
CHANGING CONCEPTIONS OF MARRIAGE IN IRELAND: LAW AND PRACTICE

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Introduction

Marriage continues to hold an important position in Irish society. While cohabitation has grown significantly as a relationship choice in recent decades or so, more often than not it is a precursor or 'trial period' for marriage, with many cohabiting relationships transforming into marriages after a period of time. Further, public opinion demonstrates a continued attachment to marriage as the basis for commitment within relationships. In one 2011 survey, *Attitudes to Family Formation in Ireland*,¹ there was strong support amongst respondents for marriage as an institution and most aspired to marry at some point. Indeed, 68 per cent of the respondents in that survey agreed with the statement '[c]ohabiting is fine but marriage seals the deal'.² From a legal perspective, marriage and the marital family in Ireland receive the highest levels of protection. It is the family based on marriage that is accorded elevated protection within the Irish Constitution, with non-marital or de facto families not recognised.

Yet while the social and legal importance of marriage remains largely constant, the concept of marriage has undergone significant change in the past 25 years. During this period, there have been substantial changes to who can marry whom, from the introduction of divorce pursuant to the Family Law (Divorce) Act 1996 to the extension of marriage to same-sex couples by the Marriage Act 2015. There have also been changes to *how* they can do so, and in individuals' preferences for marriage solemnisation, with a decline in marriages conducted according to the rites of the Roman Catholic Church and the increasing popularity of civil and secular ceremonies. However, despite these dramatic social, cultural and legal changes, contemporary marriage law and practice in Ireland arguably remains under analysed.³ This article seeks to contribute to the literature in the area by locating marriage, and

¹ The study involved a nation-wide representative sample of 1,404 people aged 20-49.

² M Fine-Davis, *Attitudes to Family Formation in Ireland: Findings from the Nationwide Study* (Family Support Agency, 2011), 60.

³ Notable contributions considering Irish marriage law from, particularly, theoretical or historical perspectives include D McGowan, 'Governed by Marriage Law: An Irish Genealogy' (2016) 25(3) S&LS 311; D McGowan, *The Normalising Power of Marriage Law: An Irish Genealogy 1945 – 2010* (PhD, Maynooth University 2015); M Harding, 'The curious incident of the Marriage Act (No 2) 1537 and the Irish statute book' (2012) 32(1) LS 78; M Harding, 'Religion and family law in Ireland: from a Catholic protection of marriage to a "Catholic" approach to nullity' in J Mair and E Örüçü (eds), *The place of religion in family law: a comparative search* (Intersentia, 2011). See also L Crowley, *Family Law* (Round Hall, 2013). For older considerations of Irish marriage law, see AJ Shatter, *Shatter's Family Law* (Tottel Publishing, 4th edn, 1997).

its evolving conceptualisation, within rapidly changing social practices in Ireland and by reflecting on the underlying policy reasoning for key reforms and developments in the area.

Part I considers the rapid changes in Irish law and society highlighting how the concept of marriage in Ireland has evolved, shifting, to borrow from Witte, ‘from sacrament to contract’.⁴ Demonstrating what this evolution has meant in terms of marriage practice, Part II compares trends in marriage solemnisation across three decades. Part III then turns to consider the evolving legal framework governing the formalities required for entry into marriage which has facilitated this changing practice and highlights the policies which prompted some of the core provisions of the Civil Registration Act 2004 (as amended). Given the speed with which these social and legal changes have taken place, increased pressure has come to bear on certain key provisions of the 2004 Act. The liberalisation of the rules regarding location and the relative ease with which solemnisers can be registered to legally perform weddings gives rise to some concerns about compliance with best practice and conformity to the rules in the solemnisation of ceremonies. These issues are considered in Part IV. The final section, Part V, briefly considers the challenges which increased immigration poses for Irish marriage law and policy, highlighting how the special protection afforded to the institution of marriage in the Irish Constitution has shaped judicial and legislative responses.

I: From Sacrament to Contract- The Evolution of Marriage in Ireland

The importance of the family has been recognised in Irish law since the foundation of the Republic in 1937. Through Article 41.1.1° of the Constitution of Ireland, *Bunreacht na hÉireann*, the State recognises the family as ‘the natural primary and fundamental unit group of society and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law’. Given this social importance, in Article 41.1.2° the State ‘guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.’ Article 41.3.1° then provides: ‘The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack’. Influenced in no small measure by Catholic social teaching, it is thus the *marital* family, specifically, which receives this elevated constitutional status. The institution of marriage, in and of itself, also receives important ‘special care’.⁵

Considering these provisions in light of the broader constitutional framework, nearly 50 years after the Constitution was enacted, Costello J explained in *Murray v Ireland*:

‘the Constitution makes clear that the concept and nature of marriage, which it enshrines, are derived from the Christian notion of a partnership based on an irrevocable, personal consent, given by both spouses which establishes a unique and very special life-long relationship.’⁶

⁴ J Witte Jr, *From Sacrament to Contract: Marriage, Religion and Law in the Western Tradition* (Westminster John Knox Press, 1997).

⁵ For more, see E Daly, *Religion, Law and the Irish State* (Clarus, 2012).

⁶ *Murray v Ireland* [1985] IR 532.

Given this Christian interpretation, marriage was also, unsurprisingly, understood under the 1937 Constitution to be confined to persons of the opposite sex.⁷ Yet, while a traditional, conservative and religiously-influenced understanding of marriage prevailed for more than half a century after the introduction of the Constitution, in the intervening 30 years, the concept of marriage has undergone profound reform from a social, cultural and legal perspective. It is to this evolution that we will now turn.

The introduction of divorce

Seeking to ensure the firm foundation of a Roman Catholic state for a predominantly Roman Catholic population, and representing a distinct ideological and social divergence from the English position, Article 41.3.2° of the Irish Constitution introduced a ban on divorce in 1937.⁸ By the early 1970s, however, marital breakdown and its associated implications were drawing increasing public attention with women’s rights groups lobbying for reform.⁹ Although measures such as the Family Law (Maintenance of Spouses and Children) Act 1976 were introduced seeking to prevent undue hardship for vulnerable spouses, more robust reform was required. A referendum on the 10th Amendment to the Constitution Bill 1986 seeking to abolish the ban on divorce was, however, rejected by two-thirds of the population with the traditional Catholic perspective on marriage to the fore in a divisive campaign.

The introduction soon after of the Judicial Separation and Family Law Reform Act 1989 – establishing the grounds for the award of a decree of judicial separation and empowering the court to make a wide range of ancillary relief orders – did represent a shift in thinking, signifying the first meaningful step away from the idea of marriage for life. However, with the right to remarriage remaining unavailable, the need for effective divorce legislation persisted.

Although 37,245 ‘separated’ individuals were recorded in the 1986 census,¹⁰ this number had risen by almost 50 percent to 55,143 persons by 1991.¹¹ Adopting the ‘comprehensive proposals’ of the White Paper on Marital Breakdown in September 1992,¹² the Government held a second referendum on divorce in 1995. This time it took a more pro-active approach.¹³ As well as publishing the proposed Divorce Bill in advance and ensuring greater dissemination of information to the public, cross-party support was secured for a ‘Yes’ vote. The referendum was passed, with 50.28 percent of the electorate supporting the amendment and 49.72 percent opposed: a winning margin of just 9,114 votes evidencing that a traditional view of marriage, though defeated, had by no means disappeared. The

⁷ The High Court in *Zappone and Gilligan v The Revenue Commissioners & Ors* [2008] 2 IR 417 noted this understanding was well established.

⁸ It provided ‘No law shall be enacted providing for the grant of a dissolution of marriage’. While the ban was in keeping with the religio-cultural norms of the majority, the First Constitution of the Irish Free State in 1922, more secular in nature, did not carry such a ban. Moreover, foreign divorces could be recognised notwithstanding this ban.

⁹ See L Connolly, ‘Locating the Irish Family’ in L Connolly (ed) *The ‘Irish’ Family* (Routledge, 2015), 31-33.

¹⁰ Central Statistics Office (CSO), *Census 86: Summary Population Report* (Stationery Office 1987).

¹¹ CSO, *Census 91: Summary Population Report* (Stationery Office 1993).

¹² P Ward, ‘The Path to Divorce’ (1994) 12 *Irish Law Times* 29.

¹³ J Burley and F Regan, ‘Divorce in Ireland: The Fear, The Floodgates and The Reality’ (2002) 16(2) *IJLPF* 202.

referendum resulted in the amendment of Article 41.3.2° of the Irish Constitution to provide for divorce and enumerating the basic criteria to be fulfilled to successfully obtain such a decree.¹⁴ The Family Law (Divorce) Act 1996 subsequently came into effect on 27 February 1997, supplementing the new constitutional provision and empowering the judiciary to order a decree of divorce and ancillary provision.¹⁵ The concept of marriage as being ‘for life’ was over.

Increased regulation and the rise of secularism

Over the course of both referenda, the normative status of marriage was emphasised, however significant societal changes were increasingly challenging this assumption. The rate of extra-marital births was growing significantly, demonstrating an increasing occurrence, and societal acceptance of, family formation outside of marriage.¹⁶ Statistical information on the rate of cohabitation was captured for the first time in the 1996 Census and recorded 31,229 households comprising cohabiting couples. By 2006 this figure had increased to in excess of 105,000 households.¹⁷ Various scandals meanwhile had dramatically eroded the power of the Catholic Church, while a booming economy had resulted in significant inward migration bringing with it greater religious and cultural diversity.

