a 'period of 7 years immediately preceding the date of the alleged offence' is sufficient to satisfy the presumption as long as the defendant has 'no reason to believe' that their spouse was alive during this time.[57]

The bigamy offence should not be read in isolation and should be understood within the context of a number of related laws and court processes. In particular, in addition to criminalising bigamous marriages under s 94, the *Marriage Act* also

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under the laws of that other country. See, eg, *Galea v Petroni*, in which an Australian marriage was declared void on the basis that the wife was already married to another man in Malta at the time: [2011] FamCA 559. By the time of this case, the wife had already been convicted of bigamy by Maltese authorities and had been sentenced to 18 months' imprisonment.

53 Though, to be clear, 'even if such a defence is available in relation to the criminal proceedings, it cannot bring about a valid marriage': Lisa Young et al, *Family Law in Australia* (LexisNexis Butterworths, 9th ed, 2016) 314.

54 *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code* (Cth)') s 6.1(2).

55 See, especially, *Thomas v R* (n 4); *R v Bonnor* (n 5).

56 Finlay (n 1) 29–32. Very similar presumptions of death have operated both within the specific statutory provisions around bigamy offences, as well as within broader common law principles applicable to a wider variety of legal situations: see *Axon v Axon* (1937) 59 CLR 395; Anna Gunning-Stevenson, Sara Ser and Valentine Dubois, 'Law Reform: Gone Missing' (2015) 40(1) *Alternative Law Journal* 53. Importantly, the effect of successfully raising the presumption of death in bigamy cases is merely to 'save the contracting party from a prosecution for bigamy' and this defence does not legally 'validate' a void bigamous marriage: *Walker v Walker* [1969] VR 580, 583.

57 Ibid s 94(3). Previous statutory formulations of this type of defence have been held to be available both to parties who have been deserted by their first spouse, as well as to parties who desert their first spouse: *R v Darnton* [1960] VR 191.

contains a series of other provisions that operate to prevent such marriages from taking place. As mentioned above, s 23B(1)(a) of the *Marriage Act* makes any second or subsequent concurrent marriages legally void. Furthermore, in order for a marriage to be solemnised in Australia, it must take place before an authorised marriage celebrant[58] to whom the prospective spouses must provide a number of documents prior to the marriage, including both a written notice and a written declaration.[59] The notice must set out certain particulars about the parties to the marriage,[60] and the current approved form[61] requires the parties to specify their current '[c]onjugal status (for example, never validly married, widowed, divorced)'.[62] The written declaration requires that the parties again specify their current 'conjugal status' and also requires them to declare their 'belief that there is no legal impediment to the marriage',[63] which the current approved form specifically articulates as requiring that each party believe that 'neither of us is married to another person'.[64] Under s 104 — a key section that this article will return to in Part IV below — it is an offence punishable by six months' imprisonment for a person to provide a notice to an authorised celebrant 'if, to the knowledge of that person, the notice contains a false statement or an error or is defective'. Where the authorised celebrant has 'reason to believe' that a notice 'contains a false statement or an error or is defective', they shall not solemnise the marriage.[65] Indeed, if a celebrant purports to solemnise a marriage where they have 'reason to believe' either 'that there is a legal impediment to that marriage' or that 'the marriage would be void', then the celebrant commits an offence and is liable to imprisonment for six months.[66]

Given this network of overlapping checks and restrictions, in situations where a bigamous marriage has taken place, the parties involved (and potentially even the celebrant) may have committed a number of different offences under pt VII of the *Marriage Act*. Indeed, they may very well have committed a number of offences under broader Commonwealth laws too. As an example, see the Nicholas Trikilis case study of a bigamy prosecution outlined in the Commonwealth Director of Public Prosecutions 2009–2010 Annual Report:

> The defendant and his wife separated and entered into a property settlement. The defendant approached a marriage celebrant with the intention of marrying another woman. He declared that he was divorced and provided the celebrant with a forged Certificate of Divorce under seal of the Family Court bearing the Registrar's signature and the Family Court file

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58 *Marriage Act* (n 6) s 41.
59 Ibid s 42(1).
60 Ibid s 42(1), (2).
61 Ibid s 119(3)(c).
62 *Marriage Act 1961: Notice of Intended Marriage*, Commonwealth of Australia <https://www.ag.gov.au/FamiliesAndMarriage/Marriage/Documents/New-notice-of-intended-marriage.pdf>.
63 *Marriage Act* (n 6) s 42(1)(c). If a declaration discloses that a party has had a previous marriage that has ended by way of divorce or death, evidence of this divorce or death must be produced to the celebrant before the celebrant can solemnise the marriage: s 42(10).
64 *Marriage Act 1961: Declaration of No Legal Impediment to Marriage*, Commonwealth of Australia <https://www.ag.gov.au/FamiliesAndMarriage/Marriage/Documents/Declaration%20of%20no%20legal%20impediment%20to%20marriage.PDF>.
65 *Marriage Act* (n 6) s 42(8).
66 Ibid s 100.

