

# STATES OF JERSEY

## Education and Home Affairs Panel Draft Marriage and Civil Status Law Amendment

FRIDAY, 16th MAY 2008

**Panel:**

Deputy D.W. Mezbourian of St. Lawrence (Chairman)  
Deputy J. Gallichan of St. Mary

**Witnesses:**

Senator W. Kinnard (The Minister for Home Affairs)  
Mr. S. Austin-Vautier (Chief Officer, Home Affairs)

**In Attendance:**

Mr. W. Millow (Scrutiny Officer)  
Mr. T. Oldham (Scrutiny Officer)

*(Please note: All witnesses and Panel Members were given the opportunity to comment upon the accuracy of the transcript. Whilst the transcript remains a verbatim account of proceedings, suggested points of clarification may have been included as footnotes to the main text.)*

**Deputy D.W. Mezbourian of St. Lawrence (Chairman):**

So, I would like to welcome everyone here this afternoon to the Education and Home Affairs Scrutiny Panel's public hearing in which we will be discussing P.61, Draft Marriage and Civil Status (Amendment No. 2) (Jersey) Law 200-. I am Deputy Mezbourian, the Chairman of the panel, and my colleague to the left is ...

**Deputy J. Gallichan of St. Mary:**

Deputy Gallichan of St. Mary.

**Deputy D.W. Mezbourian:**

We extend apologies from the Connétable of St. John and Deputy Pitman. If you would introduce yourselves, please, for the record.

**Senator W. Kinnard (The Minister for Home Affairs):**

Yes, I am Senator Wendy Kinnard, Minister for Home Affairs.

**Mr. S. Austin-Vautier (Chief Officer, Home Affairs):**

Steven Austin-Vautier, Chief Officer, Home Affairs.

**Deputy D.W. Mezbourian:**

It is the usual format. The hearing is being recorded and will be transcribed and you will see a copy before it is uploaded to the Scrutiny website so that you can check for the accuracy of your words. Minister, what we decided to do with this amendment that you have lodged is hold a public hearing because, as you know, part of Scrutiny's remit is to consider legislation brought to the States. Our intention is to prepare some comments from the hearing today which we can submit to the House to better inform the debate on P.61. We would, of course, have liked to have looked into it as a broader review, a more in-depth review, but as you know we have to be pretty well organised with our work and it would have been just too much to carry out a full review into this. So that is the rationale behind our hearing today. I understand, Minister, you have seen broad areas of our questioning. We would like to start by asking you about the rationale for amending the current law.

**Senator W. Kinnard:**

Yes.

**Deputy D.W. Mezbourian:**

Before we get to that, what we would like to know is what the intention was behind the introduction of the Marriage and Civil Status (Jersey) Law 2001.

**Senator W. Kinnard:**

Well, it is not easy for me to answer that because that is not a piece of legislation I myself took to the House. It was taken by what was called the Etat Civil Committee at that time, so I think really in a sense you would be better off asking Senator Ozouf because he was, in fact, the President of that committee at the time.

**Deputy D.W. Mezbourian:**

Does that mean, Minister, that you are also unsure as to what the situation was before the introduction of that law regarding registration of births?

**Senator W. Kinnard:**

No, I was aware as to the general situation because I myself have had children and have had to register them, so I am aware of the general situation and also aware of since 2003 because, of course, I had contact with Dr. Moran myself, contact with her since 2003, where that particular law was interrogated, if you like, in respect to a number of the issues we will be discussing today. So

I am aware of much of the arguments that went on legally, if you like, in relation to that legislation and which finally resulted, of course, in a recent determination of the court in judicial review against, actually, the Moran-Kemp case.

**Deputy D.W. Mezbourian:**

I would say, Senator, that --

**Senator W. Kinnard:**

Although that, as we know, there is an appeal or was going to be an appeal.

**Deputy D.W. Mezbourian:**

Yes. We had to give some consideration to the Moran case, of course, because it is not our role to become involved in that at all, which is why today we will be questioning you - you - on, as I said, the rationale for amending the current law. It may be that --

**Senator W. Kinnard:**

Yes. I think it is important to note that this issue around amending the law came about before the case was brought in terms of a judicial review.

**Deputy D.W. Mezbourian:**

Yes. We have noticed that you have made that comment in the report accompanying P.61. So, what we would like to know from you, Minister, is how the current legislation prohibits parents from choosing the surname under which to register the births of their children?

**Senator W. Kinnard:**

Well, the current law is quite restrictive in that if a couple are married, then the children take the surname of the father and if they are unmarried the children take the surname, the maiden surname, of the mother, and that is the current position.

