Introduction

The appropriateness or otherwise of the law governing entry into marriage in England and Wales has come under ever increasing scrutiny in recent times. Much of this focus arises, in particular, from concerns over the apparent proliferation of unrecognised – so-called ‘nikah-only’ – Muslim marriages in the jurisdiction. Reflecting the conclusions of the Law Commission for England and Wales (see Getting Married [2015]), Probert notes, ‘[i]t is widely agreed that the current law of marriage is outdated, overly complex, unfair, and ineffective’ (‘Criminalising non-compliance with marriage formalities’ [2018] 48 Fam Law 702). The need for urgent law reform adopting a more modern and streamlined approach to the regulation of marriage appears undeniable.

In this context, seemingly strong support has emerged for the introduction of an officiant-based system of marriage regulation. While the current approach places significant emphasis on the location of a marriage ceremony (which must be registered), an officiant-based system shifts the focus of regulation onto the solemniser. Early backing for such reform was observed by the HMSO in its 2003 report, Civil Registration: Delivering Vital Change. Since then, Warraich and Balchin (Recognising the Unrecognised: Inter-Country Cases and Muslim Marriages & Divorces in Britain [2006] 92), Eekelaar (‘Marriage, religion and gender equality’ in Banda and Fishbayn Joffe (eds), Women’s Rights and Religious Law [Routledge 2016]), Nash (‘Sharia in England: The Marriage Law Solution’ (2017) 6(3) Ox. J of Law & Rel 523) and this author (with Jackson, ‘Muslim marriage (non) recognition: implications and possible solutions’ [2017] 39(1) J of Soc Wel and Fam Law 22) have all lent their support for such reform.

In advocating for an officiant-based system, reference is often made to the apparent success of such regulation in Scotland, where, as Vora highlights, ‘no issues of unregistered Muslim marriage ... have been reported’ (‘Unregistered Muslim Marriages in England and Wales: The Issue of Discrimination through “Non-Marriage” Declaration’ in Suleiman and Anderson (eds), Muslims in the UK and Europe II [Cambridge University Press, 2016] 140–41). Meanwhile, however, despite also adopting an officiant-based system for over a decade, Irish marriage law has attracted minimal attention to date. Conscious of the focus on such officiant-based systems and the lack of consideration afforded thus far in academic discourse to the Irish experience, this paper seeks to briefly highlight certain features of the law in Ireland and its success or otherwise in facilitating the recognition of Muslim marriages in the jurisdiction. It considers how subtle nuances of the regimes in Scotland and Ireland may account for the seemingly disparate experiences of the two jurisdictions.
Marriage Formalities under Irish Law

Pursuant to the Civil Registration Act 2004 (as amended), three distinct types of marriage ceremony are recognised in Ireland: civil ceremonies, religious ceremonies and secular ceremonies (see Leahy and O’Sullivan ‘Changing Conceptions of Marriage in Ireland: Law and Practice’ [2018] 30(3) CFLQ279). Where age and notice requirements are met, the registrar will complete a marriage registration form (MRF) which is issued to the intending couple who, in turn, must present it for examination to the individual who will solemnise the marriage. Once the marriage ceremony is completed and the required signatures are furnished, the MRF must be returned to the registrar by either one of the parties to the marriage. The registrar will then enter the marriage on the official register.

In relation to religious ceremonies, further conditions apply for a marriage to be legally recognised. While a venue for a religious marriage does not have to be registered with or approved by the civil authorities, solemnisation must take place in a suitable venue, specifically, a ‘place that is open to the public’ (section 51(2A)). The marriage must, moreover, be solemnised by a registered solemniser (section 51(1)), namely a nominated member of a religious body whose name is included on the Register of Solemnisers (section 51(3)(c)). Temporary authorisation to solemnise a religious marriage is also available (section 57).

Given the similarities between this approach to marriage regulation and that advocated for in England and Wales, it is worthwhile to consider how effective the Irish approach has been in facilitating Muslim marriage recognition to date.

Muslim Marriage Statistics in Ireland

Notwithstanding that the Muslim community in Ireland remains relatively small, Islam now represents the third largest religion in the state. Having grown dramatically over the past 20-30 years, the latest official census recorded 63,443 Muslims in Ireland in 2016, representing 1.3 per cent of the population and almost double that recorded just 10 years earlier (Central Statistics Office, Census of Population 2016 – Profile 8 Irish Travellers, Ethnicity and Religion; for more see Leahy and O’Sullivan, ‘Recognition of Muslim Marriages Ceremonies in Ireland: An Analysis’ in O’Sullivan (ed) Minority Religions under Irish Law: Islam in National and International Context [Brill, 2019] 108).

Yet despite this growth – and the young demographic of the Muslim community in Ireland (the average age of Muslims in 2016 was just 26.0 years, much less than the State average of 37.4 years) – the number of Muslim marriages registered in the jurisdiction remains very low. While initial statistics from 2012-2015 appeared to show an upward trend in registration, rising from 28 Muslim marriages in 2012 to a modest peak of 89 in 2015, these figures have collapsed dramatically in the interim with a mere 22 Muslim marriages registered in 2016. In 2017, this figure fell even further to just 14 marriages before rebounding slightly in 2018 to 21 (CSO: on enquiry).