> number of the property settlement. The celebrant accepted the Certificate as genuine and performed the marriage ceremony.[67]

The defendant in this case ultimately pleaded guilty to two offences under the *Marriage Act*: bigamy and giving defective notice to an authorised celebrant. He also pleaded guilty to three offences under the *Criminal Code* (Cth): giving false or misleading information, forgery and using a forged document.[68]

Once a bigamous marriage has taken place, been solemnised and ultimately registered, although that marriage will be legally void, this is not a self-executing legal outcome. In order to dissolve a void marriage, the parties involved must bring (either jointly or individually) an application[69] before the Family Court of Australia seeking a declaration that the marriage is a nullity.[70] If the Court is satisfied that the marriage was bigamous, then such an application will be successful. However, if evidence before the Court establishes that a marriage is bigamous, then it may very well also implicate one or both of the parties in the commission of the offence of bigamy. In recent years, the Family Court has referred the papers in nullity of marriage cases to other legal authorities for consideration for potential prosecution. Family Court judges have referred the papers in these cases to, variously, the Chief Justice of the Family Court,[71] the Commonwealth Attorney-General[72] and the Commonwealth Director of Public Prosecutions.[73] In *Hiu v Ling*, for example, Mushin J granted a decree of nullity in relation to a marriage that took place in Australia in February 2010 on the basis that the man involved had married (and not subsequently divorced) another woman in Hong Kong in December 2009.[74] Evidence before the Court included a Certificate of Marriage for the Hong Kong marriage and the man agreed that he was the husband named in that certificate.[75] In addition to granting the declaration of nullity in relation to the Australian marriage, Mushin J observed that before the Court there was 'strong evidence to suggest that the [man] is guilty of a serious crime under Commonwealth law', namely bigamy, and commented that it would be 'contrary to my duty as a Judge of the Commonwealth if I were to decline to refer the papers' for consideration for potential prosecution.[76]

In cases where referrals for prosecution have been considered by the courts, they have usually been made. The exceptions to this include situations where there was only very slight evidence of potential bigamy,[77] where the legal authorities had

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67 Commonwealth Director of Public Prosecutions (n 12) 86.

68 Ibid.

69 *FLA* (n 43) s 44(1A). An application for a decree of nullity falls within the definition of a 'matrimonial cause': s 4.

70 Ibid s 51.

71 *Hiu v Ling* (n 13); *Chhibber v Kudva* (n 14); *Lu v Chang* [2014] FamCA 614; *Kefel v Efstani* [2016] FamCA 515.

72 *Hyun v Namgung* [2012] FamCA 146; *Jenkins v Archer* [2013] FamCA 532; *Hills v Killen (No 2)* [2015] FamCA 761; *Jsing v Kong* [2016] FamCA 288.

73 See *Ceballos v Ceballos (No 2)* [2013] FamCA 973; *Kailash v Manjalkar (No 2)* (n 14); *Amarnath v Kandar* [2015] FamCA 1138; *Kirvan v Tomaras* [2018] FamCA 171.

74 *Hiu v Ling* (n 13).

75 Ibid [13].

76 Ibid [31].

77 *Ritchie v Ritchie* [2011] FMCAfam 720.

already been made aware of potential bigamy,[78] and where the parties had already been convicted for bigamy.[79] The public policy argument that these referrals should not be made because they discourage people from 'approach[ing] the Family Court to set the record straight' has not been accepted.[80] The Family Court of Australia referral process has thus become a key pipeline in recent years for the identification of potential bigamy offences, though whether these referrals result in any action being taken is ultimately a matter for prosecutorial authorities.

III Reasons for Repealing the Bigamy Offence

Whereas Part II set out and explained the operation of the s 94 bigamy offence, this Part critically analyses the offence and argues that it should be repealed. In contemporary Australia, the bigamy offence no longer has a compelling rationale and is anachronistic, unjustifiably broad and duplicates other laws. A variety of practical and symbolic problems with the offence also indicate that it should be repealed; namely, it is in tension with other laws around personal relationships, it is unable to be enforced in an effective manner and it is culturally insensitive.

A *Lack of a Contemporary Rationale*

The analysis in this article now circles back to the key question raised in the Introduction: what, exactly, is the nature of the wrong that justifies the continued existence of the bigamy offence in contemporary Australia? Despite the longstanding nature of the offence, it is impossible to identify a satisfactory justification for it in Australia today. While a number of purported wrongs have been put forward as key justifications for the bigamy offence over time — including religious offence, the illegitimacy of children, spousal desertion and deception — none of these remain cogent. For this reason, the bigamy offence lacks a compelling rationale.

One of the earliest claimed justifications for the bigamy offence is religious in nature. When the *Bigamy Act 1603* was passed, its preamble noted that bigamy was 'to the great dishonour of God'.[81] Indeed, Williams identifies that 'the chief reason' for the criminalisation of bigamy at this time was 'that it was regarded as akin to blasphemy'.[82] Similar kinds of thinking are evident in the opinions of some Australian judges in cases concerning bigamy. For example, in the Victorian Supreme Court case of *R v Bonnor*, Barry J underscored the seriousness of bigamy by quoting an extract from the *Book of Common Prayer* about the sanctity of marriage: namely, that it is 'not by any to be enterprised, nor taken in hand, unadvisedly, lightly or wantonly'.[83] When the constitutional validity of s 94 was before the High Court of Australia in *Attorney-General (Victoria) v Commonwealth*, Dixon CJ identified that the 'crime' of bigamy 'consists in the profanation or misuse

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78 *Keyet v Keyet* [2013] FamCA 77.
79 *Tyler v Tyler* [2017] FamCA 872.
80 *Kailash v Manjalkar (No 2)* (n 14) [12].
81 Bartholomew, 'The Origin and Development of the Law of Bigamy' (n 1) 260.
82 Glanville L Williams, 'Bigamy and the Third Marriage' (1950) 13(4) *Modern Law Review* 417, 424.
83 *R v Bonnor* (n 5) 250.

of the marriage ceremony'.[84] Notions of blasphemy, profanation and the like are self-evidently not an acceptable basis for criminalisation within a liberal democratic system of laws like those of contemporary Australia.[85] They are certainly not in keeping with the 'secular status'[86] of marriage within modern Australian law, which treats marriage as a civil, rather than religious, institution. While some spouses certainly do attach religious significance to their marriages (holding them in religious venues, having them conducted by religious celebrants and so on) this is not present in all marriages and is not a legal requirement of marriage generally. Indeed, of all marriages registered in Australia in 2017, 78% had ceremonies overseen by a civil celebrant.[87] Where a 'marriage ceremony in a particular case may be entirely secular ... it is especially difficult to see why [it] should be protected by a law analogous to blasphemy'.[88] Where marriage as a legal institution is entirely secular, these religious considerations cannot justify the bigamy offence.

