

THE MONOGAMOUS TEMPORALITIES OF MARRIAGE LAW: EXPLAINING BISEXUAL ERASURE IN AUSTRALIAN SAME-SEX MARRIAGE DEBATES

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In December 2017 Australia legalised same-sex marriage. Although bisexuals were ostensibly included in the debates around same-sex marriage, substantive discussion of bisexuals and bisexuality was absent. This article asks why bisexuality was missing from the debates, despite being a key constituency that stood to benefit from its introduction. It focuses on two moments in the quest to legalise same-sex marriage in Australia: the parliamentary debates relating to the Marriage Amendment (Definition and Religious Freedoms) Bill 2017 (Cth) and two parliamentary inquiries into same-sex marriage. This article finds that moments of bisexual erasure coincided with expressions of the monogamous and temporal investments of marriage law, including the belief that marriage should be a lifelong and exclusive union. This article argues that the monogamous temporalities of marriage are at least partly responsible for the erasure of bisexuality from same-sex marriage discourses, and that this is harmful for bisexual people.

I INTRODUCTION

Since the turn of the century same-sex marriage has increasingly been legalised across the world, with a total of 28 countries having introduced marriage equality by 2020.¹ In December 2017 Australia joined the ranks of these countries, legalising same-sex marriage following a non-binding voluntary postal vote on the issue. As the culmination of a 13-year ban on same-sex marriage, the 61.6% ‘yes’ vote² and subsequent legislative amendment were widely celebrated as a victory

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1 ‘Marriage Equality: Global Comparisons’, *Council on Foreign Relations* (Web Page, 10 December 2021) <<https://www.cfr.org/backgrounder/marriage-equality-global-comparisons>>.

2 Australian Bureau of Statistics, *Australian Marriage Law Postal Survey, 2017* (Catalogue No 1800.0, 15 November 2017).

for the LGBTIQ community and an advance in social justice generally. However, at a time when marriage is expanding as an institution and same-sex marriage is being legalised across many parts of the world, it is necessary to continue to apply critical attention to marriage.

This article focuses on the legalisation of same-sex marriage in Australia, asking who was missing from the debates and why. Other scholars have critiqued the ‘yes’ campaign (in support of same-sex marriage) for sidelining trans people and queer people of colour in their pursuit of marriage equality.³ This article looks at another population: bisexuals. Focusing on two pivotal moments in the quest to legalise same-sex marriage in Australia – the parliamentary debates relating to the Marriage Amendment (Definition and Religious Freedoms) Bill 2017 (Cth) (‘Marriage Amendment Bill’) and two parliamentary inquiries into same-sex marriage – this article finds bisexuality was remarkably absent. While bisexuals were ostensibly included in the oft-repeated LGBTIQ acronym, bisexuality itself was rarely mentioned, with gay men and lesbians instead dominating the discussion. This article asks why bisexuality was missing from the debates, despite being a key constituency that stood to benefit from its introduction, and how this impacts bisexuals as a population.

Bisexual erasure refers to the ‘social phenomenon of erasing bisexuality from any discussion in which it is relevant or is otherwise invoked (with or without being named)’.⁴ Bisexual erasure often manifests as the widespread assumption that bisexuality does not exist or that the signifiers ‘gay/lesbian’ and ‘straight’ are sufficient to describe the entire population. Dyadic assumptions about sexuality make this particularly common. Two men holding hands are presumed to be gay, and a man and a woman holding hands are presumed to be straight, even though any one of them could be bisexual. By this logic, a bisexual is only recognisable when they are actively desiring persons of more than one gender (usually a man and a woman), such as when they are engaged in a threesome, or dating two people at the same time. In these circumstances, bisexuality can easily become conflated with the dominant cultural tropes of deviant sexuality: promiscuity, greed, and indecision.

Bisexual erasure can be seen in the news media where bisexuality is either not mentioned or misidentified. For example, one study analysed British print media the week after Olympic diver Tom Daley announced he had begun dating a man but was still attracted to women. The study found even though Daley had not used a particular identity label to describe himself, much of the media referred to him as a ‘gay athlete’, ‘gay man’, or being in a ‘gay relationship’.⁵ Bisexual erasure

3 See Amy Thomas, Hannah McCann and Geraldine Fela, “‘In This House We Believe in Fairness and Kindness’”: Post-liberation Politics in Australia’s Same-Sex Marriage Postal Survey’ (2020) 23(4) *Sexualities* 475 <<https://doi.org/10.1177/1363460719830347>>.

4 Shiri Eisner, *Bi: Notes for a Bisexual Revolution* (Seal Press, 2013) 66. See also Kenji Yoshino, ‘The Epistemic Contract of Bisexual Erasure’ (2000) 52(2) *Stanford Law Review* 353 <<https://doi.org/10.2307/1229482>>.

5 Rory Magrath, Jamie Cleland and Eric Anderson, ‘Bisexual Erasure in the British Print Media: Representation of Tom Daley’s Coming Out’ (2017) 17(3) *Journal of Bisexuality* 300, 309 <<https://doi.org/10.1080/15299716.2017.1359130>>.

has also been particularly evident in relation to media discussions around same-sex marriage. One study of the coverage by *The New York Times* found that while in 2012 the newspaper primarily used the more inclusive language of ‘same-sex marriage’, nearly 85% of individuals discussed in those articles were described as ‘gay’.⁶ On the other hand, less than 2% of individuals were described as bisexual.⁷ At the same time Robyn Ochs was repeatedly misidentified in the media as a lesbian when she married her partner Peg Preble in 2004, despite her public activism around bisexuality.⁸ Speaking of the difficulty of being misidentified in that context, Ochs has said that while she is ‘happy to be grouped with lesbians’ it is also important to her ‘that no part of [her] be obscured or erased’.⁹

There is evidence to suggest that bisexual erasure can have a negative impact on the wellbeing of bisexuals. Mental health literature consistently finds bisexual people have higher rates of mental ill health and distress than those who identify as straight, gay or lesbian.¹⁰ For example, a 20-year longitudinal study of 4,824 Australian adults found that, compared to heterosexuals and homosexuals, bisexuals had the highest rates of anxiety, depression and negative affect.¹¹ Although research into the poor mental health outcomes facing bisexuals is still in its infancy, studies show bisexual invisibility and erasure can have a negative impact on the wellbeing

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- 6 Andrea M Hackl, C Reyn Boyer and M Paz Galupo, ‘From “Gay Marriage Controversy” (2004) to “Endorsement of Same-Sex Marriage” (2012): Framing Bisexuality in the Marriage Equality Discourse’ (2013) 17(3) *Sexuality and Culture* 512, 518 <<https://doi.org/10.1007/s12119-012-9159-9>>.
- 7 Ibid 519.
- 8 See, eg, Tamara Jones, ‘A Carefully Considered Rush to the Altar: Lesbian Pair Wed after 7 Years Together’, *Washington Post* (online, 18 May 2004) <<http://www.washingtonpost.com/wp-dyn/articles/A34665-2004May17.html>>.
- 9 Robyn Ochs, ‘What’s in a Name? Why Women Embrace or Resist Bisexual Identity’ in Beth A Firestein (ed), *Becoming Visible: Counseling Bisexuals across the Lifespan* (Columbia University Press, 2007) 72, 85.
- 10 See, eg, Wendy B Bostwick et al, ‘Dimensions of Sexual Orientation and the Prevalence of Mood and Anxiety Disorders in the United States’ (2010) 100(3) *American Journal of Public Health* 468 <<https://doi.org/10.2105/AJPH.2008.152942>>; Tonda Hughes, Laura A Szalacha and Ruth McNair, ‘Substance Abuse and Mental Health Disparities: Comparisons across Sexual Identity Groups in a National Sample of Young Australian Women’ (2010) 71(4) *Social Science and Medicine* 824 <<https://doi.org/10.1016/j.socscimed.2010.05.009>>; Anthony F Jorm et al, ‘Sexual Orientation and Mental Health: Results from a Community Survey of Young and Middle-Aged Adults’ (2002) 180(5) *The British Journal of Psychiatry* 423 <<https://doi.org/10.1192/bjp.180.5.423>>; Audrey S Koh and Leslie K Ross, ‘Mental Health Issues: A Comparison of Lesbian, Bisexual and Heterosexual Women’ (2006) 51(1) *Journal of Homosexuality* 33 <https://doi.org/10.1300/J082v51n01_03>; William Leonard et al, *Private Lives 2: The Second National Survey of the Health and Wellbeing of Gay, Lesbian, Bisexual and Transgender (GLBT) Australians* (Report, 2012); Ruth McNair et al, ‘The Mental Health Status of Young Adult and Mid-Life Non-heterosexual Australian Women’ (2005) 29(3) *Australian and New Zealand Journal of Public Health* 265 <<https://doi.org/10.1111/j.1467-842X.2005.tb00766.x>>; Tonje J Persson, James G Pfaus and Andrew G Ryder, ‘Explaining Mental Health Disparities for Non-monosexual Women: Abuse History and Risky Sex, or the Burdens of Non-disclosure?’ (2015) 128 *Social Science and Medicine* 366 <<https://doi.org/10.1016/j.socscimed.2014.08.038>>; Lori E Ross et al, ‘Prevalence of Depression and Anxiety among Bisexual People Compared to Gay, Lesbian, and Heterosexual Individuals: A Systematic Review and Meta-analysis’ (2018) 55(4–5) *Journal of Sex Research* 435 <<https://doi.org/10.1080/00224499.2017.1387755>>; Julia Taylor, ‘Bisexual Mental Health: A Call to Action’ (2018) 39(1) *Issues in Mental Health Nursing* 83 <<https://doi.org/10.1080/01612840.2017.1391904>>.
- 11 Jorm et al (n 10) 423.

of bisexuals, especially when this is also associated with bi-negative attitudes, identity invalidation, and lack of community support.¹² The social invisibility of bisexuality can result in a lack of community and social support for bisexual individuals, as well as widespread feelings of isolation. One study found that for their bisexual male participants, the ‘lack of visible [bisexual] community, or space, and the limited instances where bisexuality could be expressed to others, often led to feelings of sadness or loneliness’.¹³ These findings are broadly consistent with the 2016–17 study of over 2,500 Australian bisexual adults, which found poor mental health outcomes were significantly related to ‘[b]iphobia, invisibility, erasure, being “out”’ as well as some aspects of intimate relationships.¹⁴