With these societal changes and the removal of the prohibition on divorce, the concept of marriage was gradually shifting from its traditional position as a *moral* institution to its more modern status as a *legal* institution. The introduction of the Civil Registration Act 2004 also played an important role in facilitating and responding to this changed understanding. Although pitched as ‘the first major reform of civil registration legislation since it was introduced in Ireland in 1845’ and as ‘a clear demonstration of Government's commitment to regulatory reform’,¹⁸ the Act, and its subsequent amendments, have contributed significantly to the evolved understanding of marriage which has emerged in Ireland.

Ostensibly, the Act simply sought to modernise the formalities required for entry into marriage. The need for such reform was clear. Commenting in the mid-1990s, Alan Shatter had noted that the law at the time was:

‘the product not of a systematic and coherent development but of piecemeal legislative action stretching across over 150 years. In all that time no effort has been made by the legislature to

¹⁴ Article 41.3.2° provides: ‘A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that i. at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the five years; ii. there is no reasonable prospect of a reconciliation between the spouses; iii. such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law; and iv. any further conditions prescribed by law are complied with.’

¹⁵ For more on the introduction of divorce, see K O’Sullivan ‘The Legacy Continues: Ancillary Relief on Divorce in Ireland’ (2017) *Journal of Family Studies* (<https://www.tandfonline.com/doi/full/10.1080/13229400.2016.1264307>). A two-stage divorce process effectively continues to apply with judicial separation continuing to play a role on marital breakdown in Ireland.

¹⁶ See Connolly, above n 9, 28..

¹⁷ CSO, Census 2006: Volume 3 (Stationery Office, 2007), 30.

¹⁸ Civil Registration Bill 2003: Second Stage, *Dáil Éireann* (27 Jan 2004) per Minister Coughlan.

clarify and simplify the general procedures that have to be followed by persons wishing to marry, or to codify or rationalise the extremely complex statutory position’.¹⁹

Prior to the introduction of the 2004 Act, the formalities for civil marriage or religious marriage (other than Roman Catholic marriage) hailed primarily from the Marriages (Ireland) Act 1844, as amended by the Registration of Marriages (Ireland) Act 1863.²⁰ The legal requirements for Roman Catholic marriage ceremonies were still governed by common law.²¹ Although the legislature, through the Family Law Act 1995, had sought to develop a more modern approach to marriage formalities in Ireland – introducing, for example, formal notice requirements for all marriages – such reforms were effectively add-ons to the prevailing regimes. The 1995 Act left the various methods of marrying unaltered and did not affect either the 1844 Act or the common law as it applied to Roman Catholic marriages.

The Civil Registration Act 2004, on the other hand, drawing on recommendations of the Interdepartmental Committee on Reform of Marriage Law, radically overhauled the formalities applicable to both civil and religious ceremonies.²² As will be discussed below, the Act played an important role in streamlining procedures and liberalising the formalities to be observed for entry into a legally recognised marriage. Yet the Act is also noteworthy for establishing the role of the State in regulating all marriages, a role which it had previously effectively delegated to the majority religion, the Catholic Church.²³ Reflecting on this development, McGowan highlights that:

‘Marriage, following the 2004 Act, was no longer a social practice that government recognized and deployed in managing the social domain. It became a fully legal status, available only to those who had complied with the detailed provisions of the Civil Registration Act 2004.’²⁴

Moreover, unlike in earlier debates in relation to divorce and judicial separation ‘which focused almost entirely on its institutional and transcendent characteristics’, there was no discussion of the nature of marriage during Oireachtas debates relating to the 2004 Act.²⁵ Consequently, as McGowan notes, ‘It now seemed universally accepted that marriage was a committed long-term companionate relationship based on contract, a civil and legal matter fully within the domain of state regulation.’²⁶

This shift in focus, and the continued social shifts away from religion and, in particular, the Catholic Church, saw the further secularisation of Irish marriage law over the ensuing decade. The Interdepartmental Committee on Reform of Marriage Law had recommended in 2004 that power to solemnise marriages be extended to bodies not covered by the prevailing laws. Although no such

¹⁹ Shatter, above n 3, 177.

²⁰ Ireland secured its independence from Britain in 1922. However, the pre-existing marriage law was carried over.

²¹ Shatter, above n 3, 158 for the different rules which applied to different categories of marriage. Provision was made for civil registration but this was not essential to validity.

²² Inter-Departmental Committee on Reform of Marriage Law, *Discussion Paper 5: Definition of Marriage, Who Can Marry, Capacity to Marry* (Stationery Office 2004).

²³ The overwhelming majority of ceremonies were conducted by the Catholic Church, see below.

²⁴ McGowan (2016), above n 3, 324.

²⁵ *Ibid.*

²⁶ *Ibid.*

reforms were introduced at that time, the inclusion of secular bodies such as the Humanist Association of Ireland (HAI) was subsequently provided for through the Civil Registration (Amendment) Act 2012. The Government-sponsored Bill largely replicated a Private Member’s Bill originally advanced in 2011 by Senator Ivana Bacik which had been drafted in consultation with the HAI. Although the traditionally dominant norm that was the Christian, or specifically Catholic, conception of marriage was undoubtedly losing ground, the primordial importance of the institution of marriage continued to be emphasised. Introducing the Bill, the then Minister for Social Protection Joan Burton noted:

‘This Bill represents a significant and important change to the Civil Registration Act 2004, which sees us, as a nation, recognise the increasing desire of people to celebrate marriage in a way that includes their own secular, ethical and humanist beliefs. *Marriage is an important institution and this Bill enhances its role in Irish law and society.*’²⁷

Same-Sex Marriage and Cohabitants Rights

While the 2004 Act (as amended) had significantly reformed the formalities required for entry into a legally recognised marriage in Ireland, momentum was also building in the early 2000s for the recognition of other marriage-like relationships. The Superior Courts began ‘to adopt [a] more rationalised, scientifically formulated understanding of marriage’, and, in managing the social domain, the government began to accept unmarried, particularly cohabiting, relationships as functionally equivalent to marriage.²⁸

This conceptual shift, combined with effective rights-based and equality-based campaigning particularly on the part of the LGBT community, led the government to enact the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. The Act was carefully framed with a view to ensuring its constitutional compatibility,²⁹ and its role in ‘providing legal remedies and rights rather than undermining marriage’ was reiterated as it passed through the legislature.³⁰ Neither cohabitants nor civil partners, it was repeatedly stressed, were equivalent to spouses and the institution of marriage retained its primacy.³¹

Yet although for same-sex couples the 2010 Act represented an important step in affording the opportunity to become civil partners, the cultural, social and, particularly in an Irish context, *legal* importance of marriage ensured marriage equality remained on the agenda with advocacy groups continuing to gain traction. Despite this, perhaps unsure to what extent the traditional concept of marriage prevailed within Irish society, the issue remained a ‘veritable political “hot potato” that was passed between the courts and the legislature because neither branch of government was really that keen to champion its introduction’.³² Effectively deciding to let society lead on the issue, the

²⁷ Civil Registration (Amendment) Bill 2012: Second and Subsequent Stages, *Seanad Éireann* (6 December 2012) (emphasis added).

²⁸ McGowan (2015), above n 3, 29.

²⁹ Civil Partnership Bill 2009: Second Stage, *Dáil Éireann* (3 December 2009).

³⁰ *Ibid*, per Deputy Flanagan.

³¹ See B Tobin, ‘The regulation of cohabitation in Ireland: achieving equilibrium between protection and paternalism?’ (2013) 35(3) *JSWFL* 279.

³² B Tobin, ‘Marriage Equality in Ireland: The Politico-Legal Context’ (2016) 30(2) *IJLPF* 115, 127.

government sent the question of marriage equality to the Constitutional Convention, a reform-oriented body composed primarily of ordinary Irish citizens. The Convention ultimately recommended the holding of a referendum to decide the matter.³³ The referendum, which was held in May 2015, passed by 62 percent with a 60 percent turnout, ensuring Ireland became the first country to introduce marriage equality by popular vote.³⁴ Article 41.4 now provides that ‘marriage may be contracted in accordance with law by two parties without distinction as to their sex’.³⁵ Another fundamental pillar in the traditional conception of marriage in Ireland – that marriage is necessarily an institution for heterosexual couples – had fallen. In addition to dramatically altering the legal definition of marriage, the referendum again served to reinforce the importance of marriage for Irish people, with the perceived need to allow greater access to such a fundamental social, cultural and legal institution acting as a key message for the ‘Yes’ campaign.³⁶

II. Changes in marriage practice in Ireland

Although the concept of marriage has changed significantly over the past quarter of a century, its importance as a social institution in Ireland remains undeniable. Based on his empirical research, Inglis noted ‘Irish people may have become more secular, mobile, globalized, individualised and informal, but the majority of adults still live as couples, get married and have children.’³⁷ He concludes:

‘The sacredness of the family is reflected in the fact that although it is not legally or normatively necessary to marry to have children, the majority of people who have children are married’.³⁸

Given this continued importance of marriage, therefore, it is interesting to consider how Irish marriage practice itself has evolved. While such an examination exemplifies, in many cases, the wider social shifts which informed the reforms of marriage law outlined above, it also, perhaps more importantly, speaks to both the traditional and contemporary social understanding of marriage in Ireland as facilitated by the evolving legislative framework.