Hart recognised the illiberalism of criminalising bigamy because of notions of religious 'immorality' or 'wrongdoing', and attempted to find an alternative justification for the bigamy offence in his influential 1963 work *Law, Liberty and Morality*.[89] He identified what he considered to be a potentially more compelling justification for criminalisation in the 'outrage' caused by the 'public act' of bigamy due to its capacity to offend those with 'religious sensibilities'.[90] For Hart, the offence of bigamy should be understood as a law 'concerned with the offensiveness to others of … public conduct' and not just as being about private immorality as such.[91] However, Hart was vexed by whether offence to religious adherents was itself a sufficient basis for criminalising bigamy. He observed that 'little sacrifice or suffering' is needed to avoid causing this offence (as one can still live with and love a second partner without getting bigamously married to them), but he also accepted that it seems plausible to argue that 'in an age of waning faith … the religious sentiments likely to be offended by the public celebration of a bigamous marriage are no longer very widespread or very deep'.[92] In any event, Hart's justification of 'nuisance' to religious adherents[93] cannot be considered a compelling reason for criminalising bigamy in contemporary Australia. As noted above, the shift towards marriage being treated as a legal institution, rather than a religious one, robs this suggestion of any strength it may have once had. That a particular person's use of a

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84 *A-G (Vic) v Commonwealth* (n 24) 547.

85 As Williams colourfully puts it, that the 'wrath of the Deity needs to be appeased … can hardly justify the continuance of the offence in modern law': Glanville Williams, 'Language and the Law — I' (1945) 61(1) *Law Quarterly Review* 71, 76.

86 Williams, 'Bigamy and the Third Marriage' (n 82) 424.

87 'Marriages and Divorces, Australia, 2017', *Australian Bureau of Statistics* (Web Page, Catalogue No 3310.0, 27 November 2018) <https://www.abs.gov.au/ausstats/abs@.nsf/mf/3310.0>.

88 Williams, 'Bigamy and the Third Marriage' (n 82) 424.

89 HLA Hart, *Law, Liberty and Morality* (Oxford University Press, 1963).

90 Ibid 41.

91 Ibid.

92 Ibid 43. Indeed, Parkinson even suggests in response to Hart that '[i]n an age when living together outside marriage is so widespread, to go through a marriage ceremony with a second wife is not to desecrate the marriage ceremony but to pay it a double honour': Patrick Parkinson, 'Taking Multiculturalism Seriously: Marriage Law and the Rights of Minorities' (1994) 16(4) *Sydney Law Review* 473, 502.

93 Hart (n 89) 41.

legal institution may offend against the religious significance that other people attach to that institution is clearly not a compelling basis for criminalising that usage. If it were otherwise, then a whole range of marriages that are currently allowed would also have to be criminalised because they may be offensive to some religious adherents. Following this line of thought, Australian law would then certainly also have to criminally prohibit same-sex marriages and would even potentially have to prohibit marriages involving atheists, divorcées, persons from minority religious faiths and so on.

A non-religious rationale for the bigamy offence was also contained in the preamble to the *Bigamy Act 1603*, which described bigamy as causing or contributing to certain kinds of social harm, namely the 'utter undoing of divers[e] honest men's children and others'.[94] In particular, as Slovenko identifies, 'laws against polygamy or bigamy were designed essentially to protect women and children'[95] from the variety of such harms that were said to attach to bigamy. However, this justification has been 'undercut' by intervening developments[96] as whatever harms the bigamy offence once addressed no longer exist in contemporary Australia. This can be illustrated in a number of ways. First, there once was a time when children born outside of a valid marriage were 'treated as second-class citizens, both legally and socially',[97] and the law discouraged 'illegitimate' children as their care could potentially impose a burden on authorities in situations where parents could not be held responsible.[98] The bigamy offence bolstered this broader framework and was understood as being 'designed to protect' children of a marriage,[99] presumably by working to ensure their legitimacy. However, as time has passed, the historical 'distinction between bastards and legitimate children' that underpins this rationale has 'rapidly fad[ed]',[100] and has now been effectively 'removed' from Australian law.[101] Indeed, the key part of Australia's current legal framework dealing with parental care and responsibility for children, namely pt VII of the *Family Law Act 1975* (Cth), treats children of void bigamous marriages in an identical manner to children of valid marriages.[102]

Second, bigamy has historically been condemned on the basis that it involves the desertion of the original spouse and the failure to provide ongoing material support.[103] In a time when divorce was practically unavailable to many lower and middle-class people, the bigamy offence may have been needed to remedy the fact that '[a] simple and no doubt common way of ridding oneself of one's spouse was simply to disappear' and then to remarry in a new location without first getting divorced.[104] However, in contemporary Australia, divorce processes are now