**Deputy D.W. Mezbourian:**

You describe it as restrictive and you say that you were giving consideration to bringing an amendment before the Moran case. Will you elaborate on why you were thinking about bringing an amendment?

**Senator W. Kinnard:**

Well, for a number of reasons: that I myself had been in a very similar position. I am quite happy to make that public. So I myself had faced the difficulty of choosing a surname for my children and, indeed, a number of members of the public, a small number admittedly but a number of

members of the public, had also expressed concern that they had not been able in most cases to choose the surname of the father when they were unmarried. So it was as a result of that that I began to investigate the possibility of (1) whether the existing law allowed for more flexibility, and some time was spent doing that; and then in later course a decision that I wanted to change the law because it did appear that the existing legislation did not allow any degree of flexibility.

**Deputy D.W. Mezbourian:**

Thank you. So what principle do you believe should underlie this legislation?

**Senator W. Kinnard:**

Well, there are a number of issues. First of all, as I say, we had representations from members of the public concerning the naming of their children. Also, there was the issue that in the modern age, of course, couples quite often have children before they are married. That is much more common now than it used to be and I think that the law really has not kept up or kept pace with some of the changing circumstances that we have in our society today. So that was one of the reasons. The other reasons were a number of other issues. If you are interested in some of the policy issues that I had to deal with - I think you asked a question about that - in bringing this law forward, at one end of the continuum there is the U.K. (United Kingdom) position, which is complete freedom to choose whichever surname you wish. There are a number of other positions which are held by various other countries where there is some restriction as to the choice of surname, not least of all there is the position in Switzerland which gave rise to a European Court of Human Rights ruling, which I will come on to in a moment, and there are also restrictions on surnames in Guernsey, Ireland, Spain, Switzerland, Germany, Austria and Holland. So, in looking at the policy issues, I was looking at we have the one end of the continuum of the British system compared to how these matters are dealt with elsewhere, and trying to decide what is appropriate in our community. I mentioned that there was a European Court of Human Rights judgment, and that held that there was very little common ground among the various convention states and, therefore, respondent states must be given a wide margin of appreciation because the way in which somebody is registered bears a relationship to the law, the history of the community, common practice and the community values. Also in that particular judgment, in *C.M.B. and M.K. v Switzerland*, the Court also drew attention to the fact that to take the family name in their view posed no inconvenience to the child and that the purpose of the legislation was to unite families under one name. That again has been one of the focuses of mine in this legislation, is to try and focus on the importance of the welfare of the child, I think, rather than necessarily the rights or preferences of the adults concerned. Also I needed to focus on the difference between my own personal views or minority views and those views that are likely perhaps to be held by the wider community and their attitudes and expectations. So, in developing the policy proposals, trying to give appropriate weighting to what I felt was a need to change the law but also appropriate

weighting to general attitudes in the community. I think I have had perhaps 6 to 8 couples that have contacted me on the issue, so not very many, really. Most of those, as I have said, have wanted to change the name when they have been unmarried to the father's name. I think only one or 2 have expressed any view that they would wish to have complete freedom of choice, so far anyway. Also, I needed to take account of some of the criticisms of the English system that were expressed to me, and some of those criticisms I can probably give you an example of in a moment. But some of those criticisms were that potentially if there was complete freedom and a child was given a name that was completely unconnected to the family, that later on that could, when the child got older, cause some concerns or potential identity crisis in terms of questioning their roots. These are things that were expressed to me. That also complete freedom, if children were given names that were completely unconnected to the family, that it could all in some ways contribute to an already somewhat eroded sense of family solidarity and unity. There was concern expressed to me as well that a child with a name that is unconnected to the family again could have potential administrative if not legal hurdles or difficulties in the future if their name is unrelated to the parents'. The other one that was mentioned to me was that the reputations of both famous, perhaps, and private citizens could potentially be damaged if parents were to name their children after, say, a celebrity or an important figure, and that was a point that was also raised with me by the Attorney General. Also, I was aware that in some circumstances there has been a certain amount of heartbreak where there has been complete choice of name, and I will give you another example of that. Also, there was a need to think about a default position to ensure some certainty and order; some method needed to be chosen in situations where parents could not agree. Again, the method that I have chosen is one that is in keeping with the customary position and, again, I can give you a paper that outlines this particular issue and the sorts of choices you could choose as a default position from the Law Reform Commission of New South Wales. In fact, if I pass this to your officer, what I have here is a -- I have really just taken these off the internet as an example of expressions of concerns that were made to me, but these perhaps express them in a more direct way. If I give you that, that is one -- this is one that is entitled: "State baby naming proposal goes awry." That is from the New York Times when a similar proposal was going through there. We also have here copies of an email here, sort of email correspondence, where someone has been concerned because they find that their partner - because they have complete freedom of choice - is choosing to name their child not in accordance with their wishes. I think that gives you quite a good example of the kinds of complications that can happen where you do not have the choice restricted. Also, if I give you a copy of the discussion paper that was released by the Law Reform Commission of New South Wales which deals with this default position, you might find those of interest. So, those were a number of issues, trying to weigh them up and balance them in developing a set of proposals that I thought would meet the needs of parents wanting to have some flexibility in choosing the name

of their child while at the same time ensuring that community attitudes and values were not in any way unnecessarily undermined.