Unsurprisingly given the well-reported increase in secularism,³⁹ the most significant change in Irish marriage practice in modern times is the dramatic fall in the number of religious marriage ceremonies

³³ Ibid. He argues persuasively that although same-sex marriage could have been introduced via legislation by the Oireachtas, the referral of the issue to the Constitutional Convention was a ‘political masterstroke’. However, it is important to note the government did seek to ensure that the legitimacy of same-sex parenting would be an issue in the referendum by enacting the Children and Family Relationships Act 2015 facilitating same-sex cohabitants and civil partners to adopt a child.

³⁴ See E O’Caollaí & M Hillard, ‘Ireland becomes first country to approve same-sex marriage by popular vote’, *Irish Times* (23 May 2015).

³⁵ With the Marriage Act 2015, same-sex couples no longer had the option to apply for civil partnership. Note, also, the Gender Recognition Act 2015 allows an individual to have his/her chosen gender legally recognised on their birth certificate. Such birth certificates can be used for marriage formalities, allowing the individual to be recognised as her chosen gender for marriage solemnisation.

³⁶ See G Healy, B Sheahan and N Whelan, *Ireland Says Yes: The inside story of how the vote for marriage equality was won* (Merrion Press, 2016), 67.

³⁷ T Inglis, ‘Family and the Meaning of Life in Contemporary Ireland’ in Connolly, above n 9, 83.

³⁸ Ibid, 77. See also Fahey et al, *Family Relationships and Family Well Being: A study of the families of nine year olds in Ireland* (Dublin, UCD and the Family Support Agency, 2013).

³⁹ The rapid growth of those adhering to ‘no religion’ was noted in the 2016 Census as accounting for 9.8% of the population. 45% of 20-39 year olds were recorded as being of ‘no religion’, see

undertaken. From 2007-2017, religious marriage ceremonies fell from 77 percent to 63 percent of all marriages.⁴⁰ Viewed in a 30 year arc, this fall is even more dramatic. In 1987, 96.5 percent of all marriages conducted in Ireland were religious marriage ceremonies – a percentage share one-third higher than the current figure.⁴¹ Given its former dominance, it is equally unsurprising that the single biggest fall in this category has been recorded for marriages conducted according to the rites of the Roman Catholic Church. Although, in 2007, 74 percent of all marriages conducted in the State were according to Roman Catholic marriage rites, this figure has fallen steadily to just 50.9 percent by 2017.⁴² Again, the comparison with 1987 – when 93.3 percent of all marriages conducted were Roman Catholic ceremonies – is stark.⁴³ Although quantitatively much less significant, marriages conducted according to the rites of the Church of Ireland also show a steady decrease, falling from 2.48 percent in 1987 to 2 percent in 2007, and to 1.7 percent in 2017.⁴⁴

Yet, these declines for the traditional, long-established, religions in Ireland are juxtaposed by gains for other religious denominations. While only 66 religious marriages or 0.3 per cent of all marriages conducted in 1987 were according to the rites of religions other than the Roman Catholic Church, the Church of Ireland or the Presbyterian Church, the range of religions represented in modern marriage practice – and the volume of marriages celebrated by such religions – has increased significantly. The number of marriages conducted by the Spiritualist Union of Ireland has grown year on year since 2014 (when statistics for such marriages were first released) and represent 5.3 percent of all marriages conducted in Ireland in 2017.⁴⁵ Moreover, ‘other religions’,⁴⁶ have seen their figures almost double from 2.6 percent in 2014 to 5.1 percent in 2017, speaking to the ever greater religious diversity in an increasingly multicultural Ireland.⁴⁷

In contrast to the overall decline in the popularity of religious marriage ceremonies, secular marriages, most commonly conducted by the Humanist Association of Ireland, have shown strong and sustained growth since their introduction through the Civil Registration (Amendment) Act 2012.⁴⁸ While only 209 secular marriages were registered in 2013, representing 1.01 percent of all marriages, this number has grown significantly with secular marriages now representing 7.8 percent of marriages conducted

http://www.cso.ie/en/media/csoie/releasespublications/documents/population/2017/Chapter_8_Religion.pdf (accessed 3 April 2018). As the average age of grooms in all opposite-sex marriages was 36.1 years and the average age of brides was 34.1 it would appear likely that this trend towards non-religious ceremonies will continue, and indeed perhaps increase, in the coming years, see CSO, ‘Marriages 2017’, available at: <http://www.cso.ie/en/releasesandpublications/er/mar/marriages2017/> (accessed 3 April 2018).

⁴⁰ CSO, above n 39; see also CSO, ‘Marriages 2007’, available at <http://www.cso.ie/en/media/csoie/releasespublications/documents/vitalstats/2007/marriages2007.pdf>. The Civil Registration Act (CRA) 2004 commenced on 5 November 2007.

⁴¹ CSO, *Report on Vital Statistics 1987* (Stationery Office 1990) 258.

⁴² CSO, above ns 39 and 40.

⁴³ CSO, above n 41.

⁴⁴ CSO, above ns 39, 40 and 41. Figures available from 2013-2015 for marriages conducted according to the rites of the Presbyterian Church show just 0.3-0.4% of all marriages were in this category.

⁴⁵ For 2017 statistics see: CSO, above n 39, see also CSO, ‘Marriages and Civil Partnerships 2014’, available at: <http://www.cso.ie/en/releasesandpublications/er/mcp/marriagesandcivilpartnerships2014/>. (Accessed 3 April 2018).

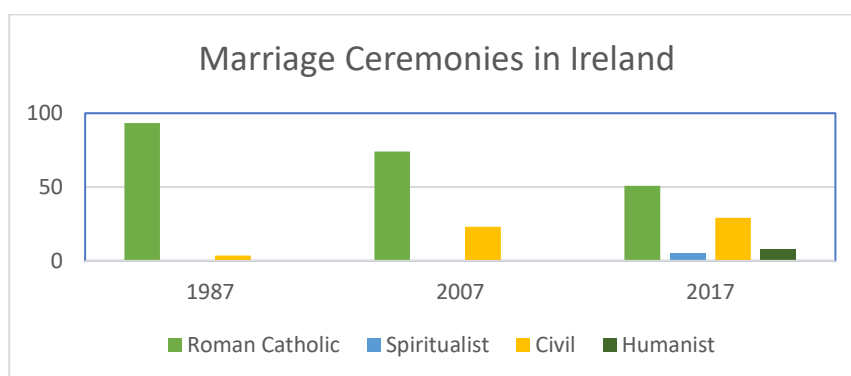
⁴⁶ That is, religions other than Roman Catholic, Church of Ireland, Presbyterian and Spiritualist.

⁴⁷ CSO, above n 45. For 2017 statistics see CSO, above n 39.

⁴⁸ The Act was commenced on 23 January 2013.

in 2017.⁴⁹ Although statistics on civil marriages have remained quite constant in the past five years, representing 28-29 percent of marriages conducted each year, this has increased from 23 percent in 2007.⁵⁰ When contrasted with 1987, when civil marriages accounted for just 3.5 percent of marriages⁵¹ – or with 1996, the year marking the introduction of divorce, when only 6 percent of marriages were civil marriages⁵² - the increased popularity of civil marriage in Ireland is evident. When combined, non-religious ceremonies – that is, secular (7.8 percent) and civil (29.1 percent) ceremonies – account for 36.9 percent of all marriage ceremonies undertaken in Ireland in 2017.⁵³

Intuitively it may seem that the introduction of divorce contributed, perhaps significantly, to this growth, with an increased number of divorced spouses unable to undertake a religious marriage. However, it appears this influence, if any, is relatively small. Ireland has one of the lowest divorce rates in Europe with a crude divorce rate of just 0.6 percent.⁵⁴ Consequently, over 87 percent of all marriages in 2017 were first-time marriages for both spouses.⁵⁵ Although 11.8 percent of opposite sex marriages did involve one spouse who had been previously divorced, only 2.6 percent of marriages involved couples where both parties were divorced.⁵⁶ These findings tend to support Fahey’s assertion that ‘Irish people are cautious about marriage’ and, where a marriage ends in divorce, ‘they are even more cautious about making a second attempt’.⁵⁷



⁴⁹ Interestingly, the CSO describe these marriages as ‘Humanist’ as opposed to ‘secular’. As non-Humanist secular marriages may also be conducted, it is unclear if these figures, which are likely to be small given there is only one alternative registered, are included here.

⁵⁰ CSO, above n 39 and 40.

⁵¹ CSO, above n 41.

⁵²For discussion of the emergence of civil marriage, see <https://www.welfare.ie/en/downloads/Registrar-General-Report-2013.pdf> (Accessed 2 April 2018).

⁵³ In 2013, the Registrar General noted: ‘The respective proportions of religious and civil marriages has remained remarkably stable since 2009 standing at 71-72% and 28-29%, respectively’ (ibid). While the percentage of religious marriages has fallen in 2017 to 63%, the percentage of civil ceremonies remains relatively constant at 28-29%. It would therefore appear that the shift from religious ceremonies has been more towards secular than civil ceremonies.

⁵⁴ See Eurostat: http://ec.europa.eu/eurostat/statistics-explained/index.php/Marriage_and_divorce_statistics (Accessed 3 July 2018).

⁵⁵ CSO, above n 39.

⁵⁶ Ibid.

⁵⁷ T Fahey, ‘The family in Ireland in the new millennium’ in Connolly, above n 9, 65.