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94 Bartholomew, 'The Origin and Development of the Law of Bigamy' (n 1) 261.
95 Slovenko (n 1) 298.
96 Ibid.
97 Young et al (n 53) 386.
98 Ibid 387.
99 *Thomas v R* (n 4) 316 (Evatt J).
100 Slovenko (n 1) 304.
101 Young et al (n 53) 388.
102 *FLA* (n 43) s 60E.
103 Williams, 'Bigamy and the Third Marriage' (n 82) 424. Though, as Williams points out, instances of bigamy do not necessarily have to involve desertion or failure to support: at 424.
104 Finlay (n 1) 12.

accessible and relatively quick, enabling a person to legitimately remarry with ease and obviating the need to resort to desertion. Furthermore, if a person in the current day were to desert their first spouse, then the relevant provisions of the *FLA* and the *Child Support (Assessment) Act 1989* (Cth) are more appropriate to deal with both this and any resulting issues to do with child support, spousal maintenance, the splitting of assets and so on.

Third, 'bigamous adultery' may still be regarded by some people as being a 'public affront and provocation to the first spouse'.[105] However, adultery itself is not a criminal offence in Australia and there is no reason to think that the addition of a form or ceremony of marriage to the situation somehow changes the nature of adultery in such a way as to warrant its criminalisation.

Fourth, prior involvement in a legally-void bigamous marriage historically may have damaged the social status and prospects for remarriage of a deceived second spouse, particularly if they were a woman, due to the (actual or assumed) consummation of that marriage. But it is clear that today virginity no longer holds the kind of social value it once did, and neither does sexual experience carry this level of social opprobrium.

Finally, an unmarried person who bigamously marries someone who is already married could be argued to be harmed by the fact that their marriage is legally void because when such a marriage comes to an end, it will be subject to a declaration of nullity rather than a divorce. However, upon the breakdown of a void bigamous marriage the provisions of *FLA* pt VIII that relate to property, spousal maintenance and maintenance agreements apply in the same way that they would to a legally-valid marriage.[106] In summation, it is apparent that the kinds of historical harms that bigamy may once have played a role in combating no longer justify the bigamy offence in contemporary Australia.

The potential justifications discussed so far in this Part all fail to provide a compelling rationale for the bigamy offence because they are anachronistic and out of place in contemporary Australia. However, there is another set of potential justifications that centre around the notion that the offence protects against deceptive conduct in relation to an innocent spouse, broader society or the government itself. These justifications also fail to provide a compelling rationale because the bigamy offence is inapt to deal with them — either because the scope of the bigamy offence is much wider than they warrant or because they are already adequately covered by other existing offences.

The potential for deception in situations involving bigamy is readily apparent. For example, a person could bigamously marry in order to deceive the government into providing them with certain legal benefits that would be unavailable to an unmarried couple, such as those in relation to welfare or immigration status. As another example, a married person could deceive an unwitting unmarried person into bigamy, perhaps even making false promises about the bigamous marriage as legally cementing their mutual commitment in order to gain their consent to sexual activity.

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[105] Hart (n 89) 40, discussing then recent proposals put forward by the American Law Institute.

[106] *FLA* (n 43) s 71.

In both examples, in order to facilitate the bigamous marriage occurring, the celebrant and registrar would also need to be deceived. These various kinds of deception do not provide a compelling justification for the offence of bigamy for two key reasons.

The first reason is that these deceptions do not justify the very broad scope of the s 94 bigamy offence. Some commentators may interpret bigamy offences as being 'aimed at deceptive conduct', as 'punish[ing] those who bigamously marr[y] an innocent victim',[107] and as existing in order to 'protect innocent and unsuspecting persons who intend to assume … a [married] status'.[108] However, the reality of s 94 is that it prohibits bigamy even where there is no deception and all of the parties are fully aware of what is occurring. A married person who marries another is liable under the first form of the bigamy offence regardless of whether they deceived that other person about their conjugal status. Furthermore, rather than simply protecting 'innocent' people from the bigamous deception of their already married spouse, the second form of the bigamy offence also explicitly contemplates and criminalises situations in which an unmarried person marries another person while knowing that that other person is married. The result of all this is that deception of an 'innocent' person is 'logically irrelevant to the offence' of bigamy.[109] As the Australian Law Reform Commission noted in relation to s 94 of the *Marriage Act*: '[d]eception is not … an element of the offence.[110] Even if one accepts that the 'harm imposed on an innocent person fraudulently misled into a void marriage'[111] is something that should be criminalised, the wide scope of the current bigamy offence is excessive.

The second reason is that these deceptions are addressed by other criminal offences already. Leaving aside the fundamental problem discussed above (that cases involving bigamy need not actually involve the following types of deception), closely examining some of these possible deceptions reveals that the bigamy offence may be both unnecessary and inapt to deal with them. For example, where a void bigamous marriage is knowingly used to claim certain legal benefits that an unmarried person is not legitimately entitled to, this situation is better dealt with as a fraud offence.[112] There are many different ways in which a person can fraudulently claim legal benefits — such as by falsely claiming that they have a disability or are older or younger than they are — and to prohibit bigamy for this reason would be to doubly criminalise one particular means of fraud. As an example of inaptness, where a void bigamous marriage is knowingly used by a person to induce their 'spouse' to consent to sexual activity, this should, if anything, be dealt with under criminal sexual offences. The High Court of Australia has already held that deception as to the existence of a valid marriage between the parties does not legally vitiate consent to sex because it does not deceive a person about 'the nature and the character of the

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107 Martha Bailey, 'Should Polygamy be a Crime?' in Janet Bennion and Lisa Fishbayn Joffe (eds), *The Polygamy Question* (Utah State University Press, 2016) 210, 215.