**Deputy D.W. Mezbourian:**

Thank you, Minister, and you have given us a very comprehensive response there. Deputy Gallichan was of the opinion that the next question I am going to ask you, you have already answered, but --

**The Deputy of St. Mary:**

Well, I was looking more at the questions we have had before and liaising it with that.

**Deputy D.W. Mezbourian:**

Okay. I am not sure that you did just answer this, and I would like to ask why you thought it appropriate in the amendment to allow for children to be registered under the mother's maiden name and not the mother's actual surname.

**Senator W. Kinnard:**

Sorry?

**Deputy D.W. Mezbourian:**

In the amendment, the child may be registered under the mother's maiden name if a couple is not married.

**Senator W. Kinnard:**

The default position you are talking about?

**Deputy D.W. Mezbourian:**

Yes. Rather than the ... well, that is the default position but the options are to -- the maiden surname of the mother, the options that you are proposing under the amendment, the maiden surname of the mother, the surname of the father or a combination of the 2. Now, why is it the maiden surname of the mother rather than perhaps the surname that she has at the time of the birth, which she is ...?

**Senator W. Kinnard:**

Well, she is only either going to have her married name or her maiden surname or a name that she has got by deed poll, so if it was a name by deed poll it would count for the same as the maiden surname. So the choices are of either name of the parent. Steven, I do not know if you see anything that we are missing?

**Mr. S. Austin-Vautier:**

I think perhaps if you look at an example, you could have a -- you could have a mother who has been married and has a married name. She has got divorced. She has a new partner. She is having a child with the new partner. The new partner may have a view on whether his child bears the name of another man. That, to me, would seem to be an argument why the mother's maiden name is chosen.

**The Deputy of St. Mary:**

Yes, I think we did not appreciate, Minister, what you said in your reply that the deed poll name would count as the maiden name.

**Senator W. Kinnard:**

My understanding is that it would under the law, but we will check that point. We will check that point for you.

**Deputy D.W. Mezbourian:**

Yes, I think that is something where we --

**The Deputy of St. Mary:**

Yes, I think that was probably where we were getting concerned.

**Senator W. Kinnard:**

I mean, obviously if you had asked me that specific question I could have answered it specifically.

**The Deputy of St. Mary:**

Absolutely.

**Senator W. Kinnard:**

Also, the other thing we can do is provide you with a short brief on the law prior to 2001 - I mean, obviously we can let you have that afterwards - and the reasons why there was a change to the 2001 law. The large impetus behind that, as far as I remember, was largely more to do with marriages and the ability to have marriages in different locations, but I am more than happy to get a brief provided for you with the details.

**The Deputy of St. Mary:**

That would be very kind, thank you.

**Senator W. Kinnard:**

And the deed poll issue I will check for you as well.

**The Deputy of St. Mary:**

Yes, because going on, also on the deed poll issue, what we were concerned about was it appeared that the child's surname could be changed by deed poll to pretty much whatever the parents wanted.

**Senator W. Kinnard:**

That can happen anyway.

**The Deputy of St. Mary:**

Exactly, so why are there restrictions on registration when you could, in fact, change to an unrestricted name? What is the difference?

**Senator W. Kinnard:**

Well, there are -- as I mentioned, it is felt that there are some public policy issues and that there are -- there is one view at one end of the continuum is that you can have it completely open, and there are others that there are perhaps other reasons why there are perhaps public policy issues why there ought to be a link that is expressed and can be more readily seen between a child and the parent. It is a decision at the end of the day I imagine there will be some amendments to this. I am aware that some amendments will be coming and it will ultimately be a matter and a decision for the States, but what I have tried to do is to try to come up with a set of proposals which, as I say, seeks to balance the changes that I think people would like to have alongside what I think are quite established community values.

**Deputy D.W. Mezbourian:**

Thank you.

**The Deputy of St. Mary:**

In your view, is the current law, the one we have now, still compatible with the European Convention on Human Rights?

**Senator W. Kinnard:**

Sorry, the current legislation?

**The Deputy of St. Mary:**

The current legislation.



