

# CORPORATE SERVICES SCRUTINY PANEL

THURSDAY, 2ND MARCH 2006

## AGE OF CONSENT

**Panel Members:** Deputy P.J.D. Ryan of St. Helier (Chairman)  
Senator J.L. Perchard  
Connétable J.L.S. Gallichan of Trinity  
Connétable D.J. Murphy of Grouville  
Deputy J. Gallichan of St. Mary

**Witnesses:** Miss S.C. Nicolle, Q.C. (H.M. Solicitor General)  
Deputy R.G. Le Hérisier of St. Saviour

**Deputy P.J.D. Ryan of St. Helier:**

Good morning, everybody, members of the public, Madam Solicitor General. Thank you for joining us this morning and welcome to the third and final public hearing that we are going to hold with regard to the Sexual Offences (Jersey) Law amendment that is in a state of suspense in the States of Jersey while we produce a Scrutiny report. In front of you, Madam, you should find our terms of reference somewhere. If not, then we will bring them round to you just in case.

**Miss S.C. Nicolle, Q.C. (H.M. Solicitor General):**

I think I have seen them. They do not seem to be on the table, but I have seen them.

**Deputy P.J.D. Ryan:**

We will remedy that in a second. I think the first thing that I would like to say to you in opening is to thank you for the extensive and very prompt and timely written advice and responses to the various angles and additional pieces of information that have been placed in front of us. We thank you for that and we are under time constraints, as I am sure you know, so I would like to publicly put on record that we have had nothing but the most professional of support from your department.

**Miss S.C. Nicolle:**

That is very kind of the Panel. Thank you.

**Deputy P.J.D. Ryan:**

We have, as I say, lots of information. I had considered that we would ask you to in a way make a presentation to us, bringing out any of the items that you felt were relevant. But rather than do that, I think the Panel is quite clear. You have consented to your written submissions being placed on the website, so that would to some degree be a bit of a waste of time. I think what I am going to do is to ask the Panel to refer to paragraphs which are helpfully numbered in there and ask for clarity in certain areas. Do you want to fire away, Jim?

**Senator J.L. Perchard:**

I would endorse what the Chairman has said. In fact, it is hard to find questions that arise out of your extensive comments on all the issues that we have raised. However, I am sure we will amongst us find something suitable. One question I wanted to ask you is are you familiar with the sodomy legislation

Statement made on 24th April 1990 by the then Deputy Edgar Becquet to the States of Jersey?

**Miss S.C. Nicolle:**

No, I have to say I am not. I do know that Deputy Becquet was then in the States, obviously. He was also a solicitor from Becquet and Syvret and was, as I recall, opposed to the legalisation of homosexual intercourse in any form. But no, I am certainly not familiar with any Statements he made to the States.

**Senator J.L. Perchard:**

That is all right. As a result of that complex debate, which is not dissimilar to the arguments we are facing today, a delegation went to the Home Office. Deputy Edgar Becquet headed that delegation as President of the Legislation Committee and returned and made a Statement to the House. Are you familiar with that Statement?

**Miss S.C. Nicolle:**

No.

**Senator J.L. Perchard:**

That is fine. I just wondered, since 1990, do you think the constitutional relationship between Jersey and the United Kingdom has changed in any way?

**Miss S.C. Nicolle:**

I think probably a better way of putting it is to say that some perceptions may have changed. The Royal Commission which was appointed to look into the constitutional relationships of the UK with various jurisdictions at the time when the matter of entry into the EU (European Union) was under consideration considered among other places Jersey. The Commission - which is sometimes colloquially known as the Kilbrandon Commission - in I think it was Part 12 dealt with the Channel Islands and simply said unquestioningly the United Kingdom can legislate, and probably that would have been a stock answer for most people. That has been questioned and I can say I think probably even more that there is a quite strongly held body of opinion by people who are quite competent to form opinions to the effect that the powers of the United Kingdom are not as great as were at that time generally accepted. For example, Professor Jowell would be a leading case. On the other hand, there are people equally competent, equally learned in those areas, who take the opposite view so that it is perhaps best put by saying it is now an open issue, whereas probably I think at the time of which you are speaking it would not have been regarded as quite such an open issue. Only a court can give a ruling and, therefore, I cannot say the position has changed. I can only say that perceptions and attitudes have changed.

**Senator J.L. Perchard:**

Just for the record, Deputy Becquet at the time - 1990 - informed the States Assembly that if the Island did not then in order to fulfil its international obligations the United Kingdom reluctantly would have no option but to legislate itself on this matter.

**Miss S.C. Nicolle:**

Yes.

**Deputy P.J.D. Ryan:**

What I would like to try and get our collective heads around is the way that constitutional relationships develop. Is it true to say that the longer we go without ever testing this the more we de facto become independent legislatively from the United Kingdom? In another 800 years of absence of legislation from the UK on our behalf ...?

**Miss S.C. Nicolle:**

Yes, convention with a small 'c' not a Convention in the sense that people enter into. Convention in the sense of a conventional way of behaving obviously does gain strength with the passage of time and the longer people keep behaving in the same way. It is rather like customary law. The basis of customary law is that usage makes custom; custom makes the law. If people behave in a particular way for a particular period of time, it crystallises into accepted law.

**Deputy P.J.D. Ryan:**

So it follows from that, perhaps, that if we act as if we have an international perspective, an international character, an international personality, continuing in that vein over the passage of time, in the end we will indeed become ...?

**Miss S.C. Nicolle:**

Yes, a course of behaviour can create a legally valid situation, but that is provided, of course, it is not in conflict with something which is established law. For example, in the context of the European Convention on Human Rights the United Kingdom is a state party and Jersey is not and that is simply an established position. I think a course of behaviour independently would not change that.

**Deputy P.J.D. Ryan:**

Thank you.

**Connétable D.J. Murphy of Grouville:**

The situation here I think is slightly different to them legislating for us in that this is something we understandably have asked them to do on our behalf, so really it is a breach of trust rather than, I would have thought, a legislative situation. I would have thought perhaps that even though they might be reluctant to legislate for us, there would be other punitive measures taken against us. Would that be a likely scenario?

**Miss S.C. Nicolle:**

Could you clarify what sort of punitive ...?

**The Connétable of Grouville:**

Yes, I am thinking about our finance industry. It is very interdependent with the UK.

**Miss S.C. Nicolle:**

Obviously it is speculation because I am talking now about what somebody else might do, but I would have thought that legislating would be the more obvious and the more appropriate answer because if the legislation is not brought in by Jersey then there is a breach of the Convention and that makes the United Kingdom answerable. It makes the United Kingdom vicariously, as it were, in breach and answerable before the European court. Putting yourself in the shoes of the United Kingdom, what you want to do if you are in breach is get yourself out of breach, not use some kind of lever to try and get the third party to get themselves out of breach or to get you out of breach.

**The Connétable of Grouville:**

So the obvious response would be, in fact, to legislate?

**Miss S.C. Nicolle:**

Yes.

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

We had an earlier submission from Advocate Lakeman and he said that in his opinion the Abuse of Trust legislation and the legal safeguards against the abuse of children in the Island are already of

comparable standards to most areas of Europe. Would you agree with that?

**Miss S.C. Nicolle:**

I certainly cannot talk about other areas of Europe because I have never done any comprehensive study of other areas of Europe. There certainly are not the special protective measures that were brought in in the United Kingdom for the position where the older person is in a position of trust towards the younger one. For example, a school teacher, a scout leader, a family relative, something of that sort. There is not anything of that kind. That is relevant only if there is some unlawful sexual intercourse and the person who is perpetrating it is in a breach of trust. That is an aggravating factor but it does not make the thing an offence. To take the example that is under consideration, if the law is changed so that the age of consent for homosexual intercourse becomes 16, there is not that protection for the band between, say, 16 and 18 where there is an abuse of trust by the older person.

**The Deputy of St. Mary:**

It has also been commented that this draft legislation we have before us now would have been better received had that Abuse of Trust legislation come in at the same time. We do have various indications that it will be brought forward and in a fairly short time. Do you consider that there are any adverse implications to holding back the draft Sexual Offences Act until that can be brought in at the same time?

**Miss S.C. Nicolle:**

The drawback of holding back the draft Sexual Offences: Age of Consent is that Jersey is currently in breach and putting the United Kingdom in breach so that for every extra day that it is held back that is the continuation of a situation which is unlawful. It is a breach of the Convention.