Finally, in relation to same-sex marriage, 1,056 same-sex marriages were recorded in 2016, the first full year that same-sex marriage was available.⁵⁸ Of these marriages, 606 were between two men and 450 were between two women.⁵⁹ By contrast, in 2017, 30 percent fewer same-sex marriages were conducted.⁶⁰ When contrasted, clear trends are evident in opposite-sex and same-sex marriages. While almost 65 percent of opposite-sex couples had religious marriage ceremonies, civil marriage ceremonies were by far the most popular form of ceremony for same-sex couples, accounting for 69.4 percent of all same-sex wedding ceremonies.⁶¹ The Humanist Association of Ireland conducted 14.6 percent of same-sex marriages ceremonies, while the Spiritualist Union of Ireland accounted for a further 10.0 percent.⁶²

III. Marriage formalities under Irish law – An overview

It is evident from the foregoing that, in line with the broader reconceptualization of marriage, Irish marriage practice has also changed considerably, facilitated by an evolving legal framework governing the formalities required for entry into marriage. The framework applied by the Civil Registration Act 2004 (as amended) and the policies which underscore its core provisions will now be considered.

The preliminaries for marriage

The Civil Registration Act 2004 (as amended) offers three options for marriage ceremonies; a civil ceremony, conducted by a civil registrar who is employed by the Health Service Executive; a religious ceremony solemnised by a registered solemniser from a religious body; or a secular ceremony solemnised by a registered solemniser from a secular body. Significantly, from the perspective of simplicity, the preliminaries for marriage are the same regardless of what form of ceremony is anticipated.

The 2004 Act did not alter the legal age for marriage which remains at eighteen as provided for by the Family Law Act 1995.⁶³ Moreover, an application may be made to a court for an exemption from the age requirement where it is shown that the grant of such an exemption 'is justified by serious reasons and is in the interests of the parties to the intended marriage'.⁶⁴ However, reform is on the way. Once commenced, section 45 of the Domestic Violence Act 2018 will abolish the potential for such a court exemption. Announcing the introduction of this reform, then Tánaiste Joan Burton and then Minister for Justice Frances Fitzgerald noted that in the period 2004 to 2014, 387 individuals (302 girls and 85

⁵⁸ Same sex marriage legislation came into effect on 16 November 2015. CSO, ‘Marriages and Civil Partnerships 2016’, <http://www.cso.ie/en/releasesandpublications/er/mcp/marriagesandcivilpartnerships2016/> (Accessed 3 April 2018).

⁵⁹ *Ibid.*

⁶⁰ CSO, above n 39.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ Family Law Act 1995, s 31(1). Prior to this, an individual under the age of 21 required parental consent to marry: Marriages (Ireland) Act 1844, ss 9, 19 and 25.

⁶⁴ See s 33(2)(d). Such applications are informal, may be heard and determined otherwise than in public and no court fees are applicable: s 33(2).

boys) aged 16 or 17 had married in Ireland.⁶⁵ The removal of the exemption was thus heralded as a ‘child welfare measure’ which would also protect minors against forced marriage.⁶⁶

The preliminaries for marriage in the 2004 Act centre upon compliance with the formal notice requirements which were also originally introduced in the Family Law Act 1995.⁶⁷ Section 46(1)(a) of the 2004 Act provides that a marriage solemnised in the State, after the commencement of the Act,⁶⁸ between persons of any age shall not be valid in law unless the intending spouses provide written notice of their intention to marry not less than three months prior to the date on which the marriage is to be solemnised.⁶⁹ This notice must be delivered by both parties in person.⁷⁰ The requirement for a three-month formal notice period appears to have built on recommendations for such provision advanced by the Law Reform Commission and sought to put on a statutory basis the ‘cooling off’ period applied by various churches. The reform was welcomed during the legislative debates as a marriage-saving provision with Senator McGennis describing it as ‘a sensible provision’ adding that ‘[t]he best way to reduce the number of marriages which fail is to ensure couples get as good a start as possible.’⁷¹

Having completed this notice period, the parties must attend the registrar’s office again at least five days (or such lesser number of days as may be determined by that registrar) before the date of the marriage ceremony. During this visit, they must make and sign a declaration that there is no impediment to the marriage.⁷² These preliminary requirements are ‘substantive requirements for marriage’,⁷³ meaning that their non-observance will legally invalidate the marriage.

When the registrar is satisfied that these requirements have been complied with, s/he will complete a marriage registration form (MRF)⁷⁴ which will be issued to the intending spouses.⁷⁵ The MRF must

⁶⁵ S Collins, ‘Underage marriages to be banned under new legislation’, *Irish Times* (15 December 2015). Child welfare concerns were also raised in 2013 in the Irish High Court by McMenamin J, see <https://www.rte.ie/news/2013/0618/457280-judge-concerned-over-marriage-age-exemptions/>. The removal of the exemption was supported by Pavee Point, a leading advocacy group for the Traveller Community in Ireland. Its CEO noted that ‘far too many members of my community get married far too young’ and suggested that there was a particular problem in relation to this for the Roma community where individuals get married at ‘an extremely young age’. See A McMahon, ‘Pavee Point supports banning of underage marriage’ *Irish Times* (15 December 2015). However, see also ‘Kelly: Law to stop young people getting married is anti-Travellers’ *The Irish Sun* (15 December 2015).

⁶⁶ Domestic Violence Bill 2017, Second Stage, *Seanad Éireann* (1 March 2017).

⁶⁷ See Family Law Act, s 32(1) for the original provisions.

⁶⁸ On 5 November 2007: Civil Registration Act 2004 (Commencement) Order 2007.

⁶⁹ It is possible to get a court exemption from the notice requirement prior to the marriage under s 47. Such an exemption ‘shall not be granted unless the applicants show that its grant is justified by serious reasons and is in their interests’: s 47(2). In 2001, the Department of Health and Children and the Department of Social, Community and Family Affairs noted that lack of awareness of the three-month notification period resulted ‘a significant number of cases’ requiring a court exemption. Nevertheless, the notification period was carried through to the 2004 Act. See DoHC and the DoSCFA, *Bringing Civil Registration into the 21st Century: a consultation document on the Modernisation of the Civil Registration Service* (Department of Health and Children, 2001), 15.

⁷⁰ Section 46(2).

⁷¹ Family Law Bill 1994: Second Stage, *Seanad Éireann* (9 Feb 1995).

⁷² Section 46(1)(b).

⁷³ Section 46(4).

⁷⁴ Section 48(1).

⁷⁵ Section 48(2).

be presented to the individual who will solemnise the marriage for examination.⁷⁶ Immediately after the solemnisation of a marriage, the MRF must be signed by: (a) each of the parties to the marriage; (b) two witnesses to its solemnisation, and; (c) the person who solemnised the marriage.⁷⁷ The MRF must be returned to the registrar by either of the parties to the marriage within one month of the ceremony.⁷⁸ The registrar will then enter the marriage on the official register.⁷⁹

Marriage ceremonies

In relation to the ceremony itself, there are certain requirements which must be adhered to. First, the marriage must be solemnised by a registered solemniser,⁸⁰ that is, a civil registrar or a nominated member of a religious or secular body who is included on the register of solemnisers.⁸¹ Both parties to the intended marriage must be present,⁸² along with two adult witnesses.⁸³ The solemniser must be satisfied that the parties to a marriage understand the nature of the marriage ceremony and the ceremony must be in a format which is approved by an *tArd-Chláraitheoir* (Registrar General).⁸⁴ Central to an appropriate ceremony format is ensuring that certain declarations are made by each of the parties in the presence of each other,⁸⁵ the solemniser and the witnesses. Both parties must declare that they do not know of any impediment to the marriage and that s/he accepts the other party as his/her spouse.⁸⁶

Finally, the Civil Registration Act 2004 (as amended) modernised the rules governing the venue for a marriage ceremony. Prior to the enactment of the 2004 Act, the rules and procedures regarding venues for marriages were directly related to the types of licences for marriages with the venue for Roman Catholics marriages remaining unregulated by statute. Moreover, civil marriages could only be solemnised in a civil Registry Office which, it was noted, gave rise to 'a considerable number of complaints regarding capacity... location and environment'.⁸⁷ As the then Minister for Social and Family Affairs, Mary Coughlan noted:

'There is a lack of uniformity regarding venues at which marriages may be solemnised and people do not have an equal choice as to the venue for their marriage. This has given rise to unintended discrimination between different denominations and groups in our society... This [reform] is required to cater for the needs of other religious denominations and groups not covered by the legislation. Greater flexibility is needed regarding venues for marriage ceremonies...'⁸⁸

⁷⁶ Section 48(3).

⁷⁷ Section 49(1).

⁷⁸ Section 49(2).

⁷⁹ Section 49(3). Once the marriage is registered, a civil marriage certificate may be issued.

⁸⁰ Section 51(1).

⁸¹ Section 51(3)(c).

⁸² Section 51(2)(a).

⁸³ Section 51(2)(b).

⁸⁴ Section 51(3)(a).

⁸⁵ Section 51(3)(b).

⁸⁶ Section 51(4).

⁸⁷ Civil Registration Bill 2003: Committee Stage (Resumed), *Select Committee on Social and Family Affairs* (4 February 2004), per Minister Mary Coughlan. She added 'The only registrar's office capable of accommodating large numbers is in Dublin and it has a capacity of 60. This has given rise to demand for civil ceremonies in locations other than the registrar's office.'