Indeed, further examination of the engagement of the Muslim community with the now well established legislation raises even more cause for concern. Notwithstanding that an officiant-based scheme has been in force since 2007, it nevertheless appears that less than 15% of all imams in Ireland are registered on the official Register of Solemnisers. While 35 imams seem to be affiliated with the Irish Council of Imams, the official Register of Solemnisers records only five registered imams in the jurisdiction. To put these statistics in context, while approximately half the Muslim community in Ireland live in County Dublin (as per Census 2016), only two imams are recorded as registered
solemnisers for this district (for more see Leahy and O’Sullivan, ‘Unregistered Muslim Marriage in Ireland: Incidence and Implications’ (forthcoming)). Admittedly, the 2004 legislation (as amended) does open the door to members of the Islamic community other than imams to secure temporary authorisation to solemnise specified marriages or marriages undertaken within a specific period of time (section 57). Despite this, however, the ability to access such temporary authorisation does little to diminish the concern raised at the low representation of the Muslim community on the Register of Solemnisers, particularly when viewed in the context of such a low Muslim marriage registration rate.

Possible Explanations for the Irish Experience?

Various possible explanations for these statistics may be advanced. It may be suggested that there is an innate preference towards civil marriage ceremonies within the Muslim community in Ireland, hence the lack of demand for registered solemnisers and the low representation from the community in official religious marriage statistics. If this is the case, any further analysis seeking to problematise the Irish context (or legislation) would be misconceived. However, although no empirical evidence exists to confirm or deny this potential hypothesis, such distinctive behaviour in an Irish context would appear to be very much at odds with the trends noted among Muslim communities in various other common law jurisdictions. It would appear rather more likely that certain nuances of the Irish legislation may have influenced the behaviour evidenced, disincentivising representatives from the Muslim community to register as official solemnisers and indirectly forcing couples into securing recognition for their Muslim marriage with a separate civil ceremony (if at all). To this end, two particular aspects of Irish marriage law emerge as possible contributing factors.

- Criminal sanctions

First, placing a relatively onerous obligation on registered solemnisers to ensure that the relevant formalities are followed, section 69(10)(c) of the 2004 Act (as amended) states it is an offence for a person who is a registered solemniser to solemnise a marriage without a MRF having been given to him/her before the solemnisation for examination. Further offences are listed throughout subsection 10 and include solemnising a marriage where the location (section 69(10)(e)) or notification (section 69(10)(f)) requirements have not been met. Pursuant to section 70(2), a person guilty of an offence under section 69(10) shall be liable on summary conviction to a fine not exceeding €2,000 or imprisonment for a term not exceeding 6 months or both.

Despite the obvious logic for the inclusion of such provisions, they may well be at least partly responsible for the low representation of the Muslim community on the Register of Solemnisers. Significant literature now exists which speaks to the ‘plethora of underlying motivations for religious-only marriages’ (Akhtar, Probert and Moors, ‘Informal Muslim Marriages: Regulations and Contestation’ [2018] 7(3) Ox J of Law & Rel 367, 375; see also Uddin, ‘Nikah-only Marriages: Causes, Motivations, and Their Impact on Dispute Resolution and Islamic Divorce Proceedings in England and Wales’ [2018] 7(3) Ox J of Law & Rel 401). The community need for unregistered, nikah-only, marriages will likely, therefore, continue. In this context, the threat of criminal sanction against any registered solemniser who solemnises a marriage where the required formalities are not met may act as a strong disincentive against seeking registration by precluding them from fulfilling this community need. Moreover, the ability to acquire temporary authorisation to solemnise a marriage(s) may provide a useful half-way house for religious leaders who do not want to commit to securing permanent authorisation and opening themselves up to liability under section 69(10)(c). While having to be
cautious in conducting an unregistered, nikah-only, ceremony not to fall foul of section 69(10)(b) of the 2004 Act (as amended) — under which it is an offence for a person who is not a registered solemniser, or holder of 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 — the potential availability of the temporary authorisation provisions may nonetheless prove attractive in an apt case.

Interestingly, comparable criminal sanctions appear to apply under the Marriage (Scotland) Act 1977. Reflecting section 69(10)(c) in Ireland, section 24(1)(c) of the 1977 Act in Scotland provides that any person who ‘being an approved celebrant, solemnises a marriage without a Marriage Schedule in respect of the marriage... being available to him at the time of the marriage ceremony’ shall be guilty of an offence. Pursuant to section 24(1), any person found guilty of such an offence shall be liable (i)on conviction on indictment, to a fine or to imprisonment up to 2 years or to both; or (ii)on summary conviction, to a fine or to imprisonment for up to 3 months or to both. Unfortunately, however, it is not possible to compare the Irish and Scottish experiences to determine the strength of the hypothesis that the inclusion of criminal sanctions may have disincentivised imams from securing registration: there is no information available as to the number of celebrants who are authorised to solemnise marriages in Scotland, whether from the Muslim community or otherwise (in response to a Freedom of Information request in March 2019, the Scottish Government admitted it does not have this information, see https://www.gov.scot/publications/foi-19-00421/). Moreover, no Muslim groups are listed under the Scottish legislation as having the right to authorise their own celebrants.