**Deputy P.J.D. Ryan:**

Can I just take you up on that? To put that into context, we have been in breach since 1953.

**Miss S.C. Nicolle:**

I am not so sure about that because the European court has gradually developed its jurisprudence and I do not think one can assume that because since the most recent cases they hold this, that they would have held the same thing in 1953. I think, in fact, that they did not and that some of the case law of the 1990s was a departure from earlier case law. So we have not been in breach. We are only in breach once the European court changes its interpretations.

**Deputy P.J.D. Ryan:**

Could you give us from the records and the history from when approximately, then, have we been in breach?

**Miss S.C. Nicolle:**

*Sutherland* is probably one of the earliest. That is 1997. That one did not go as far as the court. It was a report of the Commission saying that the complaint was admissible, but then there was an amicable settlement between the United Kingdom and the complainant and the matter did not get to the court. Certainly, the Commission upheld the complaint. That was, if you like, the writing on the wall.

**Senator J.L. Perchard:**

Just going back to the Deputy of St. Mary's point there, what legislation do we have in Jersey to protect young people from abuse of trust?

**Miss S.C. Nicolle:**

There is nothing that is specifically directed to abuse of trust. It is all age related. Sixteen is the age at which a girl can give consent to heterosexual intercourse. Take that one as an example, heterosexual

intercourse. If someone has intercourse with a girl aged 15½, then even if there was no breach of trust at all it is an offence. If someone has sexual intercourse with a girl aged 16½, it does not matter how much breach of trust there is, it is not an offence provided she consents, obviously.

**Senator J.L. Perchard:**

I should know the answer to this but just for clarification, under current law the offence is committed by the person over the age of 16 or both?

**Miss S.C. Nicolle:**

In the case of heterosexual intercourse it is committed by the man who has the heterosexual intercourse. In the case of homosexual intercourse it is committed by both because the only legalisation of homosexual intercourse has been the provisions of the Act which I think phrased it by saying that sodomy shall not be punishable as an offence if it is between two persons both over the age of 18, both consenting and in private.

**Senator J.L. Perchard:**

That is under current law?

**Miss S.C. Nicolle:**

That is under current law.

**Senator J.L. Perchard:**

What was your interpretation of the Sexual Offences (Jersey) Law 200-?

**Miss S.C. Nicolle:**

It was the same situation only 2 years younger for the age of consent, really.

**Senator J.L. Perchard:**

With regard to the minor bearing any guilt for an offence, that will change evidently because of equalisation of age?

**Miss S.C. Nicolle:**

Page 11 of the draft says: "Notwithstanding any rule of customary law or any other enactment, a person shall not be guilty of the crime of sodomy if the act is committed in private and each of the parties to the act consents and has attained the age of 16." The customary law starting point is that absent any legal provision like that, what is referred to there as sodomy, homosexual intercourse, is unlawful for both parties. This will say to what extent it can be lawful and that is if both parties are over 16 and they both consent and they are in private. But if any one of those factors is not present then it remains unlawful and that is unlawful for both parties. <sup>[1]</sup>

**Senator J.L. Perchard:**

For both parties, the 15 year old and the 17 year old?

**Miss S.C. Nicolle:**

Yes.

**Deputy P.J.D. Ryan:**

Could you compare that to heterosexual intercourse for us so we are clear?

**Miss S.C. Nicolle:**

Heterosexual intercourse worked the other way around. Whereas with homosexual intercourse the starting point is it is all unlawful and gradually bits are made lawful, heterosexual intercourse the starting point was it is lawful and then legislation was introduced to make it unlawful for girls below a certain age. It is the 1895 law and there are 2 separate criminal offences, in fact. One is sexual intercourse with a girl below 13 and one is sexual intercourse with a girl between the ages of 13 and 16, and the only distinction between the offences is the punishment available. It is a more serious offence to have sexual intercourse with a girl below 13 than below 16. The actual offence is having sexual intercourse with a girl. Obviously the girl does not commit that particular offence.

**Deputy P.J.D. Ryan:**

That begs the question as to whether, even after this amendment if it goes through, we are still discriminating?

**Miss S.C. Nicolle:**

I do not think it does because the discrimination consisting of ...

**Deputy P.J.D. Ryan:**

Two acts, one homosexual and one heterosexual, same age of participants in both cases. On the heterosexual side the minor would not be guilty of an offence. On the homosexual side the minor would.

**Miss S.C. Nicolle:**

Yes.

**Deputy P.J.D. Ryan:**

Can I have your comment on that?

**Miss S.C. Nicolle:**

The comment really is that you are talking now where the minor, the under-16-year-old, in both cases even with the heterosexual intercourse there is still an interference with the sexual life of a girl under 16 and that is one which the legislation regards as justified.

**Deputy P.J.D. Ryan:**

This would be regarded as proportionate, to use the word, would it?

**Miss S.C. Nicolle:**

An age of 16?

**Deputy P.J.D. Ryan:**

That difference that we highlighted just a second ago?

**Miss S.C. Nicolle:**

Yes. Obviously, again, as I have said, only a court can give a ruling but what I can do is explain the difference. Let us say you have 2 couples: one heterosexual, one homosexual. You have reduced the age for homosexual intercourse to 16, so for the elder partner the position is the same. You can have intercourse with a person above the age of 16; you cannot have intercourse with a person below the age of 16. For the person below the age of 16, there is a distinction in that a girl cannot be prosecuted for having sexual intercourse below the age of 16, but a male below the age of 16 who has homosexual intercourse will be committing a crime because it has only been made lawful where both parties are above the age of 16. Nevertheless, in terms of interference with their Article 8 right, to put it in Convention terms, both the girl below the age of 16 and the boy below the age of 16 are able to say that

their Article 8 right is being interfered with because as one of the Austrian cases shows, the complainant can be made by a minor below the age who is not liable to prosecution. It is one of the cases which I think I referred the Panel to and sent to the Committee, *S.L. v Austria*, and in that case the position in Austrian law was that the minor in the position of the complainant was not liable to prosecution. Nevertheless, he was able to say: "My life is interfered with because I would actually like to be able to have homosexual intercourse with older males but I am inhibited from doing so, first, because they might be prosecuted so that is bad news for them; secondly, it is a threat to me because I might get called as a prosecution witness, I might be put in the witness box, I might have to say yes, I am a homosexual and I might be asked questions about that." Now, a girl below the age of 16 can say exactly that.

**Senator J.L. Perchard:**

*S.L. v Austria*, just to be clear, he was 17 years old?

**Miss S.C. Nicole:**

He was born in 1981 and the judgment is 2003. I think he could have made the application in 1999 going by the dates, when he would have been 18. But the circumstances of the case set out that at about the age of 11 or 12 he began to be aware of his sexual orientation. By the age of 15 he was perfectly certain of it. Between the ages of 15 and 18 when he would have, if left to himself, preferred to have been able to have homosexual relationships with older men, he was inhibited from it because the other person might be prosecuted. You have the same position with a girl below the age of 16. She might say: "Well, I would like to have heterosexual intercourse but I am inhibited because, firstly, anybody who has heterosexual intercourse with me is at risk of prosecution; and secondly, I might be called as a witness and I would not like that."

**Deputy P.J.D. Ryan:**

It is the common law of Jersey?

**Miss S.C. Nicole:**

Yes. <sup>[2]</sup>

**Deputy P.J.D. Ryan:**

I am going back to this difference between the homosexual situation and the heterosexual situation. I think I am right and I have an understanding that I did not have before that it is the common law of Jersey which is then modified by statute through the Sexual Offences (Jersey) Law making the act of sodomy legal. The question is this: is that the same in the United Kingdom? Is it the same in France? I am just picking those 2 as 2 countries that we are probably closest to.

**Miss S.C. Nicole:**

France I cannot answer for. In the United Kingdom, yes, historically homosexual intercourse just would have been completely unlawful.

**Deputy P.J.D. Ryan:**

So after this, then, if this amendment to the Sexual Offences law is passed, there would be no differences between our position and the United Kingdom's position?

**Miss S.C. Nicole:**

The only difference would be the absence of the breach of trust, but apart from that, yes, the position would be the same from a starting point of homosexual intercourse simply being unlawful. In fact, I said I could not answer for France. Yes, historically yes. Go back far enough and yes, it was.

**Deputy P.J.D. Ryan:**

Thank you.