108 *Thomas v R* (n 4) 316 (Evatt J).

109 Williams, 'Bigamy and the Third Marriage' (n 82) 424. Or, as he phrases it elsewhere, while bigamy may 'involv[e] the practising of a grievous deceit … the law is not confined to this case': Williams, 'Language and the Law' (n 85) 77.

110 Australian Law Reform Commission, *Multiculturalism and the Law* (n 36) [5.11].

111 Maura Strassberg, 'The Crime of Polygamy' (2003) 12(2) *Temple Political & Civil Rights Law Review* 353, 420.

112 *Criminal Code* (Cth) (n 54) pt 7.3.

act' of sex itself,[113] noting specifically that '[i]n the history of bigamy … [t]he most heartless bigamist has not been considered guilty of rape'.[114] Whether or not one agrees with the Court's decision about what kinds of fraud vitiate sexual consent, it would be wholly inappropriate to circumvent this decision by using the bigamy offence to re-criminalise sex in such situations. The nature of the wrong in such situations is fundamentally about non-consensual sex and is only contingently about bigamous marriage, and thus should properly be left to those criminal laws that deal specifically with sexual offending, rather than those that deal with marriage law.[115]

There are, however, other wrongs that are necessarily and not contingently connected to situations involving bigamous marriage: namely, the deceptions involved in bringing about the solemnisation and registration of the bigamous marriage itself. As Williams notes: '[t]he only social mischief that is necessarily involved in every case of bigamy is the deceit practised upon those who officiate at or before the bigamous ceremony, and the consequential falsification of the marriage register'.[116] Such a deceit may be 'intentionally committed' in some situations and in others it may result from there being a party who 'honestly believe[s] that [their] first marriage was at an end'.[117] So is the justification for the bigamy offence simply 'to protect public records from confusion'?[118] The problem with this justification is that, as set out in Part II above, it is already a criminal offence under s 104 of the *Marriage Act* to give defective notice to an authorised celebrant and this will include a notice containing a false statement about a person's conjugal status. Recall also the Nicholas Trikilis case study where the defendant was charged not only with bigamy, but also with giving defective notice (as well as a number of other deception-based offences). If the criminalisation of bigamy is justified by the necessary deception involved in bringing about a bigamous marriage, then the bigamy offence duplicates what other criminal offences already cover. It could be argued that the deception involved in bringing about a bigamous marriage requires different treatment than allowed for by the generalised defective notice offence, but is the effect of making a false statement about one's conjugal status really so different from the making of other false statements within a notice? The effect of giving a defective notice regarding conjugal status is to enter into the marriage register a legally-void marriage and thus the 'law on bigamy' could be said to 'serve no legitimate purpose today other than to protect the clarity of official recordkeeping'.[119] Slovenko recounts the story of an Australian judge who apparently said to a bigamist at sentencing: 'Wretched man! You have thrown Her Majesty's records into confusion'.[120] There are, however, many ways in which the marriage register could be thrown into confusion and brought into error by many different kinds of false statements that

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113 *Papadimitropoulos v R* (1957) 98 CLR 249, 260.
114 Ibid 261.
115 Intervening amendments to the statutory definition of 'consent' may already mean that sexual consent is treated as being vitiated in 'sham marriage' cases within some states and territories: see *Criminal Code* (WA) s 319(2) as interpreted in *Michael v Western Australia* (2008) 183 A Crim R 348, 434–5 [383] (Heenan AJA); *Crimes Act 1900* (NSW) s 61HE(6)(b).
116 Williams, 'Bigamy and the Third Marriage' (n 82) 424.
117 Williams, 'Language and the Law' (n 85) 77.
118 Hart (n 89) 40.
119 Slovenko (n 1) 302.
120 Ibid.

could be given in a defective notice, including false statements about age, name, prohibited degree of relationship, and (historically) sex. There is no clear reason for singling out false statements about conjugal status as being so remarkably different from these other characteristics such as to warrant the existence of a standalone bigamy offence.

B *Problematic Operation*

So far this Part has demonstrated that the bigamy offence lacks a compelling justification in contemporary Australia. This is itself a sufficient reason to repeal the bigamy offence. However, there are further reasons for the repeal of the bigamy offence based on the practical and symbolic problems with the current operation of the bigamy offence. In particular, this Part will demonstrate that the bigamy offence creates tensions within Australian laws around personal relationships, is practically unable to regulate social simulations of bigamous marriage and is culturally insensitive.

In addition to the *Marriage Act*, the *FLA* is another key piece of legislation that deals with the legal regulation of marriages, relationships and families within Australia. The *Marriage Act* strongly embeds a monogamous conception of marriage through the s 94 bigamy offence and the s 23B(1)(a) provision that makes second and subsequent marriages legally void. However, the *FLA* does not restrict its legal recognition of relationships in the same way. Section 6 of the *FLA* specifically provides that foreign polygamous marriages are legally recognised as marriages for the purpose of accessing the provisions of the *FLA* upon the breakdown of the relationship. The *FLA* provisions relating to de facto relationships also recognise that parties can be in multiple simultaneous relationships, either in a situation where a person is married and also in a de facto relationship or in a situation where a person is in multiple de facto relationships.[121] Tension is evident between the way these two pieces of legislation deal with the existence of multiple personal relationships. The *Marriage Act* explicitly condemns and criminalises multiple marriages, while the *FLA* simultaneously recognises, and even supports, foreign polygamous marriages as well as multiple domestic marriage or marriage-like relationships. A key reason for this tension is the 'remedial purpose'[122] of the *FLA*: the *FLA*'s broader recognition of these forms of plural relationships enables the parties to such relationships to do things like apply for divorce, split assets, and claim maintenance, when those relationships end. Given that the *Marriage Act* is concerned with what kinds of marriages can be legally created, rather than how to equitably dissolve marriages and marriage-like relationships, this tension between the *Marriage Act* and the *FLA* is a product of their different purposes. And yet the *Marriage Act* goes further than simply excluding polygamous marriage from legal recognition. It also specifically criminalises local polygamous marriages under the s 94 bigamy offence. If the 'purpose of criminalization is to deter, denounce, and

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[121] *FLA* (n 43) s 4AA(5). For the relevant provisions under Western Australian family law, see *Interpretation Act 1984* (WA) s 13A(3)(b).