**Senator W. Kinnard:**

I have no indication that it is not. It is compatible, and certainly I have obviously taken my draft law for a human rights audit and had the green light on that.

**The Deputy of St. Mary:**

Looking now at the work you undertook when you were considering this amendment, could you advise us which other jurisdictions you considered? I know you have mentioned Switzerland. Was there any one jurisdiction that gave you a particular clear model that we could use?

**Senator W. Kinnard:**

I do not think there was one in particular. I think what we did was look at the situation where we are in terms of the Jersey law and then looked at what other countries provide for. We did quite a lot of research. We looked at a number of countries. We obviously looked at England and Wales and Scotland, Northern Ireland, Southern Ireland, Isle of Man, Guernsey, France, Spain, Portugal, Germany, Austria, Sweden, Switzerland, Austria ...

**The Deputy of St. Mary:**

Fairly comprehensive, then, obviously.

**Senator W. Kinnard:**

Germany, Holland. Fairly comprehensive in terms of the European jurisdiction, and I then also looked at some areas like New South Wales and some states in the United States. As I say, the practice is very, very widely different except that I would say that the vast majority do have some form of restriction, that England and Wales is rather the outlier in this particular aspect.

**The Deputy of St. Mary:**

Could I ask you, because unfortunately my research did not go into this, but what was the position in Guernsey? Is there any commonality between what is proposed now and Guernsey?

**Senator W. Kinnard:**

In Guernsey what we have here ... yes, it is the one I have here. In Guernsey, what we have here is a situation - there it is - where if married the child automatically takes the father's name. If unmarried, it is the mother's choice and usually she chooses the father's name but not always.

**Deputy D.W. Mezbourian:**

Why did you choose not to go with that here?

**Senator W. Kinnard:**

Because we chose to go our own way. I mean, it is unusual for Jersey and Guernsey always to have the same situation, and the Guernsey Registrar General also went on to say -- because our officers telephoned to obviously speak to a number of the registrars to find out how their law worked in practice, and the Guernsey Registrar General said that he wishes that, in fact, there was regulation on the choice of forenames, in fact, and he said there is a family in Guernsey who have chosen to call their children "First Son", "Second Son", and so they, in fact, would like some further restriction than they have in Guernsey.

**The Deputy of St. Mary:**

Marginally an improvement on the Teletubbies, I think. Could you tell us what consultation, if any, you undertook during your preparations, Minister?

**Senator W. Kinnard:**

Well, yes, there was some consultation with Senator Ozouf who had a particular interest in this. There was a lot of consultation with Dr. Moran through a long period of time; obviously with the Law Officers and obviously the Attorney General. We have not had a public consultation but, of course, it was very widely publicised at the time of the Moran case. As I say, a number of people sent me emails and contacted me by telephone, but we did not go out into formal consultation, taking the view that the publicity really had done it for us.

**The Deputy of St. Mary:**

Had done it for you.

**Deputy D.W. Mezbourian:**

I would like to come back, Minister, to what you said about the situation in Guernsey. It seems to me that if -- I think you said that if a couple are married the child takes the father's name. That is presumably ... if they are unmarried it is the mother's choice, but she usually goes with the father's name. Now, over here you are not providing that choice to unmarried mothers.

**Senator W. Kinnard:**

Yes, we are. We are providing a choice to both married and unmarried mothers to choose either the mother's name, the father's name or a double-barrelled name in whichever order they choose. We are actually offering more choice than Guernsey.

**Deputy D.W. Mezbourian:**

Yes, sorry, I absolutely agree with you. I beg your pardon, I am getting somewhat confused. So disregard that statement completely, I got completely confused there.

**The Deputy of St. Mary:**

I think we have been, obviously as you are aware, looking at other options that might or might not be put forward and now it is very hard to distinguish what is in one and what is in another.

**Deputy D.W. Mezbourian:**

What is in another, and we have also seen the amendments that Deputy Hill has lodged, which I believe he sent to you this morning as well.

**Senator W. Kinnard:**

That is right.

**Deputy D.W. Mezbourian:**

So we are trying to keep up with what is your proposal and what Deputy Hill is proposing to amend.

**The Deputy of St. Mary:**

Could we have a look at what the implications might be of either amending this law or not amending the current law?

**Senator W. Kinnard:**

Yes.

**The Deputy of St. Mary:**

Can you outline to us what resources - if this is within your remit, in fact - the Parish of St. Helier has to deal with the registration of births at the present time?