⁸⁸ *Ibid.*

Today, pursuant to the 2004 Act, there is no concept of a registered venue for marriage ceremonies in Ireland. The base-line requirement is that to be suitable for a marriage ceremony a venue must be a ‘place that is open to the public’.⁸⁹ Apart from this, religious and secular solemnisers are free to choose the venues in which ceremonies will be conducted. For civil marriages, while civil registrars are permitted to solemnise marriages outside of their offices, the rules on the venues they can use are a little more strict, requiring that a venue must be pre-approved. Although the liberalisation of the rules relating to venues has produced an apparently flexible and relatively straightforward framework, as will be discussed below, some uncertainties have arisen about the appropriateness or otherwise of certain types of venue. Significantly, all of the foregoing requirements for a legally valid marriage ceremony are stated to be ‘substantive requirements for marriage’.⁹⁰

Implications of non-compliance with the formalities

Intuitively, it would seem that where a marriage is not solemnised as per the rules above, it would not be legally valid. Under such an interpretation, the parties to this putative marriage would not be entitled to ancillary relief such as maintenance or property division. However, there is a perception amongst Irish family law scholars that it may not necessarily be the case that a breach of marriage formalities will lead to a marriage being declared void. Louise Crowley suggests that although non-compliance with age or notice requirements renders a marriage void (unless the relevant exemptions have been obtained from the courts), ‘[t]he general principle outside these requirements is that the non-observance of or a defect in any of the other prescribed formalities does not invalidate a marriage unless both parties were aware of it at the time of the ceremony’.⁹¹

This understanding would seem to be based upon the case-law prior to the introduction of the 2004 Act. In the 1985 decision of *IE v WE*,⁹² for example, it was held that to invalidate a marriage for non-compliance with formalities, ‘it is necessary to establish not only that there should have been a conscious disregard of [the formalities] but that both parties to the apparent marriage should have been aware of the defect’.⁹³ While this precedent may continue to apply to the formalities regime introduced by the 2004 Act, it is not safe to assume this. What might be called the ‘knowledge rule’ was developed at a time when, as has been mentioned above, the formalities for marriage were notoriously complex. Although the judiciary may have been sympathetic to deviations from the formalities at that time, they may not be so understanding of a failure to comply with what is now, by comparison, a much more accessible and straightforward regime. Further, the general principle suggested by Crowley appears to draw a distinction between the age and notice requirements (described as substantive requirements for marriage) and other formalities. Certainly, the current rules clearly delineate the former as ‘substantive requirements’ for marriage and they are integral and non-negotiable aspects of the process of creating a legally valid marriage. However, these are not the only substantive requirements for marriage under the 2004 Act. Section 51(5) provides that the requirements for marriage ceremonies set out above (i.e. that the ceremony be performed by a registered solemniser, with both parties and witnesses present, in a public venue, where the relevant declarations are made) are also ‘substantive’. Thus, it would seem that the ‘knowledge rule’ should

⁸⁹ Section 51(2A). See further below.

⁹⁰ Section 51(5).

⁹¹ Crowley, above n 3, 58.

⁹² [1985] ILRM 691.

⁹³ *Ibid*, 695. The rule in *IE* was subsequently approved in *DC v NM (falsely known as NC)* [1997] 2 IR 218.

similarly be inapplicable where the ceremony does not comply with these requirements. There is much uncertainty regarding the potential validity of a marriage which does not comply with the formalities established in the regime under the 2004 Act. In the absence of legislative clarification on this point, it is likely that the matter will not be settled until a nullity application based on non-compliance with formalities comes before the courts.

IV. Practical issues arising from liberalisation of Irish marriage law

The traditionally dominant location (the Roman Catholic Church) and the traditionally dominant solemniser (the Roman Catholic priest) now account for just over half of all marriages celebrated in Ireland. Because of this shift, increased pressure has come to bear on certain key liberalising provisions of the Civil Registration Act 2004 (as amended). In particular, the rules governing the appropriate venue for marriage solemnisation and the relative ease with which solemnisers can be registered to legally perform weddings have come under increased scrutiny.

Issue 1: The location requirement

As noted, the 2004 Act (as amended) saw the introduction into Irish law of new regulations regarding the appropriate location for the solemnisation of marriage. Pursuant to section 51(2)(c), the solemnisation of a marriage – whether religious, secular or civil – must take place in a ‘place that is open to the public’.⁹⁴ From the outset, what constituted a ‘public’ place for the purposes of the Act gave rise to confusion. It was unclear, for example, whether marriages could be solemnised outdoors in a place that was open to the public. Following consultation with the Office of the Attorney General, it was confirmed in 2014 that such outdoor venues were permissible.⁹⁵ For the avoidance of doubt, legislation clarified that ‘place that is open to the public’ refers to:

‘(a) a building that is open to the public, or

(b) a courtyard, garden, yard, field or piece of ground that is open to the public and lying near to and usually enjoyed with the building referred to in paragraph (a).’⁹⁶

Thus, a marriage ceremony, whether religious or non-religious, can only take place in a public building or in an area ‘near to’ and ‘usually enjoyed with’ it. Marriages may not be solemnised in a private dwelling or in a garden, courtyard or other piece of ground lying near to and usually enjoyed with it. This restriction of marriage ceremonies to expressly *public* locations was justified by the Department of Social Protection as necessary

‘to protect both parties to the marriage... to avoid the possibility of coercion, fraud or lack of capacity on the part of a party to a marriage, to prevent marriages taking place in secret, and to provide an opportunity for objections’.⁹⁷

⁹⁴ While there was initially a blanket ban on the solemnisation of marriage in private locations, an exemption on health grounds was included in s 51(2)(c) as amended by the Health Act 2007, Pt 5, Sched 2.

⁹⁵ See Department of Social Protection, ‘Department of Social Protection confirms that marriages may be solemnised outdoors in a place open to the public’ (Press Release, 15 July 2014) available at <https://www.welfare.ie/en/pressoffice/pdf/pr150714.pdf>

⁹⁶ CRA 2004 s 51(2)(2A), inserted by CR(A)A 2014.

⁹⁷ *Ibid.*

The requirement that there be a ‘building’ also indicates the need for a fixed structure, seemingly eliminating the possibility, in most cases, of a beach, forest, mountain-top or cliff-side ceremony.

Beyond this ‘public place’ requirement, locations for religious or secular marriages are largely a matter for the religion or secular body concerned.⁹⁸ Civil marriage ceremonies are subject to significantly more rigorous location requirements. If the place chosen for a civil marriage is not the office of the solemniser,⁹⁹ its approval by the Health Service Executive (HSE) is required and, in determining whether to provide approval, the Executive must have regard to such matters as may be specified by the Minister.¹⁰⁰ Relying on this delegated authority, in November 2007 the then Minister for Health published *Guidelines for Marriage Venues* to coincide with the commencement of the Civil Registration Act 2004.¹⁰¹ Pursuant to the 2007 Guidelines, in addition to the aforementioned, ‘public place’ requirement, various other matters were also specified by the Minister. Having regard to its primary use, situation, construction and state of repair, the place in which a marriage may be solemnised must, in the opinion of the registrar, ‘be a seemly and dignified venue’ for the solemnisation of marriages. As well as having ‘adequate capacity’ to accommodate those attending the ceremony, only venues that allow ‘unrestricted public access without charge’ will be considered for approval.¹⁰² The guidelines specify that the place in which a marriage may be solemnised must conform to all the requirements of a public place in relation to fire safety and health and safety, must possess public liability insurance cover and must ensure disability access. The guidelines also stipulate that a location must be ‘clearly identifiable by description and location’. Finally, it is explicitly stipulated that the place in which a civil marriage may be solemnised ‘must have no recent or continuing connection with any religion, religious practice or religious persuasion which would be incompatible with the use of the venue for the solemnisation of civil marriages’.

In light of these restrictions, reports abound of venues failing to secure HSE approval, with the process seen as far from a tick-the-box exercise. While failing on any of the grounds outlined above will be sufficient to see a location rejected, it appears that other factors, not listed, can also prove decisive – albeit that the rationale for such decisions remain obscure. It has been reported, for example, that a venue failed the HSE civil ceremony criteria due to the lack of a landline phone.¹⁰³

Nevertheless, a significant share of civil ceremonies are taking place in locations other than the Registry Office. Venues such as the National Gallery of Ireland,¹⁰⁴ Smock Alley Theatre,¹⁰⁵ Dublin

⁹⁸ The responsibility for ensuring that the venue meets the requirements of the legislation – and the religious or secular marriage is valid – rests with the registered solemniser.

⁹⁹ Or place referred to in s 51(2) of the 2004 Act (as amended).

¹⁰⁰ See s 52(1) (as amended). Note, separate approval is required for each civil ceremony. Whether a new inspection of the premises is required where a venue has previously been approved is at the discretion of the Superintendent General for the district.

¹⁰¹ These guidelines were produced by Minister for State the Department of Social Protection on 29 May 2015. They are reproduced at https://www.welfare.ie/en/Pages/Getting_Married.aspx#sect2 (Accessed 3 July 2018).

¹⁰² This requirement is to be subject to normal security and health and safety considerations.

¹⁰³ As reported in ‘Not going to the Chapel? You can have your wedding by the sea, or in Croke Park’, *Irish Independent* (19 February 2017).

¹⁰⁴ <https://www.nationalgallery.ie/what-we-do/civil-ceremonies-national-gallery-ireland> (Accessed 3 July 2018).

¹⁰⁵ <http://smockalley.com/weddings-at-smock-alley/> (Accessed 3 July 2018).