[122] Belinda Fehlberg et al, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2nd ed, 2015) 95.

exact retribution for harmful behavior',[123] then the *Marriage Act* characterises polygamous marriage as being a fundamental wrong. If the *FLA* treats foreign polygamous marriages and multiple domestic marriage or marriage-like relationships as being no less deserving of the protection of the Australian family court system, the *Marriage Act* explicitly denounces local polygamous marriages as being a criminal affront to the Australian legal system. To the extent that the bigamy offence tacks an additional element of symbolic condemnation of non-monogamy onto the *Marriage Act*'s broader enshrinement of a monogamous model of marriage, the bigamy offence also adds 'layer[s] of fear, guilt, and shame' to people who engage in otherwise non-criminal non-monogamous behaviour.[124] It is in these ways that the bigamy offence can be said to create 'anomalies' when read alongside those other areas of Australian family law that, albeit for different purposes, recognise and validate non-monogamous relationships.[125]

An additional problem with the bigamy offence is that it does not actually provide a practicable means by which to deter, denounce or revenge the occurrence of bigamous conduct in Australia. The way the s 94 offence is currently formulated renders any such effort largely futile. As Williams has identified: '[i]f a woman lives with a married man, takes his name, calls herself Mrs., announces her marriage to him in the papers, and sends her friends wedding-cake, neither he nor she commits an offence.'[126] A similar point was also made by Hart, who observed that a man 'may set up house and pretend that he is married: he may celebrate his union with champagne and a distribution of wedding cake and with all the usual social ceremonial of a valid marriage. None of this is illegal'.[127] A recent real-life example of this hypothetical point is the case of *Na v Tiu*.[128] This case involved a Family Court of Australia determination of whether a man and a woman were in a de facto relationship, which was argued to have begun when each of the parties was married to another different person. In the course of evidence, it emerged that the parties had 'each signed a document entitled "Marriage Certificate"' created by the man, they had 'exchanged rings' and 'photographs were taken of them together dressed in wedding attire' and were hung on the walls of the man's house.[129] While it may seem odd, it was nevertheless entirely legally proper that bigamy was never considered as a possibility in this case: none of these actions, either individually or jointly, offend against s 94. What this all demonstrates is that parties can enter into, and live out, an almost perfect simulation of a bigamous marriage without ever running afoul of the bigamy offence. The only thing that the parties cannot do is go through a form or ceremony of marriage that would legally recognise that marriage because at that point, and only at that point, will 'the law ste[p] in … to punish the bigamist'.[130] However, going through such a form or ceremony of marriage would be a

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123 Martha Bailey and Amy Kaufman, 'Should Civil Marriage be Opened Up to Multiple Parties?' (2015) 64(6) *Emory Law Journal* 1747, 1754 (citations omitted).
124 Deborah L Rhode, *Adultery: Infidelity and the Law* (Harvard University Press, 2016) 115.
125 Australian Law Reform Commission, *Multiculturalism and the Law* (n 36) [5.11].
126 Williams, 'Bigamy and the Third Marriage' (n 82) 425.
127 Hart (n 89) 39–40.
128 [2017] FamCA 282.
129 Ibid [20].
130 Hart (n 89) 40.

'purposeless act'[131] anyway because bigamous marriages are legally void in any event. As long as the parties do not attempt to legally register their marriage they can even conduct a culturally or religiously significant marriage ceremony and this is entirely lawful (as discussed in Part II above). It has been observed that various groups around the Western world maintain their religious or traditional plural marriage practices while also effectively avoiding criminal liability for bigamy in this way, including some Mormon groups in North America,[132] some Indigenous Australian groups[133] and some Islamic communities in Australia.[134] The bigamy offence is thus revealed as being practically unworkable in the face of social simulations of bigamous marriage.

The practical futility of the bigamy offence plays into the final compelling reason why the offence of bigamy should be repealed. Because of its impracticality, this offence is now primarily symbolic in nature and the symbolic message that it sends is culturally insensitive. The limited practical reach of the s 94 bigamy offence and the fact that it is 'not regularly prosecuted in Australia',[135] both suggest that the bigamy offence exists as 'a crime insofar as society uses law to mark boundaries'.[136] The symbolic boundary that the bigamy offence marks off within Australian law is the exclusive validation and legitimation of a particular 'Christian concept of monogamy'.[137] Sir Garfield Barwick, the Member of Parliament who drafted the *Marriage Act*'s originating Bill and introduced it to the Australian Parliament, specifically identified the bigamy offence as an extension of the Christian marriage ethos that he consciously worked into the original text of the *Marriage Act*.[138] The Christian roots of English marriage law are reflected across historical legal texts, including the influential case of *Hyde v Hyde & Woodmansee*,[139] as well as the various religion-based justifications for the bigamy offence that have been discussed above. This particular religious underpinning is also currently evident in the restrictive monogamous definition of marriage as being 'the union of 2 people to the exclusion of all others, voluntarily entered into for life'.[140] However, this narrow

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131 Williams, 'Bigamy and the Third Marriage' (n 82) 425.