As well as dealing with bisexual erasure, bisexuals also face negative stereotypes which conflate bisexuality with promiscuity and non-monogamy. The apparent link between bisexuality and non-monogamy arises from the assumption that the same-sex and cross-sex attractions of a bisexual are in conflict and that authentic bisexuality requires simultaneous attractions to people of more than one gender.¹⁵ While there is some research to suggest that bisexuals are more likely to be interested in or have practised non-monogamy, there is also clear evidence that non-monogamy is practised by people of all sexualities. For example, the 2012 United States (‘US’) National Survey of Sexual Health and Behaviour found 23% of bisexual men and 22% of bisexual women were in open relationships, compared to 32% of gay males, 5% of lesbians, 8% of heterosexual men and 7% of heterosexual women.¹⁶ However, unlike most other sexual orientations (with the possible exception of gay men), popular stereotypes of bisexuals frequently invoke non-monogamy, positioning bisexuals as promiscuous, diseased, greedy, cheaters,

12 See, eg, Brian Dodge et al, ‘Individual and Social Factors Related to Mental Health Concerns among Bisexual Men in the Midwestern United States’ (2012) 12(2) *Journal of Bisexuality* 223 <<https://doi.org/10.1080/15299716.2012.674862>>; Christina Dyar et al, ‘Bisexual+ Visibility Attempts: Associations with Minority Stress, Affect, and Substance Use in a Daily Diary Study’ (2022) 9(2) *Psychology of Sexual Orientation and Gender Diversity* 201; Corey E Flanders, Cheryl Dobinson and Carmen Logie, ‘Young Bisexual Women’s Perspectives on the Relationship between Bisexual Stigma, Mental Health, and Sexual Health: A Qualitative Study’ (2017) 27(1) *Critical Public Health* 75 <<https://doi.org/10.1080/09581596.2016.1158786>>; Lori E Ross, Cheryl Dobinson and Allison Eady, ‘Perceived Determinants of Mental Health for Bisexual People: A Qualitative Examination’ (2010) 100(3) *American Journal of Public Health* 496 <<https://doi.org/10.2105/AJPH.2008.156307>>.

13 Dodge et al (n 12) 239.

14 Julia Taylor et al, ‘Bisexual Mental Health: Findings of the “Who I Am” Study’ (2019) 48(3) *Australian Journal of General Practice* 138, 140 <<https://doi.org/10.31128/AJGP-06-18-4615>>.

15 Renate Baumgartner, “‘I Think That I’m Not a Relationship Person’: Bisexual Women’s Accounts of (Internalised) Binegativity in Non-monogamous Relationship Narratives’ in Emiel Maliepaard and Renate Baumgartner (eds), *Bisexuality in Europe: Sexual Citizenship, Romantic Relationships, and Bi+ Identities* (Taylor and Francis, 2020) 115, 117–18; Christian Klesse, *The Spectre of Promiscuity: Gay Male and Bisexual Non-monogamies and Polyamories* (Ashgate, 2007) 78 (‘*The Spectre of Promiscuity*’); Paula C Rust, ‘Monogamy and Polyamory: Relationship Issues for Bisexuals’ in Linda Garnets and Douglas C Kimmel (eds), *Psychological Perspectives on Lesbian, Gay, and Bisexual Experiences* (Columbia University Press, 2nd ed, 2003) 475.

16 Ethan Czuy Levine et al, ‘Open Relationships, Nonconsensual Nonmonogamy, and Monogamy among US Adults: Findings from the 2012 National Survey of Sexual Health and Behavior’ (2018) 47(5) *Archives of Sexual Behavior* 1439, 1443 <<https://doi.org/10.1007/s10508-018-1178-7>>.

and unable to commit.¹⁷ Such stereotypes incorrectly assume that all bisexual people are incapable of monogamy, when in fact most bisexual people do practise monogamy, and unfairly burden bisexual people with the stigma of promiscuity by collapsing the distinction between bisexuality and non-monogamy.

This article takes the associations between bisexuality and non-monogamy and explores them in more detail to see what they can tell us about the underlying logics of bisexual erasure. In particular, to investigate bisexuality's absence from same-sex marriage debates, this article draws on a previous article by this author which links bisexual erasure to mononormative temporalities ('mono-temporality').¹⁸ Mono-temporality refers to the temporal aspects of monogamy which tend to project a current relationship indefinitely into the future, as well as retrospectively affecting how we view past relationships. According to the romantic ideal of monogamy, relationships should be future-oriented, if not lifelong, commitments. However, as Mint points out, the idea of the soulmate may sit in tension with the realities of serial monogamy.¹⁹ Mint argues people will often repudiate or de-emphasise past relationships and even if there is no such repudiation, 'the social circle will act as if there had been, conveniently forgetting old attractions'.²⁰ This means 'the only desire given social validity is a person's current relationship'.²¹ The temporal logics of monogamy can have implications for bisexual visibility. Bisexuals who have serial relationships with people of different genders ('sequential bisexuality') may not be recognised as bisexual if their previous relationships with a different gender are repudiated in favour of their current relationship.²² At the same time, non-monogamous bisexuals may also be erased by the assumption that they will ultimately choose one partner, resolving their bisexuality as either heterosexuality or homosexuality.²³ This article argues mono-temporality also functions to erase bisexuality from discourses around marriage.

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- 17 Mickey Eliason, 'Bi-Negativity: The Stigma Facing Bisexual Men' (2000) 1(2–3) *Journal of Bisexuality* 137, 141 <https://doi.org/10.1300/J159v01n02_05>; Charles E Hansen and Anne Evans, 'Bisexuality Reconsidered: An Idea in Pursuit of a Definition' (1985) 11(1–2) *Journal of Homosexuality* 1, 3 <https://doi.org/10.1300/J082v11n01_01>; Tania Israel and Jonathan J Mohr, 'Attitudes toward Bisexual Women and Men: Current Research, Future Directions' (2004) 4(1–2) *Journal of Bisexuality* 117, 126–7 <https://doi.org/10.1300/J159v04n01_09>; Klesse, *The Spectre of Promiscuity* (n 15) 79; Paula C Rust, *Bisexuality and the Challenge to Lesbian Politics: Sex, Loyalty, and Revolution* (New York University Press, 1995) 77; Leah R Spalding and Letitia Anne Peplau, 'The Unfaithful Lover: Heterosexuals' Perceptions of Bisexuals and Their Relationships' (1997) 21(4) *Psychology of Women Quarterly* 611 <<https://doi.org/10.1111/j.1471-6402.1997.tb00134.x>>; Amanda Udis-Kessler, 'Challenging the Stereotypes' in Sharon Rose, Cris Stevens and Off Pink Collective (eds), *Bisexual Horizons: Politics, Histories, Lives* (Lawrence & Wishart, 1996) 45.
- 18 See Dylan Amy Stanford, 'Rethinking Bisexual In/Visibility on Screen: The Structuring Effect of Monogamy, Temporality and Narrative in *You Me Her*' (2020) 23(5–6) *Sexualities* 1009 <<https://doi.org/10.1177/1363460719876810>>.
- 19 Pepper Mint, 'The Power Dynamics of Cheating: Effects on Polyamory and Bisexuality' (2004) 4(3–4) *Journal of Bisexuality* 55 <https://doi.org/10.1300/J159v04n03_04>.
- 20 Ibid 68.
- 21 Ibid.
- 22 Stanford (n 18) 1014; Mint (n 19) 68.
- 23 Stanford (n 18) 1014.

This article begins in Part II by drawing out and identifying the mono-temporal investments of Australian marriage law. It argues that, despite being amended to be same-sex inclusive, the *Marriage Act 1961* (Cth) (*Marriage Act*) continues to enshrine monogamy (two people, to the exclusion of others) and permanence (for life) as the marital ideal. Part III analyses the parliamentary debates around the same-sex marriage amendment, as well as two previous parliamentary inquiries into same-sex marriage. Part III(A)–(B) first demonstrates bisexuality’s absence from the debates, and then illustrates that these moments of both general and specific bisexual erasure also coincided with expressions of the mono-temporal investments of marriage law. Part III(C) shows that when bisexual potential did arise, previous cross-sex relationships were dismissed in service of a current homosexual relationship. Part III(D) explores the only instance of bisexual visibility during the parliamentary debates, being the marriage of bisexual Senator Janet Rice to her transgender wife. The argument is made that the unique characteristics of their bi-trans relationship allowed Senator Rice’s bisexuality to conform to mono-temporal norms and thus allowed bisexuality to be visible without disrupting the mono-temporal marriage ideal.

In the submissions to the parliamentary inquiries into same-sex marriage, on the other hand, bisexuality was primarily deployed by the ‘no’ campaign, which is discussed in Part III(E). In these instances, the ‘no campaign’ invoked bisexuality for its failure to conform to mono-temporal norms and as part of the slippery slope argument that same-sex marriage will lead inevitably to polygamy or multi-partner marriage. Having drawn out the connections between marriage, mono-temporality, and bisexual erasure, this article concludes by emphasising the effect of this erasure on bisexual people. The erasure of bisexuality from same-sex marriage debates was particularly harmful for bisexual people who did not see themselves reflected in a political debate which substantially affected them. The implications of this argument extend beyond just bisexuality, however. This article suggests there is good reason to be generally critical of the mono-temporal investments of marriage which function to privilege certain life trajectories while excluding and erasing others.

II THE MONO-TEMPORAL IDEALS OF MARRIAGE LAW

In the 1866 English case of *Hyde v Hyde* (*Hyde*) Lord Penzance described marriage as ‘the voluntary union for life of one man and one woman to the exclusion of all others’.²⁴ This definition has been widely cited in both Australian

24 (1866) LR 1 P&D 130, 133 (*Hyde*).

and international case law²⁵ and commentary²⁶ as the classic or traditional common law definition of marriage. Since its commencement, the Australian *Marriage Act* has reflected the *Hyde* definition as part of its solemnisation requirements,²⁷ and in 2004 the Howard Government introduced for the first time a definition of marriage that closely resembled the *Hyde* definition.²⁸ This definition was subsequently amended to specify that marriage was between ‘two people’ as part of the 2017 marriage equality amendment.²⁹ Despite the *Hyde* definition of marriage being reformulated to include same-sex couples, it is noteworthy that the definition continues to enshrine the monogamy and permanence requirements of marriage. In fact, as discussed further below, the *Hyde* definition itself arose in a case which considered whether a polygamous marriage could be recognised in English law. Despite being invoked to limit marriage to opposite-sex relationships, the *Hyde* definition is better understood as a pronouncement about the monogamous requirement of marriage law.