Zoo,¹⁰⁶ Croke Park,¹⁰⁷ Blackrock Castle Observatory,¹⁰⁸ the National Maritime Museum of Ireland¹⁰⁹ and many hundreds of hotels and other buildings now offer alternative venues for civil ceremonies.¹¹⁰ Drawing on the data provided by the Registrar General’s Annual Reports, it seems that following the liberalisation of the rules regarding venues for civil ceremonies in late 2007, civil marriage ceremonies taking place in HSE-approved venues grew year on year from 15 percent in 2008 to 37 percent in 2012.¹¹¹ Since then, however, the percentage share has dropped back with 32-33 percent of civil marriage ceremonies recorded as taking place in HSE-approved venues in 2014-16.¹¹² While purely speculative, this trend may be linked to the legalisation of secular marriages in the latter half of 2012 and the seemingly greater freedom afforded to secular bodies vis-à-vis location than is accorded to civil ceremonies.¹¹³

Given the complexity of the law in this area – compounded by the various amendments to the principal Act – there remains some confusion about marriage formalities in Ireland. A number of websites carry inaccurate information on the venue requirements, particularly for secular (specifically Humanist) as well as for civil and religious, non-church based, wedding ceremonies.¹¹⁴ Greater awareness of the precise requirements and more easily accessible information would appear to be badly needed. Although, as considered above, unwittingly marrying in a venue that does not meet the minimum requirements laid down in the 2004 Act may not *necessarily* invalidate a marriage, the lack of clarity in relation to the law in this area means it remains a distinct possibility that such a marriage would be held void.

Issue 2: Professional Standards and Training of Registered Solemnisers

Similar to the liberalisation of the rules relating to location, the 2004 Act also introduced the flexible concept of a ‘registered solemniser’, which includes a broad category of individuals from very different organisations. Necessarily, these individuals will have varying levels of training and experience of marriage solemnisation. Consequently, it is possible that some solemnisers, although registered, may not be fully versed in all of the requirements for a legally valid marriage. Since there are three categories of wedding ceremony (civil, religious and secular), there are obviously three categories of solemniser. It is noteworthy that in an Irish context, the word ‘celebrant’ is sometimes used

¹⁰⁶ <https://www.dublinozoo.ie/164/Wedding-Ceremonies.aspx> (Accessed 3 July 2018).

¹⁰⁷ <https://crokepark.ie/meetings-events/spaces/space-listing?type=Weddings&&maxnum=10000000&minnum=0#results> (Accessed 3 July 2018).

¹⁰⁸ <https://www.bco.ie/about/venue-hire/weddings-at-the-castle/> (Accessed 3 July 2018).

¹⁰⁹ <http://www.mariner.ie/civil-marriage-civil-partnership-ceremony-venue/> (Accessed 3 July 2018).

¹¹⁰ Interestingly, although a number of venues market themselves as ‘licensed for civil weddings’, this is in fact no ‘licence’ given to venues under the 2004 Act. Each venue must be ‘approved’ separately for each wedding undertaken.

¹¹¹ 2013 Registrar General Annual Report, [40] available at <https://www.welfare.ie/en/downloads/Registrar-General-Report-2013.pdf> (Accessed 2 April 2018). The burdens this placed on the system were alluded to at [41]: ‘It should be noted that solemnisation of marriages at outside venues is very time-consuming...’

¹¹² *Ibid.*

¹¹³ This hypothesis is made in light of the relative market share in Ireland for non-religious marriage ceremonies, see above. The location for secular marriages is a matter for the secular body provided it meets the ‘public’ location requirement.

¹¹⁴ See for ‘Not going to the Chapel? You can have your wedding by the sea, or in Croke Park’, *Irish Independent* (19 February 2017) where it (wrongly) suggests Humanist (secular) or Spiritualist (religious) ceremonies need to take place in a HSE-approved venue. However, it is noteworthy that the misinformation in this example actually sets the location bar higher in most cases than is legislatively mandated for religious or secular ceremonies.

interchangeably with ‘solemniser’. However, it is important to distinguish between registered solemnisers who may solemnise legally valid marriages and celebrants who do not have such power. This distinction is particularly important in recent times with the emergence of the Institute of Irish Celebrants (IIOC) which trains individuals to celebrate marriages. However, such training does not qualify them to complete the requirements for a legal marriage. Individuals who use such celebrants for their ceremony must complete the legal requirements separately with a civil registrar.¹¹⁵

It would appear safe to assume that civil registrars who are nominated and employed by the HSE are centrally trained and that there should be no issues regarding to their capacity to ensure that a marriage ceremony satisfies all of the relevant legal requirements.¹¹⁶ Conversely, religious and secular solemnisers hail from a variety of different organisations.¹¹⁷ These solemnisers are nominated by the relevant religious or secular body. They cannot self-nominate and the nomination must be approved by the Registrar General.¹¹⁸ However, the internal training process which occurs before an individual is nominated as a solemniser by a religious or secular body is likely to vary depending upon the individual body concerned.

In an article in the *Irish Times* in 2016, the Registrar General expressed concern that religious bodies are not required by law to have training and accreditation procedures, noting that ‘there is a concern that the quality assurance provided by training and accreditation may not be present in some cases’.¹¹⁹ This concern is especially relevant for smaller religious organisations who have nominated individuals for inclusion on the list of registered solemnisers. Section 45 of the Civil Registration Act 2004 (as amended) defines a ‘religious body’ as ‘an organised group of people members of which meet regularly for common religious worship’. Responding to concerns raised about the breadth of the definition, the then Minister for Social and Family Affairs, Mary Coughlan, explained: ‘Those wishing to become solemnisers must comply with the law. If not, the [Registrar General] will not register them or will remove them from the register. *We cannot discriminate against religion*’.¹²⁰ In keeping with this position, documents made available to the authors by the General Registrar demonstrate that the process of being recognised as a religion for the purposes of nominating a solemniser for the register is not unduly onerous. In order for this to occur, the body must provide details of its constitution (including a description of the organisation structure), a brief description of the belief system of the body, confirmation of registration as a charity (if applicable), a copy of the credentials of the nominee,

¹¹⁵ A group called ‘Marry Me Ireland’ emerged in Ireland which offers non-religious, semi-religious, mixed faith and spiritual ceremonies. However, these ceremonies are just ceremonial. They do not give rise to legal marriages, couples being advised to complete the legal requirements for a valid marriage separately at the office of the registrar. See <http://www.marrymeireland.ie>. On their website, Marry Me Ireland report that they are lobbying the Government to be given the power to legally solemnize marriages: <http://www.marrymeireland.ie/faqs/> (Accessed 3 April 2018).

¹¹⁶ Information is not publicly available about the training process for civil registrars who are registered solemnisers.

¹¹⁷ As noted above, there are currently over 100 religious bodies included in the register of solemnisers. See: <https://www.welfare.ie/en/downloads/RegisterOfSolemnisers.pdf> (Accessed 2 May 2018)

¹¹⁸ It is not clear what this approval process entails (ie whether it is a largely ‘tick the box’ exercise or whether criteria are applied to determine suitability and qualifications).

¹¹⁹ K Holland, ‘Concern mounts that hundreds of marriages may be invalid’, *Irish Times* (16 June 2016).

¹²⁰ See Civil Registration Bill 2003: Committee Stage (Resumed), *Select Committee on Social and Family Affairs* (4 February 2004) (emphasis added).

and a certificate to the effect that the form of marriage ceremony complies with the legal requirements for a valid marriage.

Unsurprisingly in this context, a large number of smaller religions appear to have secured recognition with over 100 religious bodies recorded on the register of bodies authorised to solemnise marriages published by the General Register Office.¹²¹ Similarly, there are a significant number of religions represented on the register of solemnisers, many with only one solemniser registered. While the volume of marriages solemnised individually by these minority religions remains unclear, cumulatively they appear to be playing a potentially important role in marriage solemnisation. As noted above, marriage ceremonies conducted by ‘other religions’ – that is, other than by the Catholic Church, the Church of Ireland or the Spiritualist Union of Ireland – have seen a steady growth in recent times. However, the last report to provide detail on marriage ceremonies conducted by the ‘six most common religious bodies’ in Ireland in 2013 – namely the Roman Catholic Church, Church of Ireland, Presbyterian Church, Jehovah’s Witness, Methodist Church and the Islamic Community – seemed to show modest, if any, gains for the minority religions detailed.¹²² In this context, it would seem that at least some of the gains in this category may be attributed to many small, newly recognised, religions for whom little information appears publicly available.¹²³

Concerns naturally arise about the quality of the training and approach to solemnisation which can be offered within these smaller religions, such solemnisers inevitably having far less experience than those from the larger religious bodies (eg Roman Catholic or Church of Ireland) who have a long tradition of solemnising marriages in Ireland and an awareness of the requirements for a legal marriage. Without reported cases on the issue, it again remains unclear what precise impact failure to meet all the formalities set out in the 2004 Act will have. The risk of a marriage failing to meet the minimum requirements (particularly, perhaps, in relation to the required format of the marriage ceremony), however, would appear to be amplified where a marriage ceremony is celebrated by an untrained or under-trained solemniser.¹²⁴

A similar concern may also be expressed about solemnisers from secular bodies, although for the purposes of 2004 Act, a more robust definition of secular body is provided. A secular body must have at least 50 members, have been in existence for a continuous period of at least 5 years and its principal objects must be secular, ethical and humanist.¹²⁵ The definition provides that the members of the body must meet regularly in relation to their beliefs and in furtherance of these objects and must not have any rules regarding marriage or the solemnisation of marriages that contravene the requirements of the 2004 Act or any other enactment or rule of law. The body must maintain a register of its members, have secured charitable status for tax purposes and not have, as one of its principal objects, the making of profit. Crucially, in the context of training and standards, the definition for a

¹²¹ See <http://www.welfare.ie/en/pressoffice/pdf/bodiesauthorisedtosolemisemarriage.pdf> (Accessed 3 April 2017). However, note, despite enquiries by the authors it is unknown when this list was last officially updated. Moreover, it appears there is no statutory basis for the existence of such a register.