132 Rhode (n 124) 119. Indeed, the belief that 'some forms of plural marriages, such as Mormon "spiritual" marriages … conducted in private ceremonies' were 'technically exempt from the prohibition on bigamy' is the reason why Canadian law not only includes the offence of bigamy, but also the offence of polygamy, 'which prohibits multiple marriages, whether sanctioned by civil, religious, customary, or other means': BJ Wray, Keith Renner and Craig Cameron, 'The Most Comprehensive Judicial Record Ever Produced: The *Polygamy Reference*' (2015) 64(6) *Emory Law Journal* 1877, 1879.

133 Parkinson (n 92) 498–9.

134 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, 157.

135 Campbell, *Sister Wives* (n 11) 72.

136 Soothill et al (n 9) 70.

137 Sir Garfield Barwick, 'The Commonwealth *Marriage Act 1961*' (1962) 3(3) *Melbourne University Law Review* 277, 282.

138 Ibid.

139 In which Wilde JO, when discussing the *Matrimonial Causes Act 1857* (UK) 20 & 21 Vict, c 85, noted that 'And so utterly at variance with Christian marriage is the notion of permitting the man to marry a second woman, that the Act … declares that if the husband is guilty of bigamy as well as adultery, it shall be a ground of divorce to the wife:': *Hyde v Hyde and Woodmansee* [1861–73] All ER Rep 175, 179–80.

140 *Marriage Act* (n 6) s 5 (definition of 'marriage').

Christian understanding of marriage is not shared universally across the world, nor across Australian society. A number of countries not only do not have an equivalent bigamy offence, but indeed allow for and legitimate polygamous marriages,[141] and citizens from these countries may visit or migrate to Australia. A number of cultural and religious communities within Australian society regard having multiple concurrent marriages as important parts of their systems of belief or traditions, including some (but not all) Islamic and Indigenous Australian groups.[142] Whether concerns about due respect for multiculturalism provide a compelling argument for the recognition of polygamy in Australian law is beyond the scope of this article, suffice it to say that such concerns would clearly need to be balanced against other policy considerations such as gender equality.[143] However, Australian law's specific and explicit criminalisation of bigamy is not only culturally insensitive to the value that multiple marriage is accorded by cultural and religious groups but this insensitivity is also needless, given that, as discussed in this Part, the bigamy offence has no justifiable purpose or countervailing policy rationale.

IV What Repealing the Bigamy Offence Entails

So far this article has demonstrated that in contemporary Australia the bigamy offence not only lacks a satisfactory justification, but also functions problematically at both a practical and symbolic level. When faced with the various deficiencies of the bigamy offence, previous commentary has suggested a number of ways forward, including that the bigamy offence be split into multiple separate offences,[144] and that the existence of the bigamy offence be subject to 'further consideration' by the Australian Government.[145] These suggestions have value, but they do not go far enough. This article proposes that bigamy no longer be recognised as a specific offence within Australian law. In order to do this, s 94 of the *Marriage Act* would need to be repealed, as would the remaining bigamy offence sections that still exist

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141 As at 2009, 'polygamy was legal or generally accepted in 33 countries, 25 in Africa and 7 in Asia', and 'was accepted by part of the population or legal for some group of people in 41 countries, 18 of which were in Africa and 21 in Asia': United Nations Department of Economic and Social Affairs, Population Division, *Population Facts* (2011) <http://www.un.org/en/development/desa/population/publications/pdf/popfacts/PopFacts_2011-1.pdf>.

142 See, eg, Richards and Esmaeili (n 134); Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (n 35) ch 12; Frances Morphy, 'Making Them Fit: The Australian National Census and Aboriginal Family Forms' in Gillian Calder and Lori G Beaman (eds), *Polygamy's Rights and Wrongs: Perspectives on Harm, Family, and Law* (UBC Press, 2014) 170.

143 See Bennett (n 17).

144 Williams, 'Bigamy and the Third Marriage' (n 82) 425. This article's proposal is partly inspired by Williams' suggestion that one of these separate offences be 'a minor offence of falsification of the public records': at 425–6. Another partial source of inspiration is the author's disagreement with Hart's comment that 'many may still think that a case for punishing bigamy would remain even if' the harms linked to bigamy 'were catered for by the creation of specific offences which penalized not the bigamy but, for example, the causing of false statements to be entered into official records': Hart (n 89) 40.

145 Australian Law Reform Commission, *Multiculturalism and the Law* (n 36) [5.11]. This article's proposal is partly inspired by the Commission's emphasis on the fact that parties who knowingly enter into a bigamous marriage will already commit 'one or more other offences' under the *Marriage Act* (n 6) and that 'it seems doubtful whether the harm done to the other party, especially in cases where that party has not been deceived, is such as to require an additional criminal sanction': at [5.11].

within some Australian states.[146] This Part will clarify what this proposal does and does not entail.