This Part examines the broader context of marriage law, including and beyond the *Marriage Act* definition, to identify the precise boundaries of the monogamy and permanence requirements. Some have argued the *Hyde* definition has been undermined by subsequent evolutions in both the cultural realities and law of marriage, including divorce and adultery, such that the monogamy and permanence requirements of marriage are no longer strictly enforced.³⁰ Following

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- 25 In Australian case law Lord Penzance’s formulation of marriage has been cited with approval in *Khan v Khan* (1962) 3 FLR 496, 497 (Gowans J); *Calverley v Green* (1984) 155 CLR 242, 259–60 (Mason and Brennan JJ); *R v L* (1991) 174 CLR 379, 392 (Brennan J); *Kevin v A-G (Cth)* (2001) 165 FLR 404, 430 (Chisholm J). This definition has, however, been reconsidered by the English Court of Appeal in *Bellinger v Bellinger* [2002] 2 WLR 411 and the High Court in *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 (*‘Commonwealth v ACT’*) (discussed further at Part II(A)). For international cases see, eg, *Layland v Ontario (Minister of Consumer & Commercial Relations)* (1993) 14 OR (3d) 658; *Keddie v Currie* (1991) 60 BCLR (2d) 1.
- 26 See, eg, Nicola Barker, *Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage* (Palgrave Macmillan, 2012) 19; Rebecca Probert, ‘Hyde v Hyde: Defining or Defending Marriage?’ (2007) 19(3) *Child and Family Law Quarterly* 322, 322; Andrew Neville Sharpe, ‘The Transsexual and Marriage: Law’s Contradictory Desires’ (1997) 7 *Australasian Gay and Lesbian Law Journal* 1, 2–3; Anthony Dickey, ‘Family Law’ (2006) 80 *Australian Law Journal* 288, 288; Sebastian Poulter, ‘The Definition of Marriage in English Law’ (1979) 42(4) *Modern Law Review* 409, 409 <<https://doi.org/10.1111/j.1468-2230.1979.tb01544.x>>; Kristen Walker, ‘The Same-Sex Marriage Debate in Australia’ (2007) 11(1–2) *International Journal of Human Rights* 109, 113 <<https://doi.org/10.1080/13642980601176290>>; John Murphy, ‘Same-Sex Marriage in England: A Role for Human Rights’ (2004) 16 *Child and Family Law Quarterly* 245, 247.
- 27 Before a marriage is solemnised the authorised celebrant must say to the parties that ‘[m]arriage, according to law in Australia, is the union of 2 people to the exclusion of all others, voluntarily entered into for life’: *Marriage Act 1961* (Cth) s 46(1) (*‘Marriage Act’*).
- 28 The conservative Howard Government’s reform was part of an effort to ensure same-sex marriages entered into overseas could not be recognised as valid in Australia. Following the amendment, marriage was defined as ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’: *ibid* s 5, as amended by *Marriage Amendment Act 2004* (Cth) sch 1 cl 1.
- 29 *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) sch 1 pt 1 cl 3.
- 30 See, eg, Barker (n 26); Probert (n 26); Gillian Calder, ‘Penguins and Polyamory: Using Law and Film to Explore the Essence of Marriage in Canadian Family Law’ (2009) 21(1) *Canadian Journal of Women and the Law* 55 <<https://doi.org/10.3138/cjwl.21.1.55>>; Alastair Nicholson, ‘The Legal Regulation of Marriage’ (2005) 29(2) *Melbourne University Law Review* 556.

Nicola Barker³¹ and Rebecca Probert,³² therefore, this article argues that the *Hyde* definition – in both its traditional and same-sex inclusive forms – functions as an *ideal* rather than a strict definition, and that mono-temporality is a key aspect of this ideal.

A Permanence

A central aspect of the *Hyde* definition is the permanence or temporal requirement that marriage is entered into for life.³³ However, as commentators point out,³⁴ even at the time Lord Penzance made his famous pronouncement, civil divorce had been available in England for nearly 10 years.³⁵ In Australia, since no-fault divorce was introduced in 1975, divorce is even more readily available, undermining the argument that marriage is a union for life. In 2000, more Australian marriages dissolved due to divorce than widowhood for the first time,³⁶ and in 2019, 49,116 divorces were granted in comparison to the 113,815 marriages registered.³⁷ The availability of divorce means many people can have two or three marriages (or more) during their lives. None of these marriages will be rendered void, or deprived of their status as marriages, as a result of ending in divorce or the fact of a subsequent marriage.³⁸

On the other hand, the formal requirements of entry into and exit from marriage indicate a certain degree of commitment still attaches to the institution. Under the *Marriage Act* an authorised celebrant must remind the parties that marriage is ‘entered into for life’,³⁹ indicating that parties are required to understand the seriousness of their commitment. No-fault divorce has also been contentious for purportedly undermining the permanence requirement of marriage. During parliamentary debate on the legislation which introduced no-fault divorce, one Member of Parliament said the Bill ‘turns marriage into a cheap, temporary union’,⁴⁰ while another said, ‘this Bill could cause marriage to become a passing, temporary relationship’.⁴¹ While no-fault divorce is far less contentious today, the committed nature of the marriage contract continues to be reflected in the requirements for divorce. A marriage may only be dissolved where the relationship has *irretrievably*

31 Barker (n 26).

32 Probert (n 26).

33 *Hyde* (n 24) 133.

34 Nicholson (n 30) 558; Poulter (n 26) 418–19; Probert (n 26) 330.

35 *Matrimonial Causes Act 1857* (Imp) 20 & 21 Vict, c 85.

36 Belinda Hewitt, ‘Marriage Breakdown in Australia: Social Correlates, Gender and Initiator Status’ (Social Policy Research Paper No 35, School of Social Science, University of Queensland, 2008) 1.

37 Australian Bureau of Statistics, *Marriages and Divorces, Australia, 2019* (Catalogue No 3310.0, 27 November 2021).

38 Probert (n 26) 323.

39 *Marriage Act* (n 28) s 46.

40 Commonwealth, *Parliamentary Debates*, House of Representatives, 12 February 1975, 160 (Francis Stewart).

41 Commonwealth, *Parliamentary Debates*, House of Representatives, 12 February 1975, 166 (Alan Jarman).

broken down and after the parties have been separated for a period of 12 months,⁴² suggesting the decision to divorce is not to be taken lightly.

Case law has also considered the ‘lifelong’ requirement of marriage. The 1930 English case of *Nachimson v Nachimson* considered whether a Russian marriage which, under Bolshevik law could be dissolved by the spouses’ mutual consent, should be recognised under English law.⁴³ The trial judge found England had no jurisdiction over the marriage because it was not for life, but rather at the will of the parties.⁴⁴ The Court of Appeal overturned this decision, attaching ‘considerable significance’ to the spouses’ original intention that their union should be lifelong.⁴⁵ On the other hand, an intention to make a long-term or lifelong commitment may not be necessary for a marriage to be valid. In several Australian cases ‘sham marriages’, or ‘limited purpose marriage’ (for example, for immigration or taxation purposes) have been upheld as valid.⁴⁶ According to section 23B of the *Marriage Act*, a marriage is only void for lack of real consent in circumstances of duress, fraud, mistake and incapacity. Since in a limited purpose marriage there is a meeting of minds, these marriages have been upheld as valid.⁴⁷

Although limited purpose marriages may be recognised in Australian law, a recent High Court case indicates there does remain a temporal aspect to marriage law. In *Commonwealth v Australian Capital Territory* (*‘Commonwealth v ACT’*),⁴⁸ the High Court considered the scope of the constitutional marriage power⁴⁹ to determine whether the Commonwealth had the authority to legislate for same-sex marriage.⁵⁰ The High Court considered whether the marriage power was limited to the *Hyde* definition⁵¹ and instead found the scope of ‘marriage’ under section 51(xxi) was a broader ‘juristic concept’ referring to

a consensual union formed between natural persons in accordance with legally prescribed requirements which is not only a union the law recognises as *intended to*

42 *Family Law Act 1975* (Cth) s 48 (*‘Family Law Act’*).

43 [1930] P 85 (Hill J).

44 *Ibid* 98.

45 Poulter (n 26) 420.

46 See, eg, *R v Cahill* (1978) 2 NSWLR 453; *Re Kannan v Minister for Immigration and Ethnic Affairs* (1979) 23 ALR 631; *In the Marriage of Osman and Mourrali* (1989) 96 FLR 362; *In the Marriage of Hosking* (1994) 121 FLR 196; *Lee v Duan* (2009) 230 FLR 258 (*‘Lee’*).

47 *Lee* (n 46) 270–1 (Burchardt FM). Cf *In the Marriage of Deniz* (1977) 31 FLR 114.

48 *Commonwealth v ACT* (n 26).

49 Section 51(xxi) of the *Australian Constitution* confers power upon the Commonwealth Parliament to make laws regarding marriage.

50 The case considered the question of whether a piece of Australian Capital Territory (*‘ACT’*) legislation which provided for same-sex marriage was valid in circumstances where the *Marriage Act* (n 27) at the time defined marriage as ‘the union of a man and a woman’. The Court held that the federal Act was exhaustive with respect to marriage in Australia and the ACT legislation was therefore inconsistent and inoperative.

51 At issue in the case was whether section 51(xxi) of the *Australian Constitution* gives the federal Parliament power to pass a law providing for same sex marriage, since if the federal Parliament had no such power, then the ACT Act could probably operate concurrently with the federal *Marriage Act*. The argument that section 51(xxi) did *not* give the federal Parliament power to pass a law providing for same sex marriage proceeded on the basis that ‘at [F]ederation, “marriage” was well understood to have the meaning given to it by several nineteenth century English cases [including *Hyde*] and that the reference to “marriage” in s 51(xxi) must be read accordingly’: *Commonwealth v ACT* (n 25) 454 [11].

endure and be terminable only in accordance with law but also a union to which the law accords a status affecting and defining mutual rights and obligations.⁵²

In determining the scope of the federal marriage power in constitutional law, the High Court found the stricter temporal requirement of lifelong commitment suggested in the common law case of *Hyde* was not a limitation. In fact, the Court mentioned the availability of divorce and that marriage, ‘once indissoluble, could be dissolved’.⁵³ *Commonwealth v ACT* is therefore more lenient than the *Hyde* definition in that it need not necessarily be ‘for life’. Nonetheless, even this significantly broader concept of marriage retains a temporal element in that it must be ‘intended to endure’, indicating that the union should still be future oriented.

As a number of commentators and the preceding section suggests, the temporal requirement that marriage is ‘for life’ – or alternatively, ‘permanent’ or ‘enduring’ – may represent an ideal of marriage rather than a reality.⁵⁴ According to one Australian family law textbook the “lifelong” character of marriage’ may be understood as ‘a romantic ideal rather than a description of a legal incident or characteristic of marriage’.⁵⁵ Similarly in the United Kingdom (‘UK’) context, both Barker and Probert separately describe the ‘for life’ requirement of the *Hyde* definition as an ‘aspiration’⁵⁶ or an ‘ideal’.⁵⁷ Probert in particular argues the *Hyde* formulation is better understood not as a definition of marriage, but as a *defence* of marriage.⁵⁸ Probert claims *Hyde* was decided at a time when the Victorian marriage ideal was under threat, in part due to the recent introduction of civil divorce (as well as from polygamy, discussed below).⁵⁹

In the contemporary Australian context, the law continues to articulate a temporal element to marriage despite also recognising both no-fault divorce and limited purpose marriages. In the *Marriage Act*, this manifests as the inclusion of the *Hyde*-style ‘for life’ element, repeated in both the definition of marriage and the solemnisation requirements.⁶⁰ In *Commonwealth v ACT* this manifested as the juristic concept of marriage for the purposes of constitutional law including unions that are ‘intended to endure’. In both cases, although there is no strict temporal requirement that marriage be lifelong, a temporal *ideal* that marriages should aspire to be permanent and enduring nonetheless persists in Australian law.