**The Connétable of Grouville:**

Can I move on to another subject? In your excellent advice that you have given us, can I refer you to your memorandum of 21st February 2006, paragraph 33. This refers to the pressure on the States of Jersey Members in order to accept this, and it does say in paragraph 4(a): "Should the proposition be accepted solely on the grounds of coercion from external pressures." This obviously means the pressure of coercion from the UK to legislate on our behalf if we do not pass it.

**Miss S.C. Nicolle:**

Yes.

**The Connétable of Grouville:**

"Against the public will it may prejudice future issues as may be of benefit to the same community." I accept completely your explanation of this, which is in the second half of that paragraph, and I understand exactly what you are saying there. However, I as a voter in the House, if I felt that I was abstaining or voting for solely on the grounds of coercion what does that do to my human rights?

**Miss S.C. Nicolle:**

I am afraid it does not do anything to your human rights, sorry.

**The Connétable of Grouville:**

The fact that I am being forced into a situation where I have to approve or disapprove legislation by external pressure?

**Miss S.C. Nicolle:**

No, sorry, you do not have a human rights issue there, I am afraid.

**The Connétable of Grouville:**

Thank you.

**Senator J.L. Perchard:**

Can I put it another way? I understand the point Constable Murphy is trying to promote and it is a very important point. In the States debate on the draft law, the charge was made that the Island would be bowing to political correctness in changing the laws regarding age of consent. There appeared to be a feeling that valid moral and social concerns were being ignored in pursuit of the principle of non-discrimination. Do you then believe that the ECHR (European Court of Human Rights) sets down fundamental and overriding principles in which the Island is obliged to follow regardless of other considerations?

**Miss S.C. Nicolle:**

Yes, the European Court of Human Rights is the ultimate tribunal for determining human rights issues. The very fact that cases go before the European Court of Human Rights on a regular basis and every year there is a volume full of judgments of cases where somebody has challenged their state and the state has opposed the challenge shows that quite often there are strong differences of opinions between the citizen and the state, and sometimes between a lot of citizens and the state, and sometimes between a lot of citizens on the one hand and the state, including a lot of the other citizens, and that the European court decides it one way or the other. Probably with every decision there are some people who say the European court has got it absolutely back to front and, indeed, you get dissenting judgments. The courts

are constituted by quite a large number of judges and you can get a judgment with a majority of judges holding one thing, then 3 judges giving a dissenting decision one way and then 2 judges giving a dissenting decision the other way. There are always differences of opinion. There is many a case in the reported judgments where the court has upheld the complaint, so the arguments put forward by the state have been ruled out even though those arguments may be supported by a number of other citizens. But you get to the point where the thing is determined and it is determined by the European court and the European court has the last word.

**Senator J.L. Perchard:**

So there is no margin for discretion in applying the principles of ECHR within particular states where the state's government believes there may be weighty reasons like the protection of vulnerable young people?

**Miss S.C. Nicolle:**

Yes, there is a margin for discretion in any case where a right is expressed to be subject to interference. Some of the rights are what are called the hard rights, the ones that you cannot qualify or get away from; others set out the right and then they say: "There shall be no interference save ..." and then put the circumstances in which you can interfere. Where it is a right with which there can be interference, there is a margin of appreciation but there is always room for debate about how far the margin for appreciation goes. For as long as the European court has not considered the arguments and given a decision, you are still within the margin of appreciation. I think in possibly one of the Austrian cases, one of the dissenting judgments says something like: "Well, we thought this would have come within the margin of appreciation but the majority thought otherwise." Once you have what in this particular area of law you have, that is a very clear enunciation of the principle from the European court saying: "Right, we have listened to all your arguments about protection and so on, but we think that this is outside your margin of appreciation and that you have not made your grounds out", once you are at that stage where there has been a perfectly clear holding from the court, you cannot start unpicking it.

**Senator J.L. Perchard:**

Thank you.

**Deputy P.J.D. Ryan:**

I would just like to go to a few areas and ask you about them. It is the Austrian situation and I am just looking at the timeline of the Austrian situation. From memory there were 2 cases in 2003, as I recall, and then in the very latest case judgment was given in January 2006. There seems to be quite a time span for that period of time.

**Miss S.C. Nicolle:**

There was a time span. The first point is, of course, that the date when the judgment is given is not the date when the application was first made because there is quite a procedural chain when an application is made. Looking at the 2006 one, it begins: "The case originated in an application 7336/03" so this goes back. It then states that it was lodged on 3rd June 2002, so it is a claim that started life in 2002. By the time it came to the European court, the law had in any event, as I recall, been changed anyway, but it had not been changed at the times of which the applicant was complaining.

**Deputy P.J.D. Ryan:**

Looking at these Austrian cases, the first 2 judgments were in 2003, as I say, and the last one was in 2006. What has been happening here in the Austrian situation and what does it mean for Austria? It seems to me that 2006, when they already had 2 judgments in 2003, what are they still trying to prove in Austria?

**Miss S.C. Nicolle:**

I do not think they are still trying to prove anything. I am just running my eye over the case, but my recollection is that they had by then changed the law. I will see if I can find it. No, I am sorry, I am wrong. It says the legal situation had remained unchanged since 9th January 2003.

**Deputy P.J.D. Ryan:**

What I am asking is whether Austria, in fact, ignored the first 2 judgments?

**Miss S.C. Nicolle:**

I think there was debate on that. I have to apologise, I really cannot advise in detail on what did and did not happen in Austria.

**Deputy P.J.D. Ryan:**

Okay, let us move on.

**Senator J.L. Perchard:**

Just to change tack a little bit, in the report and proposition it did highlight some anomalies within the European Union on equalities of age of consent, particularly Jersey, Sark, Isle of Man, Guernsey, Portugal spring to mind. There may be others; I think that is it. That is for people who have signed up either directly or indirectly to the ECHR. Are those countries or islands facing the same arguments as we are, or do they in any way have a method that would exempt them from their obligations?

**Miss S.C. Nicolle:**

I cannot think of any way in which they can have a method that can exempt them from their obligation. Any country which is a signatory to the European Convention on Human Rights is bound by it. Therefore, any country which has discrimination of this kind is in breach. As to why it seems to be Austria more than other countries that gets taken to the European court, goodness knows. It may be that Austria does more in the way of prosecuting citizens and so they object to it more. It may be that in some of the other countries the citizens themselves do not find it as objectionable and have no particular wish to go to the European court. The relevant point about the European court is that it is only triggered when somebody makes an application to it. If nobody makes an application to it, the state can be in considerable breach but it simply will not come before the court.

**Deputy P.J.D. Ryan:**

In your paragraph 19, you consider the possibility of raising the age of heterosexual intercourse rather than lowering the age of homosexual consent. You explain this business of proportionality, I think, in paragraph 19. We have become aware that there is either something happening in France or certainly a strong debate happening in France about doing exactly that and raising it. I know you are giving an opinion about a different country, but why is it that France feels that it should do this?

**Miss S.C. Nicolle:**

I cannot give any thoughts on why France feels it should do this, whether they decide to do it or not, because the reasons could be absolutely anything. I mentioned this here because it was queried in the States and what I have done here is highlight the question which might then be raised by heterosexuals who suddenly found that the age had gone up. I have put down that it seems to me that it would raise that question. As to what the answer would be, I have not put what the answer would be because that really would be a matter for the States. The point I am making there is that it would not be something which could be safely done unless the legislature was quite confident that they had decided that 16 was too low for girls. I do not think that it would be a sufficient answer to say: "We are raising the age for heterosexual intercourse because we do not want to lower the age for homosexual intercourse." The hypothetical situation you have to think ahead to is the age has been raised, a 16-year-old girl or

somebody who is possibly already enjoying some kind of sexual relationship with a 16-year-old girl comes along and complains and says: "You have interfered with the private life of this 16-year-old girl." To justify the interference it would be necessary to say: "Well, it was necessary and proportionate for the protection of 16-year-old girls."

**Senator J.L. Perchard:**

Just an addendum to that, in Northern Ireland the age of consent for heterosexual and homosexual sex is 17. However, a person can marry at the age of 16, meaning that there is a defence, I understand, within the law for the husband who has sexual intercourse with his 16-year-old wife. I know you have answered that, but is this an option for Jersey, to raise the age of consent?

**Miss S.C. Nicolle:**

For heterosexuals?

**Senator J.L. Perchard:**

For both. Raise the age of consent with this draft Sexual Offences law meaning all you would have to do is change the 6 to a 7. What would be the implications of that to Jersey?