Repealing the bigamy offence would not alter the current state of Australian civil law provisions regarding marriage, under which polygamous (and by extension bigamous) marriages are legally void. It would also not mean that situations involving bigamous marriages would then go wholly unregulated by the criminal law, because fraud, forgery, rape and all other criminal offences discussed above would still be fully operative. Indeed, this article proposes that situations involving bigamous marriages can and should be left to be captured by these other provisions that already exist within the legal framework. In particular, the offence of providing defective notice under the *Marriage Act* s 104 should be the key mechanism through which bigamous marriages are legally regulated. This is because bigamous marriages can only practically occur in situations where a marriage notice has been provided that contains a false statement about the parties' conjugal status and thus s 104 will clearly be enlivened in such situations already. The scope of s 104 is broad enough to extend liability to parties who would currently be captured by the first and second forms of the s 94 offence. This is because s 104 does not narrowly prohibit a party from providing a false statement about themselves within a notice but instead prohibits the much broader giving of a notice knowing that it 'contains a false statement' regardless of which party provided the false statement. Thus, both a married person who knows that they are married as well as an unmarried person who knows that their purported future spouse is already married would commit an offence under s 104 if the marriage notice contained a false statement about conjugal status.

Section 104 is slightly different in scope to s 94 because it can only be offended against where 'to the knowledge' of that person the notice contains a false statement. By contrast, the first form of the s 94 offence is a strict liability offence and the second form of s 94 also prohibits situations where an unmarried person has reasonable grounds for believing that their purported future spouse is already married. In addition to altering the scope of liability in this way, the s 104 knowledge requirement also has the potential to revive some of the difficult legal issues that have historically been caught up with the bigamy offence, such as those addressed in Part II above about mens rea, the mistake of fact/law distinction, and the presumption of death. Accordingly, if the bigamy offence were to be repealed, then the specific limitations and defences currently in place around s 94 should also possibly be applied via corresponding statutory amendments to s 104 in relation to defective notices containing false statements about conjugal status.

Another key point of distinction from s 94 is that the s 104 offence does not rely on any form or ceremony of marriage having taken place between the parties. This is because the s 104 offence is complete at the point in time when the defective notice is given by the parties to an authorised celebrant (or, if an incomplete notice is originally given to an authorised celebrant, when that defective notice is later completed and signed). The scope of s 104 thus includes situations where the parties have given a defective notice containing a false statement about conjugal status, but

[146] See above n 22 for the relevant jurisdictions and sections. If this article's proposal was only that *Marriage Act* (n 6) s 94 be repealed, then these currently dormant state-based offences would effectively be revived.

have then not gone through a form or ceremony of marriage for whatever reason — perhaps because the notice's defectiveness is uncovered by the celebrant or the parties' relationship breaks down and they resile from their planned marriage. Overall, however, while in certain ways the scope of the s 104 offence may be both slightly broader and slightly narrower than the current s 94 bigamy offence, if s 94 were to be repealed then the s 104 offence nevertheless ensures that situations involving bigamous marriages are still appropriately regulated.

While repealing the bigamy offence would nevertheless mean that situations involving bigamous marriages remain criminally prohibited, taking this step would resolve many of the issues that the bigamy offence creates within this area of law. It would resolve the fundamental legitimacy problem of there being no satisfactory rationale to justify the existence of an indictable criminal offence on the Australian statute books. While the bigamy offence may lack a satisfactory rationale in contemporary Australia, the same cannot be said of the network of other laws that should capture bigamous marriages instead. Fraud, forgery and rape offences all have clear justifications, and the s 104 *Marriage Act* offence is clearly justified by the conjoined needs to dissuade the provision of false information to government bodies and to guarantee the accuracy and integrity of government records. The penalty attaching to the s 104 offence is six months' imprisonment, which is more proportionate to the nature of this wrong than the penalty of five years' imprisonment that currently attaches to s 94. Furthermore, adopting this proposal would mean that the laws around bigamous marriages would be more respectful of the value that some cultural and religious groups place on non-monogamous relationships. By attaching criminality to the provision of false information, rather than to having multiple marriages, and by bringing the maximum penalty for providing false information about conjugal status into line with that for providing other kinds of false information, the law here would more sensitively negotiate the line between respecting multiculturalism and ensuring appropriate regulation. This proposal would also move the current law beyond the historical roots of the bigamy offence and would thus reorient the law away from the illiberal aim of preserving a particular model of Christian monogamous marriage.[147] In summation, repealing the bigamy offence would mean that justified, more proportionate and more culturally sensitive prohibitions could then be used to regulate bigamous marriages.

V Conclusion

This article has examined and critiqued the longstanding bigamy offence and its current formulation in s 94 of the *Marriage Act*. It has established that this offence lacks a clear and compelling rationale in contemporary Australia because the purported justifications for it are anachronistic, inapt to the scope of the offence or reveal it as duplicative of other offences. This discussion has also demonstrated how the operation of the bigamy offence is problematic due to its tensions with other Australian laws around non-monogamous relationships, its impracticalities in

[147] Such a change would, much like Williams' proposal for splitting bigamy into multiple separate offences, 'get rid of the present theological atmosphere of the law', at least in relation to this offence: Williams, 'Bigamy and the Third Marriage' (n 82) 427.

relation to social simulations of bigamous marriage and its cultural insensitivity towards a variety of groups who do not subscribe to a Christian model of monogamous marriage. This article has proposed resolving these problems by repealing the existing bigamy offence provisions and leaving situations involving bigamous marriages to be captured by other, more appropriate, parts of the existing legal framework, most notably the giving defective notice offence under s 104 of the *Marriage Act*.

The bigamy offence may have a long history within the Western legal tradition, but this article has argued that the bigamy offence should not have a future in contemporary Australian law. Whatever purpose the bigamy offence may have once served, it serves no clear purpose now and it is indeed at cross-purposes with other areas of Australian law and society. For these reasons the bigamy offence provisions within the *Marriage Act* and some state legislation should be repealed.