B Monogamy

According to the *Hyde* definition, marriage must also be to the ‘exclusion of all others’, indicating the couple should remain faithful to one another. Like the permanence requirement, however, sexual monogamy arguably functions as more

52 Ibid 461 [33] (emphasis added).

53 Ibid 456 [17].

54 Probert (n 26); Barker (n 26) 19–40; Lisa Young et al (eds), *Family Law in Australia* (LexisNexis Butterworths, 9th ed, 2016) 27.

55 Young et al (n 54) 27.

56 Probert (n 26) 331.

57 Barker (n 26) 19–40.

58 Probert (n 26) 330–1.

59 Ibid.

60 *Marriage Act* (n 28) ss 5, 46(1).

of an ideal. In contrast to many American states,⁶¹ adultery is not an offence in Australia. Since the introduction of no-fault divorce, adultery is also no longer a ground for divorce, unlike some other jurisdictions.⁶² In these circumstances there is no legal prohibition on non-monogamy, whether the spouse does not give consent (that is, cheating, affairs, infidelity) or the spouses do consent (such as open relationships, swinging and polyamory).

Research suggests many people do engage in some form of sexual non-monogamy. One study of over 300 Australian adult men and women found 20% of individuals engaged in infidelity in their current relationships, while 42% engaged in infidelity in their previous relationships.⁶³ A national cohort survey of over 5,000 Australians in heterosexual relationships found, in the 12-month study period, 3.3% of men and 1.5% of women had sex outside the relationship when the relationship was expected to be exclusive.⁶⁴ The same survey found less than 1% of respondents were in agreed open relationships,⁶⁵ although US⁶⁶ and Canadian⁶⁷ studies have found approximately one in five adults report previous engagement in consensual non-monogamy. The data suggests that while most people are sexually monogamous, the rates of consensual and non-consensual non-monogamy are not insignificant.

As Theodore Bennett points out, 'monogamy' does not only refer to sexual exclusivity within a relationship, but also to monogamous marriage (ie, the one marriage rule).⁶⁸ On the face of it the one marriage rule is a central requirement of marriage. Under section 94 of the *Marriage Act*, bigamy is a criminal offence and a marriage will be void if either party was married to someone else at the time of the marriage.⁶⁹ Australia also refuses to recognise second or subsequent marriages contracted in a country where polygamy is legal.⁷⁰ At the same time, the one marriage rule is not as strict as it first seems and Australia does recognise polygamous marriages for some limited purposes in the *Family Law Act 1975*

61 Deborah L Rhode, *Adultery: Infidelity and the Law* (Harvard University Press, 2016) 2 <<https://doi.org/10.4159/9780674969742>>; Elizabeth F Emens, 'Monogamy's Law: Compulsory Monogamy and Polyamorous Existence' (2004) 29(2) *New York University Review of Law and Social Change* 277, 284.

62 See, eg, *Matrimonial Causes Act 1973* (UK) s 1(2)(a); *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 8(2)(b) (i).

63 Julie Fricker, 'Predicting Infidelity: The Role of Attachment Styles, Lovestyles, and the Investment Model' (PhD Thesis, Swinburne University of Technology, 17 March 2006) 5.

64 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 <<https://doi.org/10.1071/SH14031>>.

65 Ibid 527.

66 ML Hauptert et al, 'Prevalence of Experiences with Consensual Nonmonogamous Relationships: Findings from Two National Samples of Single Americans' (2017) 43(5) *Journal of Sex and Marital Therapy* 424, 438 <<https://doi.org/10.1080/0092623X.2016.1178675>>.

67 Nichole Fairbrother, Trevor A Hart and Malcolm Fairbrother, 'Open Relationship Prevalence, Characteristics, and Correlates in a Nationally Representative Sample of Canadian Adults' (2019) 56(6) *Journal of Sex Research* 695, 703 <<https://doi.org/10.1080/00224499.2019.1580667>>.

68 Theodore Bennett, 'The Inclusion of Others? Polygamy and Australian Law' (2019) 32(3) *Australian Journal of Family Law* 263, 290–2.

69 *Marriage Act* (n 27) s 23B(1)(a).

70 Ibid s 88D(2)(a).

(Cth) (*Family Law Act*).⁷¹ While the *Marriage Act* provides for the entry into marriage, the *Family Law Act* covers issues relating to marriage including divorce, declarations as to the validity of a marriage, maintenance, and property orders.

Polygamous marriages may also be recognised for limited purposes in the UK, Canada and the US, despite bigamy or polygamy being criminalised in those jurisdictions.⁷² In the UK a second marriage will only be rendered void if one of the parties was domiciled in England and Wales at the time of the marriage.⁷³ Second polygamous marriages may also be recognised for income support and jobseeker benefits.⁷⁴ In Canada, polygamous marriages contracted overseas can be recognised for some limited purposes including, for example, under Ontario's *Family Law Act*.⁷⁵ While the US has not tended to recognise polygamous marriages, some second marriages have been recognised for the purposes of inheritance.⁷⁶ In Australia and similar jurisdictions even monogamy in the literal sense of one marriage may be relaxed from time to time.

Historically, Australia and the UK have strictly enforced the one marriage rule by refusing to recognise potentially polygamous marriages. A 'potentially polygamous' marriage refers to a first and only marriage solemnised in a jurisdiction that recognises polygamous marriages, and could therefore be open to further marriages. Many commentators have rightly argued that refusing to recognise potentially polygamous marriages was linked to the fear of religious and racial others who have in turn been discursively linked with polygamy.⁷⁷ This began in England with the *Hyde* case itself, which involved a petition for divorce by Hyde who had married his wife in Salt Lake City in 1853 under the Mormon Church. At that time the Mormon Church formally endorsed polygamy, although Hyde never had any other wives. Hyde subsequently separated from his wife and petitioned for divorce in the English Court.⁷⁸

71 *Family Law Act* (n 42) s 6.

72 *Offences Against the Person Act 1861* (Imp) 24 & 25 Vict, c 100, s 57; *Criminal Code*, RSC 1985, c C-46, s 290; Casey E Faucon, 'Marriage Outlaws: Regulating Polygamy in America' (2014) 22(1) *Duke Journal of Gender Law and Policy* 1, 1.

73 *Matrimonial Causes Act 1973* (UK) s 11(d).

74 Kerry Abrams, '(Mis)Recognizing Polygamy' in Janet Bennion and Lisa Fishbayn Joffe (eds), *The Polygamy Question* (Utah State University Press, 2016) 228, 239 <<https://doi.org/10.7330/9780874219975.c011>>.

75 *Family Law Act*, RSO 1990, c E3, s 1(2); Amy J Kaufman, 'Polygamous Marriages in Canada' (2004) 21(2) *Canadian Journal of Family Law* 315, 331.

76 Abrams (n 74) 237.

77 See, eg, Probert (n 26); Judith Stacey and Tey Meadow, 'New Slants on the Slippery Slope: The Politics of Polygamy and Gay Family Rights in South Africa and the United States' (2009) 37(2) *Politics and Society* 167 <<https://doi.org/10.1177/0032329209333924>>; Mimi Schippers, *Beyond Monogamy: Polyamory and the Future of Polyqueer Sexualities* (New York University Press, 2016); Jasbir K Puar, *Territorist Assemblages: Homonationalism in Queer Times* (Duke University Press, 2007); Margaret Denike, 'The Racialization of White Man's Polygamy' (2010) 25(4) *Hypatia* 852 <<https://doi.org/10.1111/j.1527-2001.2010.01140.x>>; Margaret Denike, 'What's Queer about Polygamy' in Kim Brooks and Robert Leckey (eds), *Queer Theory: Law, Culture, Empire* (2010) 137; Christian Klesse, 'Bisexuality, Slippery Slopes, and Multipartner Marriage' (2018) 18(1) *Journal of Bisexuality* 35 <<https://doi.org/10.1080/15299716.2017.1373264>>.

78 *Hyde* (n 24) 130.

Lord Penzance's consideration went to the meaning of marriage itself, stating: 'I expressed at the hearing a strong doubt whether the union of man and woman as practised and adopted among the Mormons was really a marriage in the sense understood in this, the Matrimonial Court of England'.⁷⁹ He ultimately decided the union between Hyde and his wife could not be considered a marriage and refused to grant the divorce. Probert argues the *Hyde* formulation is better understood as a defence of Christian marriage in the context of Britain's role as an imperial power.⁸⁰ At the time *Hyde* was decided, Victorian England was debating the practices of 'heathen races', including 'polygamy and other sexual customs perceived as transgressive among Native Americans and Africans'.⁸¹ Although Mormons were white, they were framed as 'race traitors'⁸² and described as 'half-civilised' or 'savages' in British newspapers and popular media.⁸³ In this sense the promotion of monogamous marriage has been linked to preserving the white, Christian nation and excluding racialised others.

However, it is no longer the case that potentially polygamous marriages are not recognised in Australian law. In *Ghazel v Ghazel* the court recognised the validity of a Muslim marriage contracted in Iran on the basis that 'a marriage which is potentially polygamous at the outset, is still to "the exclusion of all others" as a matter of fact until it becomes actually polygamous'.⁸⁴ Other jurisdictions, such as Canada and the UK, now also recognise potentially polygamous marriages.⁸⁵ In Australia, this move towards recognition of potentially polygamous marriages, combined with the recognition of polygamous marriages for some limited purposes in the *Family Law Act*, indicates even the one marriage rule is occasionally relaxed. In this sense the one marriage rule may be thought of as an ideal more so than a requirement, and one that is related to other ideals promoted by law, including the ideal of the white, Christian nation.

This Part has examined the mono-temporal investments of marriage law. It has established that while monogamy and permanence appear to be central features of marriage, the realities of marriage law are far more complicated. No-fault divorce means a marriage does not need to be lifelong to be recognised as valid. The recognition of polygamous marriages for some purposes in Australian law, together with the lack of prohibitions on non-monogamy, also undermines the suggestion that monogamy is a necessary element of a marriage. Mono-temporality instead functions as a marital *ideal* and one that has been reiterated throughout the history of marriage law. The next Part explores how the mono-temporal marriage

79 Ibid 133.

80 Probert (n 26) 328.

81 Christopher A Bayly, 'The British and Indigenous Peoples, 1760–1860: Power, Perception and Identity' in M Daunt and R Halpern (eds), *Empire and Others: British Encounters with Indigenous Peoples, 1600–1850* (University of Pennsylvania Press, 1999) 33, quoted in Probert (n 26) 328.