- Location requirement

A second possible explanation for the low representation of the Muslim community on the official Register of Solemnisers — and the small number of Muslim marriages registered annually in Ireland — could be linked to the location requirements under Irish law. As noted above, although a venue for a religious marriage does not have to be registered, solemnisation must nonetheless take place in a ‘place that is open to the public’, that is:

‘(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...’

The only exception to this requirement is in the case of serious illness, with applications for such authorisation subject to rigorous oversight (section 51(2)(c)). Consequently, marriages may not be solemnised in Ireland in a private home or garden. While no such restriction applies in Scotland (where religious or belief marriages can be conducted anywhere), this restriction of marriage ceremonies in Ireland to expressly public locations was considered necessary by the Irish government

‘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’ (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).
However, caselaw in England and Wales (Al-Saedy v Musawi [2010] EWHC 3293; El Gamal v Al-Maktoum [2012] 2 FLR 387; Sharbatly v Shagroom [2012] EWCA Civ 1507), as well as various empirical studies, show the continued importance of the home as a possible setting for a Muslim marriage ceremony. Indeed, Vora’s recent research, although small scale, suggested the home was the ‘usual setting’ for holding the nikah ceremony (‘Unregistered Muslim Marriages in England and Wales: The Issue of Discrimination through “Non-Marriage” Declaration’ in Suleiman and Anderson (eds), Muslims in the UK and Europe II [Cambridge University Press, 2016] 140). If applied to the Irish context, the restriction of marriage ceremonies to public locations may be contributing to the low levels of Muslim marriages registered in the jurisdiction and may simultaneously reduce the demand for registered solemnisers where ceremonies are going to be held, for example, in a private dwelling. This distinction between the Irish and Scottish regimes might also go some way to explain the apparent disparity in the experiences of the two jurisdictions in facilitating Muslim marriage recognition.

**Conclusion**

Although there appears to be considerable support in England and Wales for the adoption of an officiant-based system, it is suggested that, reflecting on the Irish experience, the success of any such reform, at least within the Muslim community, will likely depend on the practical implications of various elements of the overall scheme and how these gel with traditional Muslim marriage practice.

Notwithstanding the need for a more detailed empirical study on the issue, the foregoing analysis raises especially pertinent questions as to the appropriateness of any reform which intends to provide for the criminalisation of officiants who conduct religious-only marriages (see Nash, ‘Sharia in England: The Marriage Law Solution’ (2017) 6(3) Ox. J of Law & Rel 523). While the potential inherent in leveraging criminal sanctions as a means of resolving the current challenges associated with unregistered Muslim marriages has received increased attention in recent times (see The Casey Review: A review into Opportunity And Integration [DCLG 2016]; The Independent Review Into The Application Of Sharia Law in England and Wales [Home Office, Cm 9560, 2018]) the Irish experience (and logic) might indicate that the adoption of any such criminal law infrastructure as a part of a move to an officiant-based system could, if not framed carefully, prove counter-productive.

Rather than sanctioning a registered solemniser where the required formalities are not met as under Irish and Scottish law, it might arguably be preferable to adopt the more nuanced approach considered by the Law Commission for England and Wales in 2015 which would focus on criminalising any deception by a solemniser, applying criminal sanctions only ‘in circumstances where one or both of the parties is deceived by the celebrant as to the legal effect of the ceremony’ (Getting Married, 4.60). Although even the inclusion of such an offence may be enough to spook members of the Muslim community from seeking registration in a context where they are aware of the likelihood of also being called upon to conduct unregistered marriages, it would at least leave the door open for the possibility of a solemniser conducting a nikah-only ceremony where the lack of legal recognition attaching to same was made clear to the prospective spouses. Similarly, as highlighted above, important questions will have to be asked as to whether the desire to best facilitate marriage recognition, particularly within the Muslim community, out-weighs the concerns voiced by the Irish legislature with regard to facilitating marriage ceremonies in private settings.

Admittedly, the foregoing discussion may represent an overly sophisticated analysis of what might be influencing Muslim marriage practice in Ireland. It may well be that the statistics flagged are simply
attributable to a chronic lack of awareness within the Muslim community and among Muslim leaders themselves as to the requirements for entry into a legally recognised marriage under Irish law. However, in devising reform proposals for England and Wales it would be unwise to write off the Irish experience as merely attributable to ignorance of the law but rather use it to avoid, where possible, any foreseeable pitfalls in seeking to address issues regarding Muslim marriage within a wider officiant-based marriage registration scheme.