**Senator W. Kinnard:**

Right. Well, the most identifiable implication of amending the law either in the way that we propose or, indeed, more liberally if the States so decide when it comes to debate, would obviously be an additional workload on the current 2 staff in the St. Helier Registrar's office. I think it is unlikely to affect the other parishes very much because the number of births that are registered there are negligible. So, bearing in mind that re-registration would be permissible in respect of registrations of births since the introduction of the 2001 law under my proposals, and also we have to cater for the possibility that temporary staff might need to be employed to deal with that, what the Connétable of St. Helier would like to do is to have a fee which would be increased to around £50 and that fee would allow it to cover the costs of re-registration. Of course, the other issue if the States were to opt for a more liberal approach in which any surname

were to be registered, I do not know whether that would affect the workload on the staff or not more than if the choice was restricted. I do not think it would make much difference on that particular point. But it is very difficult to predict the number of re-registrations that would be requested, but we undertook a 6-month survey which was recently carried out by the St. Helier Registrar and parents who were registering their children during that 6-month period were asked whether if they had greater freedom of choice along the lines we were suggesting would they be inclined to re-register their child's name. On the basis of the responses that were received and extrapolating back to 2001, around 1,000 re-registrations might be requested. So clearly if an amendment went back beyond 2001 we would see that the number of re-registrations would increase further. So whatever the States decides, whether the States decides to go with my proposition or some amended proposition, clearly it is going to be necessary to put in some form of arrangements to deal with re-registration because we do know that there are some parents who feel quite strongly that the current system is unnecessarily restrictive and would want to actually make some change.

**The Deputy of St. Mary:**

Is there currently a charge for registration, just for first registration?

**Mr. S. Austin-Vautier:**

About £10.

**Senator W. Kinnard:**

£10 I think it is, yes. £10 or £15. But, of course, I think the idea was that this was closer to the costs of deed poll, changing a name by deed poll.

**The Deputy of St. Mary:**

Yes, okay.

**Deputy D.W. Mezbourian:**

Minister, the draft amendment appears to indicate that parents will be able to choose the surname of their child but that they have to both agree to that chosen name.

**Senator W. Kinnard:**

Yes.

**Deputy D.W. Mezbourian:**

In fact, this would effectively provide the father or mother with a veto over the choice of name if one or other disagrees with it. Will you tell us why parents have to jointly choose the surname of their child?

**Senator W. Kinnard:**

Well, there are a number of issues that if you do not have agreement and some system to name a child you come up against a number of issues. One is the United Nations Convention on the Right of the Child that every child has a right to have a surname, and so one option is not to give a surname until there can be agreement but that seems not to be terribly in keeping. Again, one of the papers I have given you - I think it is the New South Wales Law Commission paper - deals with that issue. Another way of dealing with it would be to say that the name to be registered would be whoever got there first. Now, the difficulty with that, of course, is that that I think potentially could disadvantage women particularly as they are the ones who tend to be laid up in the maternity wing of the hospital so are not necessarily hotfooting it down to the Registrar General's Office to register the name of the child, but that is another way in which it could be sought to be done. But we felt that it is more appropriate to use a default position which is, if you like, the custom and practice that already exists to deal with that kind of situation because it is not appropriate that the Registrar should be involved in having to make a decision; that is not his role and that is why it I think needs to be carefully set out in the legislation what the default position would be.

**Deputy D.W. Mezbourian:**

If I can go back to that question, what we have here is an example of where parents may not jointly choose the surname: where a married couple may have separated by the time the child is born, unless the father was in agreement the child could not be registered under the mother's surname and would legally be given the father's surname.

**Senator W. Kinnard:**

Sorry, you will have to run that past me slowly.

**Deputy D.W. Mezbourian:**

So the married couple who separate before the birth of their child, if the mother did not want the child to take the father's surname, unless the father agreed to that the child would legally be given the father's surname.

**Senator W. Kinnard:**

That is correct, yes.

**Deputy D.W. Mezbourian:**

Is there any way that that could be -- do you think that is acceptable?

**Senator W. Kinnard:**

The only way that that is changed is by deed poll, but that is still an option that is available.

**Deputy D.W. Mezbourian:**

So there was no way through legislation to address that problem?

**Senator W. Kinnard:**

Off the top of my head, you know, I cannot sit here and draft the necessary Article. I would need to give that further thought.

**Deputy D.W. Mezbourian:**

Yes, okay. Earlier, Minister, you spoke of community values and the need to address them. We wondered how you would be able to measure those values and whether they have been addressed.

**Senator W. Kinnard:**

Well, I think it is a very difficult one, is it not? I mean, how do you measure community values? You measure it by, I suppose to some extent, the number of people that might have contacted me about this particular issue and what they had to say on it. I have to say few people have contacted me on this issue and those few that have contacted me have been quite evenly split between those saying that the law needs to change and those saying: "I do not know why you are bothering to do this, it is only a small number of people." But I do feel that there does need to be the flexibility, but equally I am also aware that the community in Jersey, we are quite a traditional community and I am aware what the original custom and practice was in Jersey. Therefore, I have, if you like, tried to take what I considered to be what is a middle road in trying to weigh up those 2 aspects and also a road that is fairly common throughout the rest of Europe because I think we are part again of a wider community.