82 Martha M Ertman, 'Race Treason: The Untold Story of America's Ban on Polygamy' (2010) 19(2) *Columbia Journal of Gender and Law* 287, 290 <<https://doi.org/10.2139/ssrn.1270023>>.

83 Probert (n 26) 328.

84 *Ghazel v Ghazel* (2016) 306 FLR 173, 181 [48].

85 *Re Hassan and Hassan* (1976) 12 OR (2d) 432; *Matrimonial Proceedings (Polygamous Marriages) Act 1972* (UK).

ideal manifested in the 2017 same-sex marriage debates and how this functioned to exclude bisexuals and erase bisexuality.

III BISEXUAL ERASURE IN MARRIAGE LAW

A Bisexual Invisibility in Australian Same-Sex Marriage Debates

In December 2017, same-sex marriage was legalised in Australia following a 13-year ban and a public vote on the issue. In 2017, amid mounting public pressure in favour of same-sex marriage, the conservative Liberal-National Coalition Government launched a non-binding postal vote on the issue of same-sex marriage. The Australian Bureau of Statistics oversaw the survey and conducted it via the postal service between 12 September and 7 November 2017. All Australian citizens over the age of 18 were eligible to vote and voting was voluntary (although voting in elections is mandatory in Australia). Over 60% of respondents voted ‘yes’ to same-sex marriage and on 7 December 2017 the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) (*‘Marriage Amendment Act’*) was passed, legalising same-sex marriage in Australia.⁸⁶

Although bisexuals were included in the oft-repeated LGBTI acronym and the more inclusive language of ‘same-sex marriage’, bisexuality was remarkably absent from the parliamentary debates in relation to the Marriage Amendment Bill. A review of the speeches made in the House of Representatives and Senate during the second and third readings of the Bill reveals bisexuals were ostensibly included. A version of the ‘LGBT*’⁸⁷ acronym, for example, was mentioned 437 times during the speeches, making it the most common way to describe the beneficiaries of the Bill. There was, however, a significant disparity in the number of times the relevant component identities were mentioned. The word ‘gay’, for example, was mentioned 341 times and the word ‘lesbian’ was mentioned 107 times. On the other hand, the term ‘bisexual’ was only mentioned 27 times.⁸⁸

Although parliamentarians used the LGBT/I/Q acronym or referred to ‘same-sex couples’, there are indications this more inclusive language may have been tokenistic. Often inclusive language was used interchangeably with the words ‘gays and lesbians’ or ‘gay couples’, indicating that the terms were regarded as being largely equivalent to one another. For example, Senator Dean Smith, himself a gay man, said: ‘The decision of the Australian people to allow *same-sex couples* to marry is an offered hand to those deep chords within *gay and lesbian* Australians’ lives.’⁸⁹ On the few times the word ‘bisexual’ was mentioned, it was

86 *Australian Marriage Law Postal Survey, 2017* (n 2).

87 For all search terms an asterisk was used to allow for a root word/stem/truncation search – ie, a search for ‘gay*’ would return results for both ‘gay’ and ‘gays’, and a search for ‘LGBT*’ would return results for ‘LGBT’, ‘LGBTIQ’, ‘LGBTQI’ and ‘LGBTQIA’.

88 The terms ‘trans’/‘transgender’ and ‘intersex’ were also under discussed, being mentioned only 49 and 45 times respectively.

89 Commonwealth, *Parliamentary Debates*, Senate, 16 November 2017, 8617 (Dean Smith) (emphasis added).

not to talk about particular bisexual individuals or how marriage equality would specifically affect bisexuals, but instead only as part of reciting the long form of the LGBT/I/Q acronym.⁹⁰

Likewise, when parliamentarians spoke about the Bill's beneficiaries through anecdote and personal storytelling, bisexuals were almost completely absent. Almost 170 Members of Parliament and Senators spoke to the Marriage Amendment Bill.⁹¹ Many of these parliamentarians recounted stories of family, friends and constituents who had been marginalised and discriminated against, describing how they were set to benefit from the same-sex marriage amendment, and dedicating their support to those people. In these speeches the beneficiaries were frequently identified as gay and lesbian individuals and couples or, occasionally, transgender and gender-diverse individuals. Trent Zimmerman, for example, started his own speech with the story of Neville Wells, a 98-year-old man who 'happened to be born gay' and had not been able to marry his partner of 39 years.⁹² Tim Hammond reflected on his sister-in-law Sharon (now passed), who had been gay and had a partner of 16 years.⁹³

Many more spoke of same-sex couples they knew and loved without identifying their sexualities, but still with the implication or assumption they were gay men or lesbians. Dr Jim Chalmers, for example, shared the stories of a number of friends and relatives and then concluded his speech saying: 'I'm voting "yes" for John; for Brian, Andrew, Shannon, James, Chris and Dan; for Penny and Sophie; for *gay and lesbian* Australians I know, work with and represent'.⁹⁴ It is clear from the way these individuals are listed alongside the general category of 'gay and lesbian Australians' that they are, or are believed to be, gay men and lesbians themselves. On the other hand, none of the family, friends and constituents spoken about in the parliamentarians' stories were identified as bisexual, with the one notable exception in relation to Senator Janet Rice (discussed in Part II(D)).

B The Mono-temporal Marriage Ideal in Parliamentary Debates on the Marriage Amendment Bill 2017

While bisexuals were largely forgotten, the mono-temporal ideal of marriage discussed above was reiterated throughout the parliamentary debates as the 'gold standard'.⁹⁵ Many parliamentarians referred to the temporal ideal of marriage

90 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2017, 8623 (Penny Wong).

91 This includes the second reading and third reading in both the House of Representatives and the Senate.

92 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2017, 12335 (Trent Zimmerman).

93 Commonwealth, *Parliamentary Debates*, House of Representatives, 5 December 2017, 12618 (Tim Hammond).

94 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2017, 12450 (Jim Chalmers) (emphasis added).

95 Claire Young and Susan Boyd, 'Losing the Feminist Voice? Debates on the Legal Recognition of Same Sex Partnerships in Canada' (2006) 14(2) *Feminist Legal Studies* 213, 230 <<https://doi.org/10.1007/s10691-006-9028-8>>.

as a ‘lifelong commitment’,⁹⁶ the ‘enduring bond of marriage’,⁹⁷ and two even referenced the iconic vow ‘until death do us part’.⁹⁸ Invoking the exclusivity aspect of the monogamy ideal, Christopher Pyne said of gay men and women that their ‘commitment is no less deep, their *fidelity* no less enduring’.⁹⁹ At the same time the numerosity requirement was repeated through endless references to ‘two people’ and ‘couples’.¹⁰⁰ A key speech, delivered by then Prime Minister Malcolm Turnbull, makes the mono-temporal investments of the same-sex marriage amendment particularly evident. He said:

I am very firmly of the view that families are the foundation of our society, and we would be a stronger society if more people were married – and by that I mean formally, legally married – and fewer were divorced. If consulted by friends about marital dramas, I always encourage the singles to marry, the married to stick together, the neglectful and wayward to renew their loving commitment and the wronged to forgive... Let’s be honest with each other: the threat to traditional marriage is not from gay people; it is from a lack of loving commitment, whether it is found in the form of neglect, indifference, cruelty or adultery – to name just a few manifestations of that loveless desert in which too many marriages come to grief. If the threat to marriage today is lack of commitment, then surely other couples making and maintaining that commitment set a good example rather than a bad one.¹⁰¹

Here Turnbull espouses what he and many other parliamentarians¹⁰² and commentators¹⁰³ have described as the ‘conservative argument for same-sex marriage’. The thrust of the conservative argument is that marriage – insofar as

96 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2017, 12357 (Anthony Albanese); Commonwealth, *Parliamentary Debates*, House of Representatives, 6 December 2017, 12785 (Josh Frydenberg), 12896 (Alan Tudge), 12910 (Amanda Rishworth).

97 Commonwealth, *Parliamentary Debates*, House of Representatives, 5 December 2017, 12678 (Julie Bishop).

98 Ibid 12681 (Greg Hunt); Commonwealth, *Parliamentary Debates*, House of Representatives, 6 December 2017, 12812 (Rebekha Sharkie, quoting constituent Dawn Cohen).

99 Commonwealth, *Parliamentary Debates*, House of Representatives, 5 December 2017, 12626 (Christopher Pyne) (emphasis added).

100 The term ‘two people’ was used 65 times during the parliamentary debates, while the term ‘couple’ was used 115 times.

101 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2017, 12343 (Malcolm Turnbull, Prime Minister).

102 Ibid 12337 (Trent Zimmerman), 12329 (Tim Wilson), 12340 (Terri Butler); Commonwealth, *Parliamentary Debates*, Senate, 16 November 2017, 8617 (Dean Smith).

103 See, eg, Paul Ritchie, *Faith, Love and Australia: The Conservative Case for Same-Sex Marriage* (Connor Court Publishing, 2016); Andrew Sullivan, ‘Here Comes the Groom: A (Conservative) Case for Gay Marriage’, *The New Republic* (online, 28 August 1989) <<https://newrepublic.com/article/79054/here-comes-the-groom>>; Andrew Sullivan, *Virtually Normal: An Argument about Homosexuality* (Picador, 1995) 112, 185; Jonathan Rauch, *Gay Marriage: Why It Is Good for Gays, Good for Straights, and Good for America* (Macmillan, 2004); Jonathan Rauch, ‘The Marrying Kind: Why Social Conservatives Should Support Same-Sex Marriage’, *The Atlantic* (online, 1 May 2002) <<https://www.theatlantic.com/magazine/archive/2002/05/the-marrying-kind/302500/>>; Jonathan Rauch, ‘For Better or Worse? The Case for Gay (and Straight) Marriage’, *The New Republic* (online, 6 May 1996) <<https://newrepublic.com/article/103297/for-better-or-worse-gay-straight-marriage>>; Dale Carpenter, ‘A Traditionalist Case for Gay Marriage’ (2008) 50 *South Texas Law Review* 93; Dale Carpenter, ‘Bad Arguments against Gay Marriage’ (2005) 7 *Florida Coastal Law Review* 181; Dale Carpenter, ‘Four Arguments against a Marriage Amendment That Even an Opponent of Gay Marriage Should Accept’ (2004) 2(1) *University of St Thomas Law Journal* 71; Dale Carpenter, ‘A Conservative Defense of *Romer v Evans*’ (2001) 76(2) *Indiana Law Journal* 403.

it stabilises and strengthens relationships and minimises sexual promiscuity – benefits society as a whole and should be encouraged as much as possible. An earlier version of this argument arose in response to the HIV/AIDS crisis as part of an effort to promote monogamy among gay men. Gabriel Rotello, in his 1997 book on HIV/AIDS, argues marriage would put social pressure on gay men (and lesbians) to remain faithful to their partners, in turn reducing the spread of the disease and creating a more stable environment for raising children.¹⁰⁴ He concludes ‘[t]he core institution that encourages sexual restraint and monogamy is marriage’.¹⁰⁵

In making his own conservative case for marriage, Turnbull repeatedly invokes the permanence and monogamous ideals of marriage, which he frames primarily in terms of ‘commitment’. Part of the marital commitment Turnbull discusses involves love and care, as indicated by his warnings against marital ‘neglect’, ‘indifference’, and ‘cruelty’. However, his idea of commitment is evidently also mono-temporal. He warns against ‘adultery’ and ‘wayward’ behaviour – the most obvious breaches of monogamy – and laments the high rates of divorce.¹⁰⁶ Although he does not use the language of lifelong or permanent commitment to describe marriage like several other parliamentarians, the marriage commitment Turnbull imagines is a commitment to ‘stick together’, to ‘forgive’ and to ‘stay married’. He celebrates gay people’s willingness to set a good example by ‘making and *maintaining*’¹⁰⁷ such a commitment. Like many other parliamentarians, Turnbull reiterates the importance of the mono-temporal aspects of marriage in arguing in favour of marriage equality.