**Miss S.C. Nicolle:**

So that you would have an age of 17 for both homosexual and heterosexual?

**Senator J.L. Perchard:**

Yes, non-discriminatory.

**Miss S.C. Nicolle:**

So far as the homosexuals were concerned, it would be non-discriminatory and they would not have a ground of complaint because the age will have simply come down. So far as heterosexuals are concerned, I think for the reasons I have given it would certainly put a 16-year-old girl or anyone who wanted to have a relationship with a girl aged 16 but below 17, it would put them in a position where they could challenge. I am not saying what the result of the challenge would be, but it seems to me that there would be an obvious challenge because the girl in the relevant age band would say: "You have interfered with my right and it was not necessary to do so for my protection" and I do not see where the answer would be. I do not see how you could say that 16 has been quite safe for heterosexuals since 1895, but suddenly we have decided it is not safe any more.

**Senator J.L. Perchard:**

In your opinion it is only a matter of time before a 16-year-old girl challenges the law in Northern Ireland?

**Miss S.C. Nicolle:**

There again, although you cannot discriminate between the sexes within a state, there are differences between the states. Certainly no one in Northern Ireland can challenge it on the grounds of discrimination. It does not seem to me that they can challenge it on the grounds that I have suggested, that the age has been brought up artificially. I do not know that I would agree.

**Deputy P.J.D. Ryan:**

Just to clarify that question I asked about France, the sort of information that we get, although we have not done a lot of research on it, is that there is a worry in France about the sale into marriage of young girls by persons in trust, e.g. parents, among certain sections of the immigrant population.

**Miss S.C. Nicolle:**

That would be a very proper ground for legislating, yes.

**Deputy P.J.D. Ryan:**

We have not done a great deal of research but we may do a little bit more research on this. You would feel that that might be a legitimate reason?

**Miss S.C. Nicolle:**

Yes. If the concern of the French Government is that there is a proportion of the population where girls of the age of 16 are being coerced into sexual relationships or marriages that they do not want, then that would be a proper ground because you would be doing it for the protection of the girls.

**Deputy P.J.D. Ryan:**

Thank you. We have also looked a little bit at Canadian law and I notice from your written submission that you do not feel that this is relevant because our commitments are to the European Convention.

**Miss S.C. Nicolle:**

Yes. I do not think that it can be. If it is the same as the European Court of Human Rights, then it is superfluous. If it is different, it is irrelevant.

**Deputy P.J.D. Ryan:**

Thank you. Moving on to your second section, we asked you to look at the Jersey curriculum in schools, paragraph 31. We asked you to look at whether there was anything in the curriculum in Jersey schools that was significant or may cause a problem in the future. You have obviously looked at it and you confirmed that it is compliant in every way.

**Miss S.C. Nicolle:**

Yes. There is certainly nothing that is the equivalent of the erstwhile UK ban on promoting homosexuality, which was what prompted the request. There are various points which talk about relationships, and I can read them out if the Panel would like or, indeed, I can leave this with the Panel, but frankly they are in very general terms and I do not think personally that they are of relevance one way or the other.

**Deputy P.J.D. Ryan:**

That is fine. We can put that away. I think we have covered the queries I had on paragraphs 36 and 37. In paragraph 44, the Guernsey situation, I think one of the concerns that had been raised in very general terms is this question of the Bailiff sitting as chair of the States. Do you want to expand on that a little bit? Guernsey was perhaps in a different situation but it has changed now, you believe?

**Miss S.C. Nicolle:**

No, I say I do not know what Guernsey is doing. I have said it is possible Guernsey may have adopted the same practice. One of the factors in the McGonnell case is that the Bailiff was presiding over a planning appeal which referred to some planning document which had been adopted while he was in the States. It is settled practice certainly now in Jersey that neither the Bailiff nor the Deputy Bailiff will sit on a case if they were in the States when it was debated. Panel members may recall there was a debate about a field in St. Brelade and at the stage when I gave legal advice the Deputy Bailiff left the chamber. In any event, we now have our files noted to say: "Deputy Bailiff not to sit if any appeal on this case" so that there is no cross-infection, as it were.

**Deputy P.J.D. Ryan:**

But it is true to say that in Guernsey this may not have been the case in the past but since McGonnell ...?

**Miss S.C. Nicolle:**

It certainly was not the case in the McGonnell case because (I think I have set it out at paragraph 43) the Deputy Bailiff had presided over the States when Detailed Development Plan No. 6 was adopted. He then went and presided over an appeal which turned upon the provisions of the Detailed Development Plan, so he had been dealing with both.

**Deputy P.J.D. Ryan:**

Thank you.

**Miss S.C. Nicolle:**

I wonder if I could just jump back a few questions to when I was being asked about Austria. I said I thought that they had appealed the law but I could not find the passage in the judgment. I have now found it and it is in *R.H. v Austria*, which was the 2006 one, but that was complaining of events that took place in 2002. And at paragraphs 14, 15, 16 and 17 of that judgment it says that on 10th July 2002 Parliament decided to repeal Article 209. That amendment published in the Official Gazette came into force on 14th August 2002, so there has been some legislative change.

**The Connétable of Grouville:**

Is it possible for Jersey through the UK to opt out of any part of the ECHR?

**Miss S.C. Nicolle:**

No. You can make reservations, but those have to be made at the time of joining up, or derogations, but derogations have to be in time of war and they are for things like terrorism. If you have a state of national emergency you can suspend, for example, some of the provisions about arresting people and holding them for trial and so on. But you cannot suddenly backtrack and say: "Please disapply this Article."

**The Connétable of Grouville:**

The lines I am thinking along are this. We signed up for it; I do not think there is any doubt about that. It can then change its mind or the court can make different rulings as it progresses. It is a living document, for want of a better word, to use the old expression. As such, we are bound by all the changes that subsequently occur after we have signed up.

**Miss S.C. Nicolle:**

That is right, yes. It certainly is fair to say that the interpretations of the Articles over the decades that have passed have, I think, probably transformed it from what the original drafters had in mind.

**Senator J.L. Perchard:**

In addition to the Constable's question, the evolving European Court of Human Rights legislation only evolves by case law judgment?

**Miss S.C. Nicolle:**

It evolves by case law judgment, yes, and for that there has to be an applicant. An aggrieved applicant has to go and complain about something.

**Senator J.L. Perchard:**

That is the only way it changes, is that right?

**Miss S.C. Nicolle:**

Yes. I suppose all the states parties could agree theoretically, but I think we are getting ...

**The Connétable of Grouville:**

So at the end of the day we are involved in what one would almost term a judicial dictatorship where the court itself can change its opinions and we are bound by those opinions as they change and not by the opinions of the people who elected us?

**Miss S.C. Nicolle:**

Without adopting the wording, it is certainly the case that the judgments of the European court which interpret the Convention go far beyond the bare words of the Articles and that the thing does change and it is binding.

**The Connétable of Grouville:**

Right, so we know where we are going. Thank you.

**Miss S.C. Nicolle:**

For example, if I can refer to the European Commission case of Sutherland, the 1997 one, where the Commission found that the complaint was admissible. At paragraph 58 of the report of the Commission the report records that the UK Government: "... drew attention to the consistent series of decisions by the Commission recognising the criterion of social protection justifies not only the imposition of restrictions on male homosexual activity but the setting of a higher minimum age than in the case of heterosexuals." It cites a 1975 case which said that there are objective reasons for a different age of consent. So the question that I was asked much earlier - have we been in breach since 1951 - the answer is no because certainly right up to 1975 and possibly later the Commission was saying something different. They were saying you can have different ages.

**Deputy P.J.D. Ryan:**

A couple of little variations on some of the questions that you have already answered. Raising the age of consent for heterosexuals as opposed to lowering the age of consent for homosexuals, hypothetically if we were to take that option up, in terms of our commitments and our breaches of the Human Rights Convention, do you think that would be more serious, less serious or pretty much the same in either case?

**Miss S.C. Nicolle:**

In both cases it would be a breach of the same Article in the same way, really. It would be an interference with the right to respect for private life in the form of preferred forms of sexual intercourse. I think it would be pretty much the same.

**Deputy P.J.D. Ryan:**

No different? Thank you. There is a case that is coming possibly to the European Court of Human Rights of a local resident versus the United Kingdom. It has been quoted that we are in breach of Articles 1, 8 and 14. We are a little bit unclear as to why Article 1. Can you help us with that?