**The Deputy of St. Mary:**

In the current amendment there is not any provision to deal with the forenames that were given at first registration. Would you be amenable to allowing for the re-registration of or the amendment of forenames at registration as well?

**Senator W. Kinnard:**

Well, again, if there is an amendment it is a matter for the States, I think, to decide that. Again, I have not brought it for you, but I have got some evidence - again from doing a search on these matters on the internet - of some distress caused to a young woman who was required to change her name, both her forename and her surname for whatever reason, and was suffering a severe identity crisis as a result of that. But as I say, at the end of the day if there is an amendment to allow that, that would be a matter for the States to decide. It is not one that I am personally proposing. I think the one that I am proposing is the one that I have had representation upon. I have not received any representation upon forenames.

**The Deputy of St. Mary:**

Absolutely, yes. I was not thinking so much of changing all the forenames, it was just simply where quite often there has been a -- the father's surname will have been incorporated as an extra forename and you could end up after re-registration with the same name repeated.

**Senator W. Kinnard:**

Right, but then that may be another sort of amendment.

**The Deputy of St. Mary:**

Absolutely. We will see if that comes --

**Senator W. Kinnard:**

But I do not think it is necessarily directly related to the particular issue that I was trying to fix.

**The Deputy of St. Mary:**

Right, okay.

**Deputy D.W. Mezbourian:**

We have given consideration to the fact that this law would be applied retrospectively or this amendment would be applied retrospectively, and we know that P.110/2007 was a piece of retrospective legislation that you took to the House, Minister. That was the Draft Criminal Justice (Community Service Orders) Amendment.

**Senator W. Kinnard:**

Yes.

**Deputy D.W. Mezbourian:**

I have looked at the Hansard and I do not see anywhere during the debate that you made reference to the fact that it would be retrospective, albeit it did say in the report that it would apply retrospectively. We were wondering how many laws allow retrospective application at the moment.

**Senator W. Kinnard:**

That would be a question better put to the Attorney General.

**Deputy D.W. Mezbourian:**

Why do you think it is in the public interest to introduce retrospective legislation?

**Senator W. Kinnard:**

Well, I have decided to introduce it in specific -- I do not think it is generally a good practice, but I think in specific instances it is appropriate. I think in this particular instance it is appropriate because I had already decided quite early on that I did want to change the legislation. I am aware that there are a number of people who since the 2001 law thought that the 2001 law allowed them a greater degree of flexibility than it turns out the law allows them, and for that reason I felt that it was important to make the legislation I am bringing forward retrospective to the start of the 2001 law because we did spend some time interrogating whether the law was allowing -- could allow greater flexibility than we now know it does.

**Deputy D.W. Mezbourian:**

I suppose the problem with retrospective legislation is that there will always be people who just miss out.

**Senator W. Kinnard:**

Yes.

**Deputy D.W. Mezbourian:**

How do you answer that, those people who -- you are looking at 1st May?

**Senator W. Kinnard:**

Well, I think it is absolutely clear to say that the law was very certain on what the appropriate states of registration should be prior to the 2001 law. I think it was only with the 2001 law and the introduction of the shortened form of the birth certificate that there was then some concern as to what the law allowed and what it did not allow. That is partly what this judicial review has been about, and so that is again the reason why I feel that to ensure that there is clarity and to be fair, I



think, to those who feel that they have been caught out by the 2001 law that I feel it is appropriate in this one instance to take it back as far as that. I would not be recommending going further than that because I think it was absolutely clear to everyone what the law was then and I think we have to draw the line somewhere because of the need to allow for the number of registrations and the resources that would be required to do that for the re-registration process.

**Deputy D.W. Mezbourian:**

Thank you. Well, as usual you have answered most of our questions.

**The Deputy of St. Mary:**

There was just one point I wanted to pick up in the report. Concerning the Swiss position, it is just I am a little concerned. When you give the statement: "Thus in Switzerland a child of a married couple can only take the father's surname", the position as I understand it is that, in fact, when a couple marry they must choose either the mother's name or -- the husband's name or the wife's name to be the surname, what they call the family name, and then thereafter the children must use that family name but it is not necessarily the name of the father.