C Erasure of Sequential Bisexuality

As discussed above, although bisexuality was nominally included, it was evident gay men and lesbians were at the forefront of parliamentarians’ minds. On the other hand, bisexuals (as well as trans people and intersex people)¹⁰⁸ were completely omitted from Turnbull’s speech as he fails to mention bisexuality in particular or the LGBT/I/Q acronym in general. Instead, as Turnbull articulates his investments in the mono-temporal aspects of marriage he imagines ‘two gay men or women setting up house down the road’ in a vision that is as homonormative as it is mononormative.¹⁰⁹ This article suggests, however, it is not a coincidence that bisexual erasure and mononormativity occur in the same breath throughout Turnbull’s speech. Rather, the erasure of bisexuals from parliamentary debates around the Marriage Amendment Bill was a *direct result* of the mono-temporal investments of marriage law.

104 Gabriel Rotello, *Sexual Ecology: AIDS and the Destiny of Gay Men* (Dutton, 1997).

105 Ibid 250.

106 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2017, 12343 (Malcolm Turnbull, Prime Minister).

107 Ibid (emphasis added).

108 It is also noteworthy that Turnbull does not use the term ‘lesbian’ in his speech and instead uses the term ‘gay’ to refer to both same-sex attracted men and women.

109 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2017, 12343 (Malcolm Turnbull, Prime Minister).

This section looks at how mono-temporality functioned in the same-sex marriage debates to obscure sequential (or serially monogamous) bisexuality. It demonstrates that on occasions where bisexual potential did arise, previous cross-sex relationships were dismissed in the service of homosexual and mono-temporal futures. American bisexual scholars have previously identified the erasure of sequential bisexual in the US same-sex marriage case *Perry v Schwarzenegger*.¹¹⁰ *Perry v Schwarzenegger* was a 2008 federal lawsuit filed by two same-sex couples challenging the ban on same-sex marriage in California arising from Proposition 8. In that case, Sandy Stier and her wife Kris Perry were one of the couples challenging the ban. However, Stier had been married to a man before becoming involved with Perry and this came up during the trial. Stier was questioned by her own attorney, Theodore Olson, on direction examination about her gay identity, her previous marriage and whether she had been in love with her ex-husband. Finally, he asks her:

How convinced are you that you are gay? You've lived with a husband. You said you loved him. Some people might say, 'Well, it's this and then it's that and it could be this again.' Answer that.¹¹¹

To which she answers:

Well, I'm convinced, because at 47 years old I have fallen in love one time and it's with Kris.¹¹²

This is not an example of *individual* bisexual erasure, since Stier is clearly describing herself as a gay woman who came out later in life. What is interesting about this extract, however, is that there is some recognition that Stier could be mistakenly interpreted as bisexual because of her relationship history. As Olson's comment indicates, the possibility that Stier might be anything less than completely gay poses a threat to their claim. In this case Olson was relying on the argument that gay men and lesbians should be brought within the US Equal Protection Clause on the basis that the characteristic which differentiates them is immutable.¹¹³ Olson is therefore attempting to mitigate any suggestion that Stier's sexual orientation is changeable over her lifetime by suggesting that she has always been a lesbian even if she did not know it at the time. As other bisexual legal scholars have pointed out,

110 704 F Supp 2d 921 (ND Cal, 2010). For discussion of *Perry v Schwarzenegger* and bisexual erasure, see Elizabeth M Glazer, 'Sexual Reorientation' (2012) 100(4) *Georgetown Law Journal* 997; Naomi Mezey, 'Response: The Death of the Bisexual Saboteur' (2012) 100(4) *Georgetown Law Journal* 1093; Michael Boucai, 'Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality' (2012) 49(2) *San Diego Law Review* 415; Nancy C Marcus, 'The Global Problem of Bisexual Erasure in Litigation and Jurisprudence' (2018) 18(1) *Journal of Bisexuality* 67 <<https://doi.org/10.1080/15299716.2017.1384423>>; Nancy C Marcus, 'Bridging Bisexual Erasure in LGBT-Rights Discourse and Litigation' (2015) 22(2) *Michigan Journal of Gender and Law* 291 <<https://doi.org/10.36641/mjgl.22.2.bridging>>; Ruth Colker, 'Response: Hybrid Revisited' (2012) 100(1) *Georgetown Law Journal* 1069 <<https://doi.org/10.2139/ssrn.2046141>>; Ann E Tweedy and Karen Yescavage, 'Employment Discrimination against Bisexuals: An Empirical Study' (2015) 21(3) *William and Mary Journal of Women and the Law* 699.

111 Transcript of Proceedings, *Perry v Schwarzenegger* (US District Court for the Northern District of California, C 09-2292-VRW, Judge Walker, 11 January 2010) 166–7 (TB Olson).

112 Ibid 167 (SB Stier).

113 See generally Janet E Halley, 'Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability' (1993) 46(3) *Stanford Law Review* 503 <<https://doi.org/10.2307/1229101>>.

this line of questioning indicates that bisexuals are ‘somehow less worthy of full marriage equality rights’.¹¹⁴

However, the suggestion that Stier may be bisexual also poses a threat to the temporal requirement of marriage that her relationship with Perry is enduring and future oriented. Olson raises the possibility that she could become interested in men again, saying it has been ‘this’ – meaning an opposite-sex relationship – before, ‘and it could be this again’. The implication here is that if Stier were bisexual it would pose a threat to the longevity of her marriage with Perry since she may be attracted to men in the future. Olson therefore raises bisexuality to have Stier dismiss it. In response Stier relies on the romantic ideal of ‘the one’ to demonstrate both her commitment to her partner and to her gay identity. Stier compares and contrasts her relationship with her ex-husband to the one she has with Kris Perry, explaining that although she loved him while they were together, she was never *in love* with him, and that Perry is in fact the only person she has ever fallen in love with. In doing so Stier dramatises the tension between the romantic ideal of ‘one true love’ and the lived realities of serial monogamy. She emphasises her commitment to a projected monogamous future with Perry by minimising the meaning and importance of past relationships. Stier’s story becomes legible as a ‘coming out’ narrative where she transitions from an inauthentic straight identity to an authentic gay identity. As a result, the threat of any potential bisexuality is recast as merely a transition or phase – a thing of the past.

Sequential bisexuality was also erased in the Australian parliamentary debates on the Marriage Amendment Bill. This was demonstrated in a speech by Andrew Wallace about his daughter. Wallace says:

My daughter, Caroline, struggled through much of her teenage years with mental illness. She suffered from an insidious disease, an eating disorder, most notably anorexia and bulimia ... As a dad, I’m very pleased and proud to say that my daughter is now in a much healthier and happier place. She has a terrific job and a wonderful partner who our family love very much. What does this story have to do with same-sex marriage, you may ask? About three years ago, our daughter told my wife and me that she was attracted to women and that she had a girlfriend ... *Whilst she’d had boyfriends, she has since told me that it never felt quite right*, and that she felt that she couldn’t tell us as we would not approve. She said she had always secretly been attracted to women, and I’m sure that this internal conflict would have, in some part at least, exacerbated her mental state.¹¹⁵

In this extract, bisexual possibility is raised only to be rejected as Wallace says Caroline previously had boyfriends but that it never felt ‘quite right’. Again, this is not an example of bisexual erasure in the specific sense of the word, since Caroline and her father both appear to frame her attraction to women as central to her identity. Nonetheless, it is noteworthy that one of the few times bisexual possibility arises in parliamentary debates, it is to specifically dismiss it. Caroline’s story repeats a common trope whereby coming out stories ‘filter out our heterosexual impulses

114 Marcus, ‘The Global Problem of Bisexual Erasure in Litigation and Jurisprudence’ (n 110) 70. See also Boucai (n 110) 455–7; Marcus, ‘Bridging Bisexual Erasure in LGBT-Rights Discourse and Litigation’ (n 110) 308–9; Glazer (n 110) 1031–5; Colker (n 110) 1078–80.

115 Commonwealth, *Parliamentary Debates*, House of Representatives, 5 December 2017, 12540 (Andrew Wallace) (emphasis added).

and experiences'¹¹⁶ and use the 'exclusion of any bisexual potential as one of its key dramatic and moral incidents'.¹¹⁷ In this sense Caroline's coming out narrative, like Sandy Stier's, relies on mono-temporal assumptions about relationships, de-emphasising previous boyfriends as mistakes in service of a projected future with her current female partner. In this teleological narrative of progress bisexuality becomes rhetorically linked with the inauthenticity of the past, in contrast to her future of mono-temporal and homosexual happiness. Wallace relies on a number of normative markers of progress to convey his hope for Caroline's future, including having a 'wonderful partner' and a 'terrific job'. Her workforce participation and successful (monogamous) relationship are both used as evidence of her ability to attain temporal standards of stability and maturity. Bisexuality, on the other hand, becomes rhetorically linked with a past of immaturity and inauthenticity, and is dismissed in the process.