**Miss S.C. Nicolle:**

Well, I have to confess to being unclear as well. Is there a copy of the case explaining why Article 1 is thought ...?

**Deputy P.J.D. Ryan:**

There probably is and maybe we will ask you for that later rather than now.

**Miss S.C. Nicolle:**

Maybe if I could see the application I could comment upon it.

**Deputy P.J.D. Ryan:**

Okay. Probably if you do not have that in front of you now then --

**Miss S.C. Nicolle:**

I would prefer to be able to see the ...

**Deputy P.J.D. Ryan:**

Should we ask you maybe to comment on that and revert back?

**Miss S.C. Nicolle:**

Oh, maybe it looks as if it is coming.

**Male Speaker:**

We have been given a copy of this but some of it was provided on a confidential basis.

**Deputy P.J.D. Ryan:**

Sorry, if it is on a confidential basis then maybe we should hold that back.

**Male Speaker:**

I have the actual version which I am not bothered about being seen (...inaudible).

**Deputy P.J.D. Ryan:**

Thank you.

**The Connétable of Grouville:**

It seems a bit unfair to ask her to comment on something --

**Deputy P.J.D. Ryan:**

Yes. I feel it might be better if you were to revert to us at a later time rather than ask you to make any comment at this stage.

**Miss S.C. Nicolle:**

I think probably yes.

**Deputy P.J.D. Ryan:**

Okay, so we can deal with that in writing at a later date. Thank you.

**Miss S.C. Nicolle:**

Sure.

**Senator J.L. Perchard:**

If we were to delay for any reason the implementation of this legislation (and one of the reasons could be that we wanted to bring Sexual Offenders legislation in tandem with the draft of the Sexual Offences legislation), would it delay the implementation of the Human Rights (Jersey) Law?

**Miss S.C. Nicolle:**

Yes. What the Human Rights (Jersey) Law does is give a right to inhabitants of the Island to enforce Convention rights in the domestic courts, i.e. in the Royal Court. In practice it would delay it. In theory it would not need to. It could be brought into force, but all that would mean would be that everybody could then go along to the Royal Court who felt aggrieved and start bringing actions for breaches of such perceived human rights as they wished to complain of.

**Senator J.L. Perchard:**

So it is not realistic for the States of Jersey to be put under the sort of pressure they are being put under with the excuse being used that it will delay the implementation of the Human Rights (Jersey) Law?

**Miss S.C. Nicolle:**

Well, as I said, in practical terms it will delay it because I cannot see it being brought in while there are known breaches.

**The Connétable of Grouville:**

Surely as this is a private prosecution against the UK Government and the States of Jersey it is up to the claimant to decide how fast or how slow they want to proceed. I do not think it is within our grasp at all, is it?

**Miss S.C. Nicolle:**

Sorry, are we talking about the progress of the application to the court or the bringing into force of the law?

**Senator J.L. Perchard:**

Well, I was talking about implementing the Human Rights (Jersey) Law and whether any delay in implementing Sexual Offences legislation would delay the implementation.

**Miss S.C. Nicolle:**

Yes, in practical terms it will and that is why it has not been brought into force for the period for which it has not been brought into force.

**Senator J.L. Perchard:**

I feel that the Sexual Offences legislation would be better accompanied with Sexual Offenders legislation and be presented to the House at the same time. What in your opinion would be the possibility of doing this and implementing the Human Rights legislation in good time?

**Miss S.C. Nicolle:**

Well, as I said earlier, I think there is unarguably a breach at the moment in this area and the starting point has to be that breaches should not be continued. That is it in legal terms, anyway.

**Deputy P.J.D. Ryan:**

In legal terms and you are qualified to give us the legal terms. The political angle to it is outside of your

--

**Miss S.C. Nicolle:**

That is outside my remit, yes.

**Connétable J.L.S. Gallichan of Trinity:**

Can I just ask a question? Say we brought the sexual law in and then brought in later in the year or possibly if it was given as a guarantee the Abuse of Trust would come along, because that is basically I think for the local people (...inaudible), would that help the situation if the law came in now or within a short time and then we would discuss and arrange the proper Abuse of Trust law later in the year?

**Miss S.C. Nicolle:**

Yes, if the amendment which is under consideration was brought into force, that would put an end to the breach of Articles 8 and 14 taken together, the discrimination point, and there is no bar to subsequently

bringing in the breach of trust because I think there is no doubt that breaches of trust do take place and that there is sexual exploitation as well as people who want sexual freedom. I have seen enough prosecution files to know that.

**Deputy P.J.D. Ryan:**

One of the things that has come out of this Scrutiny process (and I am ranging wide a little bit here) is that Jersey has in the past signed up or been extended to certain international treaties and conventions without fully realising the extent or the implications on the Island. First of all, would you agree with that?

**Miss S.C. Nicolle:**

Well, if we take this one as an example, it was extended to Jersey a very long time ago at a stage when there was not much developed case law. I do not think anyone would have foreseen the implications of the case law developments because I think that some of the judgments given by the European Court of Human Rights (and I am not particularly talking about this area even) would have surprised the original drafters of the Convention.

**Deputy P.J.D. Ryan:**

So it has developed and ...?

**Miss S.C. Nicolle:**

So it has developed in a way that I do not think anybody would have predicted.

**Deputy P.J.D. Ryan:**

If there are problems and snags being created by us signing up, do you feel we are still doing that? Is there a problem here? As an Island, do we need to be more careful? Do we need to research better before we sign ourselves up to these international treaties and conventions?

**Miss S.C. Nicolle:**

I think careful consideration is given every time Jersey is asked whether we wish to have a convention extended. I think quite careful consideration is given.

**Deputy P.J.D. Ryan:**

I suppose what I am asking is whether you believe we are robust enough? Are we paying enough attention? Do we put enough resources behind it? Do we give it enough careful thought? Is it robust enough? Are we still getting ourselves into a pickle in the future by signing things now?

**Miss S.C. Nicolle:**

I do not think that is likely, I have to say. Obviously you could do a comprehensive examination of every convention that has been under consideration.

**Deputy P.J.D. Ryan:**

Are you aware of any storms brewing in other areas other than this particular European Court of Human Rights?

**Miss S.C. Nicolle:**

No, I cannot think of any. For example, if there were some convention that appeared to create obligations that Jersey might not have the resources to meet, then the answer would be we do not want it extended at the present time. But going back to the European Convention on Human Rights, I do not think it would matter how robust or how critical the scrutiny back in the early 1950s. What people would have seen would have been a convention that appeared to preserve very basic fundamental rights

which very recently had been disregarded in the most horrible ways and no sort of scrutiny would have led anyone to say that is not a good convention, I do not think.

**Deputy P.J.D. Ryan:**

So there are no actions that we need to take of a corrective nature with the way that we go about signing international treaties at the moment that we are not already doing?

**Miss S.C. Nicolle:**

No, I do not think so.

**Deputy P.J.D. Ryan:**

There are no lessons to be learned?

**Miss S.C. Nicolle:**

No.

**The Deputy of St. Mary:**

Can I just ask for some clarification, please? If we do bring in the Sexual Offences law now and then there is a delay in implementation of Abuse of Trust, even if it is, say, only 6 months or whatever (I am sure it will be the minimum time), what position do we find ourselves in in the interim if there is a case where abuse of trust would have been admitted? Do we find ourselves deficient in any way?

**Miss S.C. Nicolle:**

Do you mean suppose you bring the age down to 16 and then there is some kind of abuse of trust between 16 and 18?

**The Deputy of St. Mary:**

Yes.

**Miss S.C. Nicolle:**

The same, really, as if there is an abuse of trust with a girl between 16 and 18, as can indeed happen.

**The Deputy of St. Mary:**

Thank you.

**Senator J.L. Perchard:**

The Minister for Home Affairs at a hearing just a week ago said the Abuse of Trust legislation would not be complicated to draft because there are some very good models. Would you agree with that?

**Miss S.C. Nicolle:**

Yes. Obviously I am not a law draftsman and perhaps I should not be answering questions for the law draftsman. I would have thought it would not have been complicated or not excessively complicated.

**Deputy P.J.D. Ryan:**

Well, I think that probably concludes our hearing this morning. Thank you very much for attending and once again our thanks for your written responses to our questions. There is just one outstanding.

**Miss S.C. Nicolle:**

Yes, one outstanding now.

**Deputy P.J.D. Ryan:**

Could you have a look for us?