¹²² Although Islam is one of the fastest growing religions in Ireland, the number of Islamic marriages registered is very low and seemingly somewhat erratic, see S Leahy and K O’Sullivan, ‘Recognition of Muslim Marriage Ceremonies in Ireland: An Analysis’ (forthcoming).

¹²³ Issues regarding the validity of marriages conducted by some solemnisers from minority religions has raised concern as will be detailed below.

¹²⁴ This fear was raised by senior officials in the Department for Social Protection in 2016, see K Holland, ‘Concern mounts that hundreds of marriages may be invalid’, *Irish Times* (16 June 2016).

¹²⁵ CRA 2004, s 45A (inserted by Civil Registration (Amendment) Act 2012, s 3).

secular body provides that it must be shown to the satisfaction of the Registrar General that it has appropriate procedures in writing for selecting, training and accrediting members as fit and proper persons to solemnise marriages.¹²⁶

As mentioned above, to date, the Humanist Association of Ireland (HAI) remains the primary secular group which has nominated individuals for inclusion on the register of solemnisers, with 30 or so registered at present.¹²⁷ The website of the HAI details a relatively robust process for selection and training of solemnisers, which specifically mentions the need to be cognisant of the requirements for a legally valid marriage.¹²⁸ However, it is likely that other secular bodies will be established in the future and, without a centralised training or accreditation process, similar concerns may arise about the level of training and experience which registered solemnisers in those bodies might have. Consequently, to ensure best practice and consistency in the training and accreditation of all registered solemnisers, it is necessary to consider a centralised process for training and a more formal accreditation process. Further, some impetus should be put on organisations such as the IIOC which train celebrants to make sure that those couples who use celebrants are fully aware of the need to complete the legal formalities separately if they are to be legally married.¹²⁹

V: Immigration and Protection for the Institution of Marriage in Ireland

This article has sought to demonstrate the way in which Irish marriage law, policy and the conception of marriage itself has evolved over the past three decades in response, in particular, to changing social, religious and cultural norms. While the declining influence of the Roman Catholic Church and the corresponding rise in secularism have been two of the most important factors in driving this change, increased multiculturalism has also, arguably, played an important role. Although, as Scharbrodt notes, it is ‘simplistic’ to suggest that the Celtic Tiger years of 1995-2008 were a ‘watershed period’ turning a culturally homogenous Ireland into a multicultural society,¹³⁰ since the mid-1990s, in particular, Irish society has become much more diverse from an ethnic, religious and cultural perspective. In some areas of Irish law, a State policy of encouraging integration or accommodation of newly emerging minority religions and cultures seems apparent.¹³¹ Having regard, in particular, to the special protection afforded to the institution of marriage, however, a much more cautious approach is adopted in recognising and regulated marriages in the context of immigration.

An Irish response to polygamous marriage

Pursuant to the principle of *lex loci celebrationis*, where a marriage is contracted in a foreign country and complies with the laws of that country, *unless it conflicts with fundamental requirements relating to validity* (for example, the domicile of the parties or public policy), Irish law will recognise that marriage. However, public policy and constitutional arguments centring on the capacity to marry and

¹²⁶ See s 45A(2) for a list of what does not constitute a secular body.

¹²⁷ Only one other secular solemniser is recognised, namely a representative of Aisling Arann Teoranta.

¹²⁸ See <https://www.humanism.ie/ceremonies-2/becoming-a-celebrant/> (Accessed 3 May 2018).

¹²⁹ In this respect, it is notable that there is presently an offence pursuant to CRA 2004, s 69(10)(b), which applies where a person who is not a registered solemniser or the holder of a temporary authorisation to conduct a marriage ceremony in such a way as to lead the parties to the marriage to believe that he or she is solemnising a valid marriage.

¹³⁰ O Scharbrodt, ‘Introduction’ in O Scharbrodt et al (eds), *Muslims Past and Present* (Edinburgh University Press 2015), 5.

¹³¹ For example, the Burial Ground (Amendment) Regulations 2013 introduced to better facilitate traditional Islamic burial customs.

the need to protect the institution of marriage, were long invoked in Ireland to prevent recognition of both actually *and* potentially polygamous marriages.¹³² The landmark 2017 decision of the Supreme Court in *HAH v SAA & ors* has, however, confirmed, for the first time, that a *potentially* polygamous marriage is capable of being recognised as legally valid in Ireland.¹³³ This recognition is, moreover, not lost or withdrawn if the husband contracts a further marriage.¹³⁴ In reaching its conclusion, the court held there were ‘significant practical policy disadvantages in denying recognition to such marriages’.¹³⁵ To withhold such recognition, ‘would be likely to cause distress, disruption and confusion amongst a significant number of people living in the Irish community’ without any ‘corresponding gain in terms of the protection of marriage’.¹³⁶ Albeit *obiter*, the court also expressed its view on *actually* polygamous marriages. Despite concluding that an actually polygamous marriage could not be recognised as valid in Irish law,¹³⁷ the court nevertheless added that ‘this does not necessarily mean that such a marriage can never have legal consequences.’¹³⁸ How this will be interpreted going forward remains to be seen, however, the decision does represent another important milestone in the evolution of the concept of marriage under Irish law.

The threat of ‘marriages of convenience’

The perceived emerging threat of so-called ‘marriages of convenience’ or ‘sham marriages’ has also attracted increased attention and has been a dedicated focus of An Garda Síochána since the establishment of Operation Vantage in August 2015. This operation was established by the Garda National Immigration Bureau (GNIB) to identify marriages of convenience and investigate illegal immigration. Legislative measures to tackle marriages of convenience were introduced by the Civil Registration (Amendment) Act 2014.¹³⁹ A ‘marriage of convenience’ is defined as ‘a marriage where at least one of the parties to the marriage (a) at the time of the marriage is a foreign national, and (b) enters into the marriage solely for the purpose of securing an immigration advantage for at least one of the parties to the marriage.’¹⁴⁰ The 2014 Act gave registrars the power to object to marriages which they believe are marriages of convenience. Under its provisions, a registrar who forms the opinion that an intended marriage would constitute a marriage of convenience, or receives an objection to the marriage based on an allegation that the marriage is one of convenience,¹⁴¹ and forms the opinion that grounds for the objection possibly exist and need to be investigated, must refer the matter to the Superintendent Registrar in his/her registration area. The registrar must provide his/her written

¹³² See M Ní Shuilleabháin, ‘Marriage, Divorce and Stagnation in the Irish Conflict of Laws’ (2014) 52(2) *Irish Jurist* 68. This judicial conservatism was in keeping with the approach of the courts in many areas of Irish family law and policy. Seminal judgments include *McGee v The Attorney General* [1974] IR 284 and *Murphy v The Attorney General* [1982] IR 241.

¹³³ [2017] IESC 40.

¹³⁴ *Ibid*, [110]-[111].

¹³⁵ *Ibid*, [106]. The court also noted ‘it does not appear that there are many instances of actually polygamous households in this State’.

¹³⁶ *Ibid*, [121].

¹³⁷ *Ibid*. The court noted at [113] ‘marriage, as far as the Constitution is concerned, must in all cases be seen as a union between two people.’

¹³⁸ *Ibid* at [121]. The Department of Justice appear to be considering legislative intervention on the issue: C Kenna, ‘Call for legal clarity on rights of polygamous families’, *Irish Times* (16 June 2017).

¹³⁹ This Act, which amended the 2004 Act, became operative on 18 August 2015.

¹⁴⁰ CRA 2004, s 2 (inserted by CR(A)A 2014, s 3.

¹⁴¹ Such objections are often made by Gardaí working as part of Operation Vantage.

report of the reasons for the forming of his/her opinion. In forming this opinion and deciding to refer the matter to the Superintendent Registrar, the registrar must consider the following:¹⁴²

- (a) if the intending spouses speak a common language;
- (b) the period prior to the relevant notification of the intended marriage during which the intending spouses are known to each other;
- (c) the number and frequency of meetings of the intending spouses prior to the notification of the intended marriage;
- (d) if the intending spouses have lived together in the past or if they currently live together;
- (e) the extent to which the intending spouses are familiar with each other’s personal details;
- (f) the extent to which the intending spouses intend to continue an existing commitment to mutual emotional and financial support of each other;
- (g) the immigration status of one or each of the parties who is a foreign national;
- (h) other than in a case where money is paid as a dowry as appropriate to the culture of one or each of the intending spouses, if money was paid as an inducement for the marriage;
- (i) if the one or each of the intending spouses has previously been the subject of an objection;
- (j) any other information regarding the intended marriage which gives reasonable grounds for considering the marriage to be a marriage of convenience.¹⁴³

Although the Act is not specific on this point, it would seem that in order to form his/her opinion, the registrar is entitled to ask these questions and to obtain answers from a couple in order to satisfy him/herself where the intended marriage is a marriage of convenience.¹⁴⁴ When deciding whether the marriage is a one of convenience, the Superintendent Registrar must consider the report provided by the registrar, as well as the criteria listed above.¹⁴⁵ If the Superintendent Registrar decides that the proposed marriage would be one of convenience, s/he must notify the Minister for Justice as soon as is practicable.¹⁴⁶

In introducing the provisions to prevent marriages of convenience, there were, of course, concerns to ensure that individuals’ right to marry under the Irish Constitution and under Article 8 ECHR - as well as the right to free movement within the EU - were not interfered with. However, the importance of preventing criminal activity such as trafficking and other gang-related activity which is associated with such marriages of convenience justify intervention in this area.¹⁴⁷ Furthermore, as noted by the then Tánaiste and Minister for Social Protection Joan Burton, ‘Our duty under the Constitution is to protect the institution of marriage and we aim to do this by introducing legislation which makes it more

¹⁴² The information with which to consider these factors will typically be gleaned during the mandatory interview which couples must complete with the registrar when a marriage involves a non-Irish EU citizen and an individual from outside of the EU. Irish citizens marrying non-EU citizens must also sit such an interview.