D Bisexual Visibility, Bi/Trans Relationships and Mono-temporality

As mentioned previously, the only time bisexuality was visible in the parliamentary debates on the Marriage Amendment Bill was in the context of Senator Janet Rice's marriage to her transgender wife, Penny Whetton. In the press, Senator Rice spoke about a legal 'loophole'¹¹⁸ where their marriage continued to be legally valid because it had occurred before Whetton transitioned. Prior to legalising same-sex marriage, married trans people were required to dissolve their marriage before changing the gender marker on their identity documents, to prevent the possibility of a same-sex marriage occurring.¹¹⁹ Whetton had not yet changed her gender marker to 'female' and so the two continued to be married. During the parliamentary debates on the Marriage Amendment Bill Senator Rice spoke about their marriage, Whetton's transition, and coming to identify as bisexual. She said:

As it seems the whole country knows by now, Penny and I have been married for 31 years. We have two wonderful sons. For the first half of our marriage, we fitted the stereotype – a perfect couple with a perfect family – but, 17 years after we first married, Penny transitioned, affirming her identity as a woman, and I still loved her. I affirmed my sexuality as bisexual.¹²⁰

This section analyses the ways transness, bisexuality and mono-temporality collide to produce a rare moment of bisexual visibility in this narrative. This arises from the unique intersection of bisexual and trans temporalities and, in particular, how they come together in bi-trans relationships.

116 John D'Emilio, *The World Turned: Essays on Gay History, Politics, and Culture* (Duke University Press, 2002) 161.

117 Esther Saxey, *Homoplot: The Coming-Out Story and Gay, Lesbian and Bisexual Identity* (Peter Lang, 2008) 10.

118 Elias Clure, 'SSM: Greens Senator Janet Rice on Her "Loophole" Same-Sex Marriage and Deciding to Stay Together', *ABC News* (online, 17 September 2017) <<https://www.abc.net.au/news/2017-09-17/janet-rice-on-her-loophole-same-sex-marriage/8952546>>.

119 Rachael Wallbank, 'The Legal Status of People Who Experience Difference in Sexual Formation and Gender Expression in Australia' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia, 2015) 457.

120 Commonwealth, *Parliamentary Debates*, Senate, 16 November 2017, 8626 (Janet Rice).

Some scholars have argued both bisexuality and transness have temporalities which trouble the idea that identity is fixed and permanent.¹²¹ Juana María Rodríguez, for example, writes that bisexual and transgender identities ‘share nuanced relationships to temporal narratives that attempt to fix the time of gender and sexual self-knowing’.¹²² Shiri Eisner similarly argues: ‘In a world that presumes one is born a certain way (male, female, gay, straight) and cannot change, both bisexuality and transgender offer the options of mutability and change.’¹²³ Eisner further suggests both bisexuality and transness require ‘long-term viewpoints that allow for change over time’ to be fully understood.¹²⁴ Since both bisexuality and transness disrupt the temporal notion that identity is permanent and immutable, bi-trans relationships can provide unique opportunities for visibility of both bisexual and trans individuals. This was the case for Rice and Whetton’s relationship which allowed for periods of change and flux for both.

While Rice and Whetton’s bisexuality and transness might disrupt temporal beliefs about the fixity of identities, their relationship does not disrupt temporal norms of monogamy in the same way. In an earlier parliamentary speech concerning the postal survey, Rice was at pains to demonstrate the heteronormativity of her relationship with Whetton prior to her transition. She said: ‘We fitted the stereotype of being the perfect couple. We married in a church. We bought a house. We had two kids. We fitted hand in glove with mainstream Australia.’¹²⁵ Rice not only illustrates the heteronormativity of the relationship, but also its adherence to mono-temporal norms as she plots a trajectory of marriage, property acquisition and procreation.

When Whetton transitioned the couple no longer enjoyed heterosexual privilege – they started being discriminated against and no longer held hands or kissed in public – but their investment in the permanent and enduring nature of their marriage remained.¹²⁶ Rice continued:

Suddenly, if Penny wanted to complete her affirmation as a woman by changing her gender on her birth certificate, we were going to have to divorce. Of course, we didn’t want to get divorced. We were still a happily married couple. We had two wonderful children. But that was what our law said that we needed to do.¹²⁷

Rice reiterates hers and Whetton’s commitment to the marriage and to their family. In fact, for the couple, the marriage continuing was so important it was prioritised over Whetton completing her legal transition and changing her gender on her birth certificate. Although Rice and Whetton’s marriage unsettled the former heterosexuality requirement of marriage, she makes clear the marriage was

121 See, eg, Eisner (n 4) 241; Jonathan Alexander and Karen Yescavage, ‘Bisexuality and Transgenderism: InterSEXions of the Others’ (2003) 3(3–4) *Journal of Bisexuality* 1, 12 <https://doi.org/10.1300/J159v03n03_01>; Juana María Rodríguez, ‘Queer Politics, Bisexual Erasure: Sexuality at the Nexus of Race, Gender, and Statistics’ (2016) 21(1–2) *Lambda Nordica* 169, 176–7.

122 Rodríguez (n 121) 176–7.

123 Eisner (n 4) 241.

124 Ibid.

125 Commonwealth, *Parliamentary Debates*, Senate, 13 September 2017, 7080 (Janet Rice).

126 Ibid.

127 Ibid.

entirely normative in relation to the mono-temporal requirements of numerosity, exclusivity and permanence.

The mono-temporality of Rice and Whetton's relationship is what allows Rice's bisexuality to be visible. Unlike most bisexuals, Rice does not have to rely on her attraction to multiple *people* of different genders – whether serial or simultaneous; actual or hypothetical – to demonstrate her bisexuality. As I have argued, bisexuals who have same-sex and cross-sex attractions over time are often made invisible by the logics of mono-temporality, which tend to dismiss and minimise previous attractions.¹²⁸ Instead, Rice can point to only one love object, Penny, who she met as a young adult in university, married and planned to spend the rest of her life with. Instead, it is Whetton's transition which allows Rice to become visible as a bisexual. When they first met and were married Whetton was living as a man and Rice believed herself to be straight. But when Whetton transitioned and Rice found herself 'still so deeply in love' with her,¹²⁹ Rice discovered she was able to be attracted to women as well as men and affirmed her identity as bisexual.¹³⁰ In this case Rice can demonstrate both cross-sex and same-sex attractions within the same monogamous relationship. In fact, it was precisely *because* of the relationship's mono-temporality that bisexuality is visible in this context. Having a trans partner allows Rice to be seen as having multiple gendered object choices over time, while the singularity of that relationship provides for bisexuality's adherence to mono-temporal norms.

E Non-monogamous Bisexuality, Polygamy and Threats to Mono-temporality

Bisexuality was also visible in the 'no' campaign against same-sex marriage. In this iteration non-monogamous bisexuality was invoked as part of the slippery slope argument that same-sex marriage would lead to polygamy or multi-partner marriage. According to Dag Stenvoll, slippery slope arguments work by linking the '*instant case*' – in this case same-sex marriage – with a '*future danger case*' – polygamy – such that 'the more negative evaluations and connotations of the latter attach to the former'.¹³¹ As Stenvoll further argues, slippery slope arguments function through an analogy between political events and the world of physics, such that the slippery slope always implies movement in a downwards direction (where downwards symbolises moral decay) in a manner which is both inevitable and unstoppable.¹³² Through metaphorical reasoning different cases in a slippery slope chain are bound together, such that the endpoint of polygamy 'semantically contaminates'¹³³ the instant case of same-sex marriage. As discussed earlier in this article, the mono-temporal investments of marriage law have long histories

128 Stanford (n 18).

129 Clure (n 118).

130 It is not necessarily the case that a person will come to identify as bisexual due to their partner transitioning. Many people who hold minority sexual identities (such as gay or lesbian) may continue to identify that way after their partner transitions.

131 Dag Stenvoll, 'Slippery Slopes in Political Discourse' in Terrell Carver and Jernej Pikalo (eds), *Political Language and Metaphor: Interpreting and Changing the World* (Routledge, 2008) 28, 28.

132 Ibid 29.

133 Ibid 28.

of playing on anxieties about racial minorities who are often discursively linked with polygamy. In contemporary debates around same-sex marriage in Australia we see these anxieties play out again in versions of the slippery slope argument which draw connections between bisexuality, polyamory, and polygamy. In these circumstances bisexuality is invoked because of its perceived inability to conform to mono-temporal marriage values, including the white, Christian underpinnings of these marriage values.

The slippery slope argument that same-sex marriage will lead to polygamy has haunted same-sex marriage debates, both in Australia and overseas,¹³⁴ and at times bisexuality has been invoked to solidify this fear.¹³⁵ For example, in 2012 the Catholic Archdiocese of Melbourne made a submission to an inquiry into two proposed marriage equality bills that were then before the House of Representatives. In opposing the proposed bills, the Catholic Archdiocese drew connections between same-sex marriage, polyamory, and bisexuality:

Accepting, as the proposed Bills implicitly do, that marriage has no connection to sexual complementarity or child bearing, but should instead be based solely on feelings of affection or sexual orientation, necessarily calls into question any prohibition on polyamorous relationships.¹³⁶ To accept the proposed definition of marriage removes any rationale for maintaining that people who claim a different orientation (such as bisexual) should be restricted from expressing their 'right to sexual identity' and being married to both a man and a woman.¹³⁷

A similar argument was also made in response to the 2017 Inquiry into the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill (a version of which was ultimately passed following the 'yes' vote in the marriage postal survey). In one submission Patrick Byrne, the National Vice-President of the Australian conservative Christian lobby group the National Civic Council, wrote:

If the intention of the Exposure Draft Bill is to provide equality for all LGBTIQ people, defining marriage between only 'two people' fails to provide equality for bisexuals. Equality for bisexuals would require a redefinition of marriage that would allow a bisexual to marry two other people, one of each biological sex. Bisexual marriage would be between one man and two women, or between two men and one woman.¹³⁸

134 See generally Eugene Volokh, 'Same-Sex Marriage and Slippery Slopes' (2005) 33(4) *Hofstra Law Review* 1155; David L Chambers, 'Polygamy and Same-Sex Marriage' (1997) 26(1) *Hofstra Law Review* 53; Edward Ashbee, 'Polyamory, Social Conservatism and the Same-Sex Marriage Debate in the US' (2007) 27(2) *Politics* 101 <<https://doi.org/10.1111/j.1467-9256.2007.00285.x>>.

135 Klesse, 'Bisexuality, Slippery Slopes, and Multipartner Marriage' (n 77); Boucai (n 110) 457–60; M Paz Galupo, 'Introduction (Bisexuality and Same-Sex Marriage)' (2008) 7(3–4) *Journal of Bisexuality* 139, 143 <<https://doi.org/10.1080/15299710802171357>>; Rachel Asher, 'Ireland, the Same-Sex Partnership Debate, and the Normal Sexual Citizen' (2009) 9(3–4) *Journal of Bisexuality* 477, 482–3 <<https://doi.org/10.1080/15299710903316711>>.