**Miss S.C. Nicolle:**

I will do and I will let the Panel have my advice as soon as possible.

**Deputy P.J.D. Ryan:**

Thank you very much and good morning.

### **The Panel adjourned for a short time**

**Deputy P.J.D. Ryan:**

Good morning again, ladies and gentlemen. We reconvene this morning's final public hearing and I would like to welcome Deputy Roy Le Hérissier (who is here also in his dual role as Dr. Roy Le Hérissier) to the final session of the public hearing on the amendment to the Sexual Offences (Jersey) Law. Roy, first of all, I think it would be useful to establish your background.

**The Connétable of Grouville:**

Could you just let us know what your qualifications are for the benefit of the public, really, to assess the weight that we give to your arguments?

**Deputy R.G. Le Hérissier of St. Saviour:**

Well, I was obviously educated in Jersey to the point of 18. I did a degree in politics and then I did a PhD in politics and government. Then I trained in prison service management and went into the Prison Service.

**The Connétable of Grouville:**

The correlation between politics and prison service is escaping me at the moment.

**Deputy R.G. Le Hérissier:**

Well, I stayed in it for some years. I always wanted to go into one of those professions, oddly enough, either the Probation Service or that. I worked in 2 systems. I worked in Britain and overseas, and then I went into academic life. Then I moved back into politics and public administration.

**The Connétable of Grouville:**

Thank you.

**Deputy P.J.D. Ryan:**

Your PhD, your doctorate, specifically what was that about?

**Deputy R.G. Le Hérissier:**

It was on the development of the Government of Jersey 1771 to 1972.

**Deputy P.J.D. Ryan:**

So I think one could safely assume that you are fairly knowledgeable in this particular area of the constitutional relationship between Jersey and the United Kingdom?

**Deputy R.G. Le Hérissier:**

Yes.

**Deputy P.J.D. Ryan:**

Does that extend to the relationship constitutionally between Jersey and the European Union, if there is

one, or indeed the Council of Europe?

**Deputy R.G. Le Hérissier:**

No. I have obviously kept in touch with that, but that developed after.

**Deputy P.J.D. Ryan:**

Okay, thank you. Is there any further clarification of Roy's credentials? No? Thank you for that.

**The Deputy of St. Mary:**

What consequences do you attach to Jersey's position if we do not accept judgments of the European Court of Human Rights?

**Deputy R.G. Le Hérissier:**

I think that is as much a political as a constitutional question, which is what I was going to try and argue. My view would be we would be in a very difficult position. We have signed up to the Convention and obviously you have had the Solicitor General who can speak about what the implications of that are. But certainly my understanding is once you have signed up to it, you have signed up to what flows from it. I think we would be in big trouble but if you look going back to a bit of the history, part of the problem (as a colleague was telling me before) is the Jersey Constitution and the Jersey relationship with the United Kingdom, of course, is not written down. It has never gone for a final clear judicial judgment so we operate in a bit of a dark area and an area where maybe there is a bit of ambiguity. What you are faced with is you are looking at a series of incidents or a series of cases where sometimes you go to the brink, sometimes the UK goes to the brink, or you look at the Isle of Man, for example, who have gone to the brink over the Birching case. There was also telecommunications where the Isle of Man I think put up a pirate radio station, for example. They have gone to the brink and what has always been clear is that generally we pull back from the brink. But if the UK is determined to get its way it will not get its way by, for example, asking Parliament to legislate for the Island because that has become a bit of an off-bounds area, so to speak. It generally gets its way obviously through a process, I imagine, of political pressure behind the scenes.

**Deputy P.J.D. Ryan:**

That is interesting because we have 2 conflicting views here, I think. The narrow legalistic view from the Solicitor General is that, in fact, if you were to go to that brink or past it, the UK Government would, in fact, legislate. Whereas we have a view from our Chief Minister that that will not happen, and I think he concurs with your view that there will be more subtle means brought to bear of a political nature to do with concessions maybe that we currently enjoy with the United Kingdom that could be withdrawn, all those kinds of areas. I believe you are saying that you would concur with Senator Walker's more politically based view on what would happen, is that right?

**Deputy R.G. Le Hérissier:**

Yes, I would. Obviously a lot would depend on the issue. If the issue was really seen as a keynote issue which could have the possibility of breaking the relationship, then maybe the UK would issue a direct threat, but I do not think so.

**Senator J.L. Perchard:**

How do you define "the brink"? What does that mean?

**Deputy R.G. Le Hérissier:**

Well, Senator Perchard, something where, for example, good government was breaking down on the Island or where we produced a law that was so in conflict with the UK's essential values and beliefs that they would say to us: "Look, if you really believe that, however you define it, I do not think you can be

part of Great Britain. You really have to make up your mind about dependence.”

**Senator J.L. Perchard:**

So we are nowhere near the brink at the moment?

**Deputy R.G. Le Hérissier:**

No.

**Deputy P.J.D. Ryan:**

This particular issue that we are dealing with, how serious a conflict would you see this potentially as being?

**Deputy R.G. Le Hérissier:**

I think if we pushed the boat out and we said: “Look, I am afraid this is not something we are comfortable with” it would be bad for 2 reasons. One obviously the Solicitor General has presumably addressed, i.e. we bought into a convention, the Convention on Human Rights, and here we are saying we would only be selective in what we accept. Much as we do not perhaps agree with the way that Convention is operating, I do not think you can do that. You buy into the deal and you have to stick with it.

**Deputy P.J.D. Ryan:**

You mentioned 2 things. That was one; was there a second one?

**Deputy R.G. Le Hérissier:**

Could you repeat your question?

**Deputy P.J.D. Ryan:**

How serious a conflict potentially could this be?

**Deputy R.G. Le Hérissier:**

I think if for the sake of argument we said: “Well, tough luck, we believe very sincerely about this and it really goes to our values and we find ourselves in a bit of a straightjacket. We will accept on one level that we have to take the findings of the court but we thought there was a bit more of a margin about the way we could accept or deal with those findings” I think it would be very serious if we pushed it, just as the Isle of Man found with the Birching case.

**Deputy P.J.D. Ryan:**

It could be a deal breaker?

**Deputy R.G. Le Hérissier:**

Yes, if we went that far. I think we would have to be pretty politically foolhardy to do that irrespective of how people feel.

**Deputy P.J.D. Ryan:**

Thank you.

**Senator J.L. Perchard:**

Define “very serious”. What are the implications of a very serious situation? We all know it could be very serious. What does that mean, Roy?

**Deputy R.G. Le Hérissier:**

I think what it would mean is, as I said before, Great Britain would tell us: "Look, this is something that is very important to us. We have signed up to this agreement" and often the unwritten political code is: "And that means we have to keep our relationships right with Europe." Obviously that is a big issue for the UK as a member of the European Union. I know the courts and the Union are separate things but the 2 get conflated. That is where I think it could be very serious. They will say: "I am sorry, we believe in this. This is going to embarrass us internationally if you do this. You did sign up to it. What are you up to?"

**The Connétable of Grouville:**

Okay, 2 questions. Firstly, we have heard from both the Solicitor General and Advocate Lakeman that, in fact, there are 2 bodies of opinion as to whether the UK can legislate for us or not, and they are equally balanced. Would you agree with that, that they are equally balanced, or do you think it is heavily weighted on another side? I am talking purely about legislating; I am not talking about corrective measures, for want of a better word. But to legislate for us, would you agree that it is a 50/50 deal whether they can or not?

**Deputy R.G. Le Hérissier:**

The last firm statement (I do not know if either of them referred to it) was in the Kilbrandon Report of the early 1970s where they did say that there was a residual possibility if things got really bad, if, for example, good government broke down (and we can spend all day discussing what good government is) then they would have to step in. But my view is if you analyse the development of the conventions, a convention becomes established over a period of time. Professor Jowell is the latest sort of work on that, which obviously was referred to. You cannot put a year to it, but there seems to be a tipping point when people say it has been around so long, this practice, that we really cannot go back on it. If you analyse all the big cases that have involved Jersey, like those big cases of the 19th century, the Prison Wall(?) case, the Victoria College case --

**The Connétable of Grouville:**

But none of them ever went over the brink, did they?

**Deputy R.G. Le Hérissier:**

No. They always pulled back. Jersey, in fact, was much more robust and aggressive in asserting its rights than we probably are now. We are probably much more diplomatic about the way we handle things. If you read the correspondence, we took no prisoners when we argued our case.