¹⁴³ Section 4C (inserted by CR(A)A 2014, s 18(c)).

¹⁴⁴ This power is supported by the fact that the provision of false or misleading information to a civil registrar is an offence: CRA 2004, s 69(3). A person guilty of such an offence shall be liable (a) on summary conviction, to a fine not exceeding €2,000 or imprisonment for a term not exceeding 6 months or both, or (b) on conviction on indictment, to a fine not exceeding €10,000 or imprisonment for a term not exceeding 5 years or both: s 70(1).

¹⁴⁵ CRA 2004, s 5A (inserted by CR(A)A 2014, s 18(c)).

¹⁴⁶ CRA, s 7A (inserted by CR(A)A 2014, s 18(e)).

¹⁴⁷ See Civil Registration (Amendment) Bill 2014: Second Stage, Seanad Debates (15 July 2014)

difficult to broker a marriage of convenience in the State.¹⁴⁸ The limits provided for in the legislation represent a proportionate response in this regard and genuine marriages should easily satisfy the requirements listed above. The marriage is investigated by a qualified registrar, with oversight from the Superintendent Registrar. Further, an appeal to the Circuit Court is available for couples who feel that their marriage has incorrectly been flagged as one of convenience.¹⁴⁹ Thus, although these new provisions place an additional burden on certain couples, they are not unduly restrictive and should not raise undue concerns about discrimination.

Indeed, the need for the new rules is clear from the fact that a significant number of potential marriages of convenience have been identified by Operation Vantage since the enactment of the 2014 provisions. On 25 November 2015, just a few months after the legislation had become operative, Operation Vantage released a statement¹⁵⁰ to the effect that 55 formal objections to pending marriages had been made through the operation and 22 people had been arrested and charged for offences of provision of false information to the Registrar¹⁵¹ and custody or control of a false instrument.¹⁵² A further 30 marriages between EU and non-EU nationals had not proceeded as both parties failed to present themselves for the ceremony after Gardaí had made enquiries about the intended marriages. More recently, in April 2018, newspaper reports revealed that GNIB officers in Ireland had discovered a criminal network which had organised more than 2,100 marriages of convenience between non-EU males and non-Irish female EU citizens in the period 2011 to 2015. These marriages were reported to have generated up to €20 million for the criminal gangs involved, each marriage costing between €15,000 and €20,000.¹⁵³ The *Annual Report of the Register General for 2016* suggests that the 2014 Act has been successful in tackling marriages of convenience.¹⁵⁴ In 2016, 416 marriages involving a non-Irish EU national and a non-EU national were registered in Ireland.¹⁵⁵ In 2014, this figure was 1,163.¹⁵⁶ Only 59 percent of notices of intention to marry involving a non-Irish EU national and a non-EU national resulted in registered marriages.¹⁵⁷ Drawing on these figures, the Report concludes that the measures in the 2014 Act ‘has obviously had a significant impact’.¹⁵⁸

Forced marriage under Irish law

Finally, responding to a lacuna in Irish law, the offence of forced marriage has recently been included in the Domestic Violence Act 2018. Section 38(1) provides that a person commits an offence where

¹⁴⁸ Ibid.

¹⁴⁹ However, notably, a couple in 2017 requested a judicial review of a refusal to allow them to marry as it was believed their marriage was a sham. They were unable to take an action in the Circuit Court as they had insufficient information on the refusal, see M Carolan, ‘Couple challenge registrar’s refusal to allow them to marry’, *Irish Times* (22 May 2017).

¹⁵⁰ An Garda Síochána, ‘Operation Vantage - Investigation into Sham Marriages and Immigration Issues’, available at: <https://www.garda.ie/en/About-Us/Our-Departments/Office-of-Corporate-Communications/Press-Releases/2015/November/Operation-Vantage-Investigation-into-Sham-Marriages-and-Immigration-Issues.html> (Accessed 13 May 2018).

¹⁵¹ CRA 2004, s 69(3).

¹⁵² Criminal Justice (Theft and Fraud Offences) Act 2001, s 29. A false instrument includes a passport.

¹⁵³ P Williams, ‘Probe into Irish-based marriage scam being used to obtain EU residency for illegal immigrants’, *Irish Independent* (29 April 2018).

¹⁵⁴ See <https://www.welfare.ie/en/downloads/Register-General-Report-2016.pdf> (Accessed 5 July 2018), [30].

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid, [31].

s/he engages in ‘relevant conduct’ for the purpose of causing another person to enter into a ceremony of marriage.¹⁵⁹ ‘Relevant conduct’ means violence, threats, undue influence or any form of coercion or duress.¹⁶⁰ The penalty on summary conviction for this offence is a class A fine or a term of imprisonment up to 12 months or both. The penalty on conviction on indictment is a fine or a maximum term of imprisonment of 7 years, or both. Moreover, in an apparent nod to the specific threat which prompted the legislative initiative in the area, namely that arising from our increasingly multicultural society, the legislation also protects against the threat of an adult or a child being removed or lured from Ireland to another territory and forced to enter into a marriage.¹⁶¹ Although there is no data on the extent to which forced marriage may be a problem in Ireland, the introduction of this new offence is to be welcomed.¹⁶² That said, however, legislative intervention on its own is not sufficient to tackle forced marriage. As Soweby notes, effectively tackling forced marriage requires preventative and protective strategies, as well as empirical research to fully understand how the phenomenon is operating within a particular jurisdiction.¹⁶³ Whether such a pro-active and reflective approach will be adopted in an Irish context remains unclear.

Conclusion

Marriage in Ireland has changed almost beyond recognition in the last quarter of a century. While Irish marriage law and jurisprudence was for much of the twentieth Century sculpted by Catholic social teaching, this is no longer the case. The rapid evolution of Irish society and its marriage law, in particular over the past 30 years, is striking.¹⁶⁴ Reflecting the changing concept of marriage, Irish marriage practice has evolved considerably, facilitated, in particular, by the liberalisation of marriage formalities.

Throughout this period, cognisant of the ‘special care’ afforded to marriage under the Irish constitution, Government policy sought to ensure that while marriage was being reconceptualised it did not lose its primacy. Following the introduction of divorce in Ireland, as McGowan explains,

‘the Irish government moved resolutely away from moral conceptualisations of relationship and family life, calling instead on rational, sociological and statistical information in its decision making process. This did not, however, result in a devaluing of marriage, rather it facilitated the re-definition of marriage as a rationally, as opposed to morally, optimal relationship form...¹⁶⁵

¹⁵⁹ For the purposes of the section, ‘ceremony of marriage’ means any religious, civil or secular ceremony of marriage, whether legally binding or not: s 38(11).

¹⁶⁰ Section 38(11).

¹⁶¹ Section 38(2).

¹⁶² For a discussion of the desirability of criminal, as opposed to civil responses to forced marriage, see K Quek, ‘A civil rather than a criminal offence? Forced Marriage, Harm and the Politics of Multiculturalism in the UK’ (2013) 15(4) *British Journal of Politics and International Relations* 626. See also the reform of age limits, discussed above.

¹⁶³ H Soweby, ‘From an emic perspective: Exploring consent in forced marriage law’ (2018) 51(2) *Australian and New Zealand Journal of Criminology* 258.

¹⁶⁴ However, note, not all areas of Irish marriage law have seen legislative intervention. Despite repeated calls for reform, rules governing the prohibited degrees of relationship remain outdated, see Harding (2012), above n 3, 78.

¹⁶⁵ McGowan (2015), above n 3, 29-30.

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Indeed, marriage as an institution still holds an important space in the public consciousness. As Connolly notes, although alternatives to traditional marriage such as cohabitation have significantly increased among the younger generations particularly, 'they are not even remotely close to replacing traditional marriage as a basis for family formation, as has been the trend in some other European countries'.¹⁶⁶

As we look to the future, it is clear that although marriage law and policy in Ireland has undergone profound change and modernisation, issues remain which require further attention. Whether in determining the precise implications of non-compliance with the formalities required for entry into a valid marriage or in addressing the inevitable issues which will arise with increased immigration, important questions will have to be answered. Given the co-existence of increased religious plurality and increased secularism, questions may also be raised as to the fundamental appropriateness of the regime applied in Ireland which places such an important responsibility in the hands of ever more diverse religious, secular and civil bodies. It will be interesting to see how the arms of government respond and what direction Irish marriage law takes over the coming years.

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¹⁶⁶ Connolly, above n 9, 34.