**Senator W. Kinnard:**

Okay, this was in a particular case. I mean, I have got the position in Switzerland which I can give you, the position I have here, which is: "Parents may choose any first name they wish as long as it is not likely to damage the interests of the child. If the parents are married, the child will bear the parents' surname or the surname that the parents use. In Switzerland this is usually the father's as a couple may not have different names. Women may hyphenate their maiden name with their husband's while special authorisation is needed for the couple to only use the wife's name. If the parents are not married, the child will bear the name of the mother. If the child's parents then get married the child will bear the name of the parents. In the case of an adoption, the child will bear the surname of the adopting parents." That is the general position, but the case that you are referring to is a particular case at the European Court of Human Rights, which ... if I just get that for you ... which was the case of *G.M.B. and M.K. v Switzerland* in 2001. What happened there was that the court held that the Swiss legislation under which these parents were refused permission to give the child its mother's surname -- and the court held that it was not incompatible with Articles 8 and 14 for the refusal. The court went on to say that where there is little common ground among convention states the respondent states must be afforded a wide margin of appreciation. So that is in relation, that comment, to a specific case where it was challenged, where the state had not allowed the child to take the mother's surname.

**The Deputy of St. Mary:**

I hear what you say. I still think that in the report it simply says in Switzerland the couple can only take the father's surname. Also, there is a Council of Europe Directive after that.

**Senator W. Kinnard:**

I am sorry if I did not make that clear, but that --

**The Deputy of St. Mary:**

No, I just think it could well be something you are asked about.

**Senator W. Kinnard:**

Yes. Well, I can obviously make that clear in my opening speech.

**The Deputy of St. Mary:**

Absolutely.

**Senator W. Kinnard:**

Not a problem from my point of view on that.

**The Deputy of St. Mary:**

There is ... this field is not my forte. The European Court of Human Rights, there is a Council of Europe recommendation which is dated after that in 2005<sup>1</sup>, because G.M.B. I think is 2001.

**Senator W. Kinnard:**

It is.

**The Deputy of St. Mary:**

Which says that areas of discrimination, because of the differences between the member states, should be ... let me see: "Consequently, the Assembly recommends that the Committee, Minister and Council of Europe identify those member states which retain ... existing discrimination [in other words, differences between how names are afforded] and ask them to take appropriate measures to implement strict equality between the mother and the father." Of course, you do have equality here even though it is the name that is the maiden name, but I think probably things are moving on. But anyway, that was the point I wanted to make in regard to the court.

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<sup>1</sup> It was subsequently noted that the date of the recommendation was 1995

**Senator W. Kinnard:**

Thank you. Thank you for alerting me and I will work that into my speech because I was thinking there specifically of the case rather than the more general ...

**Deputy D.W. Mezbourian:**

One other area that we wanted to touch on was the communities over here, such as Portugal and the Polish communities, and what research you have undertaken as to what happens with the registration of births in those countries and how it -- and to provide those people with the same options here as they would perhaps have in their home countries. Does this amendment --

**Senator W. Kinnard:**

Yes, I have not got the papers with me but we have looked at Portugal but I would have to come back to you with that. I have not got the Portugal ones with me. I am not sure if we have the Polish ones. Let me just see.

**Mr. S. Austin-Vautier:**

No.

**Senator W. Kinnard:**

We have done some research on that, but I will have to come back to you on that.

**Deputy D.W. Mezbourian:**

Okay. Well, shall I get our officers just to contact you to ask for that, then?

**Senator W. Kinnard:**

Yes, please do. Yes, I have a note here about Portugal but I have not got the detail here.

**Deputy D.W. Mezbourian:**

Can you just reiterate, Minister, please, why you choose to not give parents the option of free choice, to have a free choice of surname for their child?

**Senator W. Kinnard:**

Okay. Well, I suppose the thing about civil registration, I think it plays a number of roles. It provides an individual first and foremost with a name and identity within society. It is also evidence of parentage and in some circumstances it can be evidence of entitlement to inheritance, so it is a very serious and important matter. As I have said, I have chosen not to give complete freedom of choice (1) because I believe that England and Wales is the outlier compared to the rest of Europe; and I am trying to make a change that I believe balances the rights and

freedoms that are appropriate for parents who wish to name the child according to either one of the parents while at the same time trying to weigh up some of the difficulties that have been alerted to me of having complete freedom of choice. Again, of course, in our research and speaking to other registrars a number of those that have greater freedom have often expressed the view that they would like to have greater control than they have. In practice, even where there is greater freedom, some registrars find themselves guiding parents in certain ways to perhaps name their children with names more closely aligned to family names, so that, again, in practice I think even where there is, if you like, a wider freedom, there is some degree of influence brought to bear on parents.

**The Deputy of St. Mary:**

You mentioned in your report the fact of possible embarrassment to the children at a later stage especially in a small community. Do you have any further comments on that?