**The Connétable of Grouville:**

No, exactly. Perhaps an argument that one would have at the moment, that we are being too easy going.

**Deputy R.G. Le Hérissier:**

I would say, answering your question, probably the balance is in favour of Parliament not legislating unless something inconceivable or at the moment improbable happened; Jersey collapsed and there were riots in the streets or something.

**The Connétable of Grouville:**

The second thing I wanted to ask was we have had a submission that says basically should the proposition be accepted solely on the grounds of coercion from external pressure against the public will, would it prejudice our position as elected representatives of the people? In other words, will it affect my right to vote as I thought fit? When I have been asked by my constituents to vote a certain way, an external pressure is then brought to bear upon me to vote another way because of certain situations. How would you view that in the question of human rights and the rights of the elected person?

**Deputy R.G. Le Hérissier:**

Well, it has not come in yet, as we know. It has not come in in domestic law, but your predecessors agreed in the 1950s to the acceptance of the European Convention on Human Rights and by doing that we accepted the judgments that flowed from that. What I would say is we probably mishandled it; of that there is no doubt. I was for a period on Legislation when some of these similar things were coming through. You do not have a lot of choice; you basically have to nod it through. As we heard, too, in the States, the Legislation Committee is not a social committee. It does not have the resources to carry out social investigations and so forth and so on. If we were to learn anything from this, then, what I would say we have to learn is to do something that happens with international treaties. It was always said we were getting into trouble because we were accepting these treaties and they sometimes have, for example, environmental consequences, and we never had the infrastructure to implement them. Really, thinking about this, the question we should have asked ourselves is: do we have the infrastructure to implement this? Have we looked at the social situation? We were late in the day in bringing up the issue of trust, which was clearly something that should have gone in parallel with it. Did we approach the right ministries or committees as was the case for their advice on how to implement this law? Did we inform the public? I do not think you can negotiate with the public on this. Ultimately we are signed up to it, unless we want to unravel that agreement.

**The Connétable of Grouville:**

No, I quite agree with you. I think that the law, the Human Rights Act that was passed in the early 1950s, is a completely different animal to what it is today. It has changed and it has evolved and we are forced to accept any change or evolution. I made the point earlier on that really we are being dictated to by a small number of courts or judges as to our position, and our position will change despite the will of the people.

**Deputy P.J.D. Ryan:**

So you are asking the witness whether he agrees with that?

**Deputy R.G. Le Hérissier:**

Indeed, yes.

**The Connétable of Trinity:**

How do you think our international status will be affected if we do not? I know we have to sign up with Great Britain and United Kingdom, we have signed up, but we are now being told that our international reputations will ride... Would it be a great damage to the Island?

**Deputy R.G. Le Hérissier:**

I think so. I think it would be as damaging, for example, as not accepting a necessary law in financial regulation. Because what it would do, even if we had good arguments and, of course, in a way we cannot have the argument because we have the judgment, even if we had good arguments (which I find doubtful) people would say: "Well, you signed up for this Convention". If it reached the stage where it became a public argument between us and the UK, that would look incredibly embarrassing. Now, you might say: "Well, that is terrible. Can we not have a public argument or debate with the UK? Do we just have to sit there and meekly accept what they tell us?" Well, then I would say we should approach them and say: "Look, there are difficulties in accepting some of the judgments of the European Convention". There is a margin of discretion in the Convention itself, and that was applied in the case of the Guernsey Bailiff where they looked at that case about whether the Guernsey Bailiff was conflicted because of the 2 roles he plays and he was sitting on the planning board. They applied that concept to that case, that there was a margin. I think it is discretion.

**The Connétable of Grouville:**

I think we have been advised on this one that there is no margin at all.

**Deputy R.G. Le Hérissier:**

On this case, no, but what I would say is there might be a point then we could go to the UK Government and say: "Look, we are finding it difficult". I suspect they will say: "Well, we will listen to you on resource issues but we will not listen to you on principle issues". I suspect that would be their line. My view is it would be really embarrassing. The UK has this argument within itself obviously about these judgments. I think it would be enormously embarrassing.

**Senator J.L. Perchard:**

Deputy Le Hérissier covered the sort of question I was going to ask, but are you familiar with Deputy Edgar Becquet's Statement to the States in 1990 regarding sodomy legislation? He made a Statement after a visit to White Hall with a group of Jersey politicians. This was lowering the age of consent for homosexual sex from 21 to 18. Are you familiar with the Statement?

**Deputy R.G. Le Hérissier:**

Not his statement, no.

**Senator J.L. Perchard:**

That was 1990. Do you think the constitutional relationship between the United Kingdom and Jersey has changed in any way since then?

**Deputy R.G. Le Hérissier:**

Well, oddly enough and more so possibly through the Tomes case, there was meant to be a more open relationship and it was meant to be a relationship at the political level rather than at the executive office level. In other words, delegations used to be led by the Bailiff or the Deputy Bailiff and people like that. When the Tomes affair blew up, as you know, there was this big argument about we the politicians want to have a view and that was Senator Shenton then who led the delegation. The feeling I got was there was going to be a more open and not quite equal relationship, but moving to a more equal relationship, and they would say: "These are the things that are coming through. What do you think?" and so forth and so on. Of course, this is a slightly different matter. We are talking here about a judgment of a court whose judgments we have through the Convention accepted.

**Senator J.L. Perchard:**

We can move on, but just for the record it was very interesting, the Bailiff, the Attorney General and the Greffier and 2 politicians attended the Home Office in 1990, which is interesting. Would a decision by the States not to lower the age of consent, Roy, in your opinion prevent the introduction of the Jersey Human Rights legislation which is due to be implemented this year we hope?

**Deputy R.G. Le Hérissier:**

I am not a lawyer and I presume the Solicitor General has answered this, but my understanding is yes, it would prevent it because it would be seen as so much in conflict with a key decision.

**Deputy P.J.D. Ryan:**

There are a couple of little statements that you made earlier on, about 10 minutes ago, and I would just like to remind you of them, just draw you out a little bit. You said that over the various cases in the 19th century (you quoted 2 or 3) we were much more robust, whereas nowadays we are more diplomatic. Why?

**Deputy R.G. Le Hérissier:**

That is a very good question. I think because we live in an interdependent world a lot more, just as the

UK does. For good or for bad the UK is a member of the European Union and, much as we all know there are large sectors of the population not happy with that arrangement, politically it is a member and when it makes decisions it is always aware of the European Union. I think when it makes decisions about Jersey it is probably aware for good or for bad.

**Deputy P.J.D. Ryan:**

Yes. I suppose I am asking whether you agree with this statement: as we go through time, we are becoming more tolerant of other people's views and one could take a parallel with this particular issue that we are looking at in that this is why the ages of consent and we are taking more notice of what other people's views are on sexual offending for homosexual sex, for example. Would you say there is a parallel there in the way that people's thoughts and attitudes are developing?

**Deputy R.G. Le Hérissier:**

Yes, I would say so. People move around the world a lot more, societies are linked through various treaties and so forth, and in the 19th century we did not have to open ourselves to that as much. We could be truly independent and we were until the large scale immigration started in the early and mid 19th century.

**Deputy P.J.D. Ryan:**

Thank you. The other thing that you said, you used the words "mishandled it". I would like you to explain exactly what you meant. I think you were talking about this particular treaty that we signed, or possibly other treaties that we have signed or are signing, what have you. You used the words "mishandled it". Do you want to expand on that? I am particularly interested in who mishandled. Not specifically people, but do you think it is politicians that mishandle or is it officers or advisers that have mishandled in the past? Is that what you are saying?

**Deputy R.G. Le Hérissier:**

Well, I am partly guilty because I was on Legislation and I was for a short time president on Legislation. I remember the Cross Gender Act was just starting to appear. I do not know where that is at at the moment but I remember we were starting to get papers from that. The question that was raised about that, for example, on the committee was did the Island have the resources to implement this? We did ask the questions that you are asking now. Did we have to do it? Not because we necessarily opposed it, I should add. In fact, we never really got to the principle of the thing. We were looking at the logistics because as I recall at the time it was quite a complex law. Again, we were told this is probably going to have to go through, so we asked: "Well, what are the practical implications? Have we got the resources to handle this? Where is the pressure coming from on the Island?" and so forth and so on. I think when I say "mishandled" perhaps what we should have done is Legislation, as you know, had a narrow brief. It dealt with everybody's sort of stuff that could not be put into other committees. That was often what it did, dealt with a lot of material that was conveyed by the Attorney General that she would get as the Crown Officer which did not sit easily into other roles. What we should have asked even more strongly is what are the resources required for this law, what are the social consequences it is going to have on the Island, but we did not have the mechanisms to do that. We could not go round holding big surveys and so forth and so on. Obviously the priority of the Legislation Committee was to take advice on the legal aspects. I would add that if we were to introduce it, as I said at the very beginning (and this is where the issue of the abuse of trust seems to come up), what other things would need to be done in parallel? Would we need a more assertive health education campaign, for example? Would we need to have strong liaison with the Education Department? Although I noticed that they had been consulted, I do not think the Legislation Committee had the wherewithal to do an awful lot with the replies. That was not their ball game.