136 As discussed previously, polyamorous relationships are not prohibited under Australian law. The Catholic Archdiocese is mostly like referring to the prohibition on polyamorous relationships becoming marriages (ie, the prohibition on polygamous marriage).

137 Life, Marriage & Family Office, Catholic Archdiocese of Melbourne, Submission No 14 to the House of Representatives Standing Committee for Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012* (2012) 3.

138 Patrick Byrne, National Civic Council, Submission No 88 to Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, Parliament of Australia, *The Commonwealth Government's Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill* (February 2017) 7.

Here, both the Catholic Archdiocese and Byrne make versions of the slippery slope argument that if marriage is extended to same-sex couples then it will inevitably be extended to recognising polyamorous relationships as marriages as well.¹³⁹ In order to bolster this argument, bisexuality is used as a ‘hinge’¹⁴⁰ to link the mobilisation of sexual orientation in the argument for same-sex marriage to the inevitability of multi-partner marriage.¹⁴¹ As Boucai points out, the link between bisexuality and polygamy or non-monogamy arises from the idea that sex difference is so ‘erotically portentous’ that a monogamous bisexual ‘endures harsher deprivation and greater temptation’ than a monogamous gay or straight person.¹⁴² As he further points out, there is some empirical support for this suggestion. Although most bisexuals are monogamous, bisexuals as a group tend to be more open to non-monogamy.¹⁴³ Both the Catholic Archdiocese and Byrne takes this link to its logical extreme. They suggest that the *only* way a bisexual person can fully express their sexual identity is by entering into a polygamous marriage with both a man and a woman, thus conflating bisexuality, polyamory, and polygamy. They argue if it is necessary to legalise gay marriage because marriage cannot be limited based on sexual orientation, then bisexual people will be next in demanding recognition through multi-partner marriage.

As Christian Klesse cogently argues, these slippery slope arguments also mobilise cultural anxieties about race by invoking long histories of racialised anti-polygamy legislation.¹⁴⁴ To the extent that bisexuality is conflated with polyamory and polygamy or used to make the slippery slope argument, it is also drawn into the mobilisation of racist and nationalist tropes associated with polygamy.¹⁴⁵ This can be seen in a submission made by the Australian Christian Lobby (‘ACL’) to the 2012 inquiry into marriage equality. The ACL submission asserts (among other things) that if same-sex marriage were legalised there would be no basis for denying multi-partner marriages. In making this argument the ACL begins with Mormon and Islamic polygamy and then goes on to discuss the bisexual practise of polyamory, allowing the racialised aspects of the former to attach to the latter.¹⁴⁶

139 In many forms of the slippery slope argument, same-sex marriage is said not only to lead inevitably to polygamous marriage, but also to bestiality and incest: 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-bernardi-same-sex-bestiality>>; Steph Kyriacou, ‘Australian Archbishop Compares Same-Sex Marriage to Incest’, *PinkNews* (online, 26 September 2017) <<https://www.pinknews.co.uk/2017/09/26/australian-archbishop-compares-same-sex-marriage-to-incest/>>.

140 This language is borrowed from Christian Klesse who makes a similar argument, discussed further below: Klesse, ‘Bisexuality, Slippery Slopes, and Multipartner Marriage’ (n 77) 42.

141 ‘Multi-partner marriage’ here refers to any departure from the traditional dyadic model of marriage. It may include multiple dyadic marriages (which is usually referred to as polygamy) or it may refer to group marriage whereby there are more than two parties to one marriage.

142 Boucai (n 110) 458.

143 *Ibid.*

144 See Klesse, ‘Bisexuality, Slippery Slopes, and Multipartner Marriage’ (n 77).

145 *Ibid.*

146 Australian Christian Lobby, Submission No 21 to the House of Representatives Standing Committee for Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012* (April 2012) 27.

In the first sub-section entitled ‘Polygamy’, the ACL sets up a link between same-sex marriage and the racialised practise of polygamy. They start by referring to two instances of Mormon polygamists in the US and Canada fighting for legal recognition by relying on previous legal wins for LGBTIQ people. As discussed above, anti-polygamy efforts have often framed Mormons as non-Christian and ‘metaphorically nonwhite’ through discourses linking Christianity, whiteness and monogamy.¹⁴⁷ In this case, the racialisation of polygamy is pressed by reference to the Islamic practise of polygamy. The ACL writes:

Polygamy is specifically one man having multiple marriages to different women, in which the women have no relationship with each other. It is almost always religious, being widespread in Islam and, while no longer as common as it once was, persists in conservative Mormon communities such as Bountiful [Canada].¹⁴⁸

The ACL establishes polygamy as a racialised practise stating, without references or examples, that polygamy is ‘widespread in Islam’. This establishes the first step in a chain of signification whereby the Islamic practise of polygamy is equated with the Mormon practise of polygamy, rendering them the same or substantially similar. This allows the ‘racialised attributes’ of Islamic polygamy to ‘pass over and start to “stick”’ to Mormon polygamy.¹⁴⁹ The chain of signification continues with a section on polyamory which is in turn linked to bisexuality:

There are other sexual arrangements of multiple partners which have no basis in religion, a relationship type usually referred to as ‘polyamory’ ... Polyamory is a broad term to describe relationships involving more than two people. Three, four, and sometimes more people may be involved intimately with each other or with a common individual, and the number may be made up of males, females, and those identifying neither as male or female. Often, but not always, one or more members are bisexual.¹⁵⁰

As in the examples discussed above, bisexuality is conflated with polyamory. Bisexuality is then subsequently deployed as justification for the position that the campaign for multi-partner marriage is inevitable. The ACL cites an example of a polyamorous triad in the Netherlands involving a man and two bisexual women who sought legal recognition of their relationship as a ‘cohabitation contract’ or civil partnership.¹⁵¹ The ACL then goes on to cite the argument made by conservative commentator, Stanley Kurtz, that the Netherlands example amounts to a ‘bisexual marriage’:

If every sexual orientation has a right to construct its own form of marriage, then more changes are surely due. For what gay marriage is to homosexuality, group marriage is to bisexuality. The De Bruijn trio is the tip-off to the fact that a *connection between bisexuality and the drive for multipartner marriage has been developing for some time.*¹⁵²

147 Nancy F Cott, *Public Vows: A History of Marriage and the Nation* (Harvard University Press, 2000) 4 <<https://doi.org/10.4159/9780674029880>>.

148 Australian Christian Lobby (n 146) 27.

149 Klesse, ‘Bisexuality, Slippery Slopes, and Multipartner Marriage’ (n 77) 41, citing Sara Ahmed, *The Cultural Politics of Emotion* (Edinburgh University Press, 2004).

150 Australian Christian Lobby (n 146) 27.

151 Ibid 29.

152 Ibid, quoting Stanley Kurtz, ‘Here Come the Brides: Plural Marriage Is Waiting in the Wings’ (2005) 11(15) *The Weekly Standard* 19, 20 (emphasis in original).

Together these quotes demonstrate the chain of signification involved in the slippery slope argument where same-sex marriage is said to lead inevitably to polygamy via the bisexual practise of polyamory. As Klesse argues, this line of reasoning mobilises ‘racist and nationalist tropes’ at the centre of anti-polygamy discourse.¹⁵³ The slippery slope argument plays on cultural anxieties that racialised others pose a threat to treasured national institutions such as marriage and monogamy. By using bisexuality and polyamory as part of a chain of signification linking same-sex marriage to multi-partner marriage, the racialised meanings attached to polygamy also become attached to polyamory and bisexuality. In the ‘no’ campaign, bisexuality (like polygamy) is therefore framed as inherently incompatible with the mono-temporal norm of exclusivity and invoked for its perceived failure to conform to the white, Christian, monogamous ideal of marriage.

IV CONCLUSION

This article has endeavoured to understand why bisexuality was absent from the 2017 same-sex marriage law reform efforts and what this, in turn, means for bisexual individuals. Drawing on examples from parliamentary debates and inquiries relating to same-sex marriage, the argument has been made that bisexuality was mostly invisible and that the mono-temporal investments of marriage law go at least part of the way to explaining why. It was demonstrated that while bisexuality was largely absent from the parliamentary debates, parliamentarians repeatedly invoked the mono-temporal ideal of marriage. This article suggests this is no mere coincidence and that it is precisely *because* of the mono-temporal investments of marriage law that bisexuality could not be visible. According to the mono-temporal marriage ideal, monogamy is not only cast forward to exclude the possibility of other love objects in the future, but also cast backwards to minimise or repudiate previous love objects. With its future-focused temporalities of monogamous commitment to ‘the one’, marriage struggles to account for bisexual histories and in turn bisexual identity, and bisexuality therefore disappears from debates around same-sex marriage.

The erasure of bisexuality from same-sex marriage debates matters because of the significant negative impact of bisexual erasure on the well-being of bisexual people. As outlined in Part I of this article, psychological research consistently finds bisexual people have worse mental health outcomes than straight people, gay men or lesbians, and draws links between these mental health outcomes and experiences of invisibility and erasure. When this erasure occurs in the public sphere, at the level of a national debate, it may be even more troubling for bisexual people and impact upon their sense of being full and equal citizens. Despite being rarely mentioned in the same-sex marriage debates, bisexuals suffered from the ban on same-sex marriage in the same way that gays and lesbians did. The suggestion throughout the same-sex marriage debates that same-sex marriage was primarily

153 Klesse, ‘Bisexuality, Slippery Slopes, and Multipartner Marriage’ (n 77) 36.

for the benefit of gays and lesbians was therefore not only inaccurate, but also harmful for bisexual people who did not see themselves reflected in a political debate which substantially affected them.

At the same time, the arguments laid out in this article have implications for how we think about marriage generally and, in particular, suggest there is reason to be critical of mono-temporal marriage norms. The foregoing discussion makes it evident that mono-temporal marriage designates the white, Christian, monogamous heterosexual couple as the marital ideal and the primary beneficiary of marriage's significant prestige and benefits. Insofar as same-sex couples can emulate this ideal they have now been granted access to the institution. Yet while bisexuals in same-sex relationships are now able to get married, bisexuals continue to be excluded and marginalised from discourses around marriage for their apparent failure to conform to the mono-temporal ideal of marriage. In privileging – both socially and economically – those who conform to mono-temporality, marriage also excludes and stigmatises others who are unable or refuse to comply with these norms. This might include single people (including, especially, single parents), divorcees, polyamorous people, sex workers, non-sexually related caregivers and co-parents, asexuals and anybody else whose practises of intimacy and belonging fall outside of the sexual-romantic dyad and nuclear family. At a time when the privileges and benefits of marriages are being extended to new populations (including some same-sex couples), it is necessary to continue to think critically about those who are stigmatised, marginalised and excluded by mono-temporal marriage norms. This article offers up bisexuality and mono-temporality as one way of continuing this project.