**Senator W. Kinnard:**

Well, just an example, a sort of -- not an absolute concrete example, but it is possible that if there was complete freedom that a mother could choose to name their child after somebody they particularly admired in the community. When the child grows up, you know, there might be questions: "Well, you know, is he your father or not?" You know, in a small community that could cause more difficulties than it perhaps would do in a larger community. That is, you know, not to say that it would happen very often, but with complete freedom it is a possibility that it could happen. That, I think, is something that is a particular issue in a smaller community than it would be perhaps in necessarily a wider one.

**Deputy D.W. Mezbourian:**

One of the suggestions we had made to us was that restricting the choice means that we as a government believe we cannot trust parents to make the right decision for their child. Is that what you think this amendment is saying?

**Senator W. Kinnard:**

No, I do not think it is saying that at all because we are trusting parents to make a choice. Some people may see it as sort of the nanny state, but I think again it is a matter of trying to weigh up how you think the community values these things. I think there was a comment that was made in one of the papers I have given to you, which I do not necessarily hold but similar comments have been expressed to me, that we as a government in trying to be more contemporary perhaps it is not a proper goal for the state to permit parents to obscure rather than clarify family connections. That is the kind of thing that has been expressed to me in developing this legislation by some people.

**The Deputy of St. Mary:**

Here is an oddball comment for you, Minister. How do you respond to the possibility that your default position where the mother and father cannot agree on a name - in other words if they are married it is the married surname, if they are not married it is the mother's maiden name - is quite simply just sexist because it gives married men the veto, effectively?

**Senator W. Kinnard:**

But it gives unmarried mothers the veto as well.

**The Deputy of St. Mary:**

But it does not allow the unmarried mother to choose a name other than her maiden name, whereas the man has only -- why do men not have maiden names, this is the question?

**Senator W. Kinnard:**

Well, some of us keep our same name all the way through our lives. No, I mean, obviously this would engage Article 14 if it was sexist; it would be discriminatory. Quite clearly, the piece of legislation has had its human rights audit and it has been found that it has passed it, that it is not discriminatory to treat the way in which the legitimate and illegitimate births are treated differently. The default position reflects the position at customary law and can be justifiable on the grounds of certainty and good order. We have to have a mechanism. It allows a choice, albeit a limited one, but the choice is to parents of both legitimate and illegitimate children. Therefore, it does not, if you like, fall foul of either Article 14 or Article 8.

**The Deputy of St. Mary:**

Thank you. We are just analysing what you have just said --

**Deputy D.W. Mezbourian:**

Yes. Is it discriminatory for an illegitimate child to ... the default position would be to have the mother's maiden surname?

**Senator W. Kinnard:**

No, that has been checked.

**Deputy D.W. Mezbourian:**

It is not discriminatory?

**Senator W. Kinnard:**

No, because the draft law allows a choice, as I said, albeit a limited one, to parents of both legitimate and illegitimate children to choose mother's, father's or a mixture of both.

**The Deputy of St. Mary:**

So it is the same choice for everyone?

**Senator W. Kinnard:**

Yes, it is.

**Deputy D.W. Mezbourian:**

So, finally, Minister, we have seen and I believe Deputy Hill has sent you a copy of his proposed amendments.

**Senator W. Kinnard:**

Yes.

**Deputy D.W. Mezbourian:**

The main one really is -- and he has given us permission to discuss them in --

**Senator W. Kinnard:**

Obviously we have not received the report yet so ...

**Deputy D.W. Mezbourian:**

No, we have not received that, but he has given us permission to discuss them in open session here. What he is proposing is that parents are able to choose the name to be registered as the child's surname which is, from what we can see, the same as is applicable in England, Wales and Northern Ireland. Will you be accepting that amendment?

**Senator W. Kinnard:**

No, because I believe that the States needs to have the choice. As I say, I have tried to divorce my own personal views and the views of a minority from what might be the views of the wider majority and so I have always known that there was going to be some sort of amendment because right back in my meeting in 2006, I think it was - I will check in a moment - with Senator Ozouf, who was originally going to bring an amendment, I was very relaxed about that because I felt all along that the way that this needs to be settled is on the floor of the Chamber and it is important that States Members have the choice to either restrict or to have complete freedom. So I would not be accepting it because I think it is important for the States to have the debate.

**Deputy D.W. Mezbourian:**

Okay, thank you. I think that winds up the questions that we had for you.

**Senator W. Kinnard:**

Okay. Well, we will come back with the information that you have requested that we were not able to give you today.

**Deputy D.W. Mezbourian:**

Yes. Thank you very much.

**Senator W. Kinnard:**

A pleasure.