**Deputy P.J.D. Ryan:**

I think you are talking about the consultative processes. I should explain to the public that I have an email from Dr. Le Hérissier here which highlights certain things to aid the discussion today. One of them (quoting from your email) says: “The consultative processes that precede the adoption of such treaties” et cetera, and I think that is what you are referring to, is it not?

**Deputy R.G. Le Hérissier:**

Yes.

**Deputy P.J.D. Ryan:**

The question is do you think there are lessons to be learned here?

**Deputy R.G. Le Hérissier:**

Yes.

**Deputy P.J.D. Ryan:**

Is there any further expansion you would like to make?

**Deputy R.G. Le Hérissier:**

Apropos of what Jim said, for example, there is no doubt that more ongoing consultation needs to occur with the UK Government, the Government of Great Britain.

**Deputy P.J.D. Ryan:**

About this particular issue?

**Deputy R.G. Le Hérissier:**

Well, about how we deal with these issues. As you probably know, there are protocols in place about how we handle international treaties and it has always been very difficult because there has always been a category where we can be consulted. There was a famous advisory written in about 1951 about this and it basically breaks down into 2 categories: those that we can have a general input into, and those basically where we can do little. For example, treaties like when the UK Government imposes sanctions on Kosovo or places like that, Southern Rhodesia. That was an issue with the Isle of Man.

**Deputy P.J.D. Ryan:**

Things that might have come out of the United Nations, for example?

**Deputy R.G. Le Hérissier:**

Yes. Maybe we need to press much more strongly and say: “We want to be involved in a much more continuing dialogue with you” but it cannot get around this particular issue, quite frankly. It can certainly get around issues where members get a surprise all of a sudden and find: “Heavens, I never knew we had signed up to that treaty”. We do get a list of these treaties and they are handled by the Chief Minister’s Office now, as you probably know, but they need to be looked at. There is this other set of treaties which have always been slightly in the background like the United Nations International Covenants on Economic, Social and Cultural Rights. We do give reports on these and they are written in very general terms. I know one or 2 civil rights activists on the Island basically because I have always been pinned to the wall by them and so forth. One or 2 of them have said that the reports are too general, that there are things there that we are skating over and we really have to be stronger about the way we reply. I understand people do go to New York, to the United Nations, and give a verbal report every 2 years on some of these treaties. I would have thought that has to be looked at much more clearly about what have we signed up to and what does it actually involve. We had, I understand, a lot of frights with some of these environmental treaties where it was quite clear we never had the infrastructure to deal with them.

**Senator J.L. Perchard:**

Can you envisage any circumstance at all that would provide the Island with the opportunity not to comply with the European Court of Human Rights laws and regulations?

**Deputy R.G. Le Hérissier:**

The only one, which of course is the nuclear option, would be to withdraw from the European Convention, which is too late in any case for this one, I would imagine. Internationally, it is impossible to do that. If people are not satisfied with the European Convention and the way the court works, they clearly have to work through channels in Europe with the Council itself.

**Senator J.L. Perchard:**

Pressing you for an answer then, there is no option?

**Deputy R.G. Le Hérissier:**

No. It is only a nuclear option, which is not conceivable.

**Senator J.L. Perchard:**

All or nothing?

**Deputy R.G. Le Hérissier:**

Yes.

**Deputy P.J.D. Ryan:**

I think we are pretty clear now on the constitutional position that we are in. Are there any things that we have missed or not asked you about that you would like to add to what we have been talking about this morning?

**Deputy R.G. Le Hérissier:**

No. I do thank you for this opportunity and I have really enjoyed it. I think it is very good that people are pinned to the wall on what, quite frankly, is a bit of an ambiguous subject. This debate goes on and on, of course. In a way not getting the UK relationship clarified has always been seen, I know, by senior people in the Island as to our benefit. How much longer can this continue? Of course, Kilbrandon did call for a written constitution between us and Great Britain. They did call for that, so at some point I would imagine we are going to have to look at that. I would imagine in the context of the UK relationship it is a quid pro quo relationship. As I think Advocate Lakeman said, you cannot be under the tutelage. I do not think it is a child/adult relationship; it has sometimes been described as that. But you cannot seek to take certain things from that relationship and not expect them to want some tradeoffs from us. The big issue is where those tradeoffs are going to occur.

**Deputy P.J.D. Ryan:**

I was going to come to this because you have put in your email “political tradeoffs” and I think that is what you are referring to.

**Deputy R.G. Le Hérissier:**

Yes. I do think it was unfortunate the way it was portrayed that if we do not agree to this the finance industry will suffer. I think it is a slightly more complicated issue than that. People like the Chief Minister should be in much more continuous contact with their political opposite numbers in the UK.

**The Connétable of Grouville:**

Can I just ask a final question? You were saying there is no constitutional set-up relationship. Would

you think in view of the fact that we are trying to stress our international identity or to make it a point that this is the time to do it?

**Deputy R.G. Le Hérissier:**

I would have said so. It certainly has its dangers if the UK got more assertive, but yet again, if you analyse what people like Professor Jowell write, conventions have developed. We have a high degree of internal autonomy but, of course, we deal with issues that cannot be classified as internal and external in a black and white sense. That is the nature of the world we live in. The UK suffers from that; we are not alone as an Island. I would say yes, it needs to be written down at some point. It has been talked about in finance that the nuclear option would be if the UK or Europe through the UK imposed unacceptable conditions on us we might have to seek independence.

**The Connétable of Grouville:**

So we could write a treaty which would be to a large extent defensive on our part to protect us?

**Deputy R.G. Le Hérissier:**

Yes. It would probably bring out what the powers are that we have as a legislature and what the reserved powers are that Great Britain has, and what are those that have to be negotiated, which would be a more difficult area.

**Deputy P.J.D. Ryan:**

A question to you, though, on that: would that be in our best interests or is it in our best interests to keep it as vague as possible?

**Deputy R.G. Le Hérissier:**

A very good point, the 64,000 dollar question. My view would tend to be get prepared for it, have the discussions, look at the options, but be very careful about how you move on it.

**Deputy P.J.D. Ryan:**

Keep it locked away in the safe?

**Deputy R.G. Le Hérissier:**

Yes. My view is that independence, for example, if you are going for independence it could well be on an issue of we are unhappy with some financial regulation that is coming our way. People then could say: "Well, if you are unhappy does that mean you are a second-class jurisdiction? Does that mean you want second-class regulation?" They will start drawing those conclusions so you could get into dangerous waters.

**Deputy P.J.D. Ryan:**

Okay. Dr. Le Hérissier, thank you very much for your time this morning. It has been very interesting to get an expert view on the constitutional issues involved. I think that concludes this morning's business. Thank you very much. Hopefully I think we will not be calling any more witnesses to give evidence before we produce our report. We now need to get into a huddle, so to speak, and see what we can come up with. Thank you very much and thank you to the members of the public for joining us once again this morning. We look forward to seeing you again at some stage in the future. Thank you.

**Hearing concluded**

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[1] Qualification added by the Solicitor General after the Public Hearing – *“Unless the factor which is not*

*present is that both parties consent. If A sodomises B without B's consent, A is guilty of an offence, but B does not commit an offence."*

[2] Qualification added by the Solicitor General after the Public Hearing - *Can I make clear here that I answered the question on the basis that it referred to homosexual intercourse. Having read it, I think that it may have referred to heterosexual intercourse. The answer is that the prohibition on sodomy is common law, modified by the Sexual Offences (Jersey) Law 1990, which made it lawful for consenting parties over the age of 18 in private. The prohibition on having sexual intercourse with a girl below the age of 16 is statutory (the Loi (1895) modifiant le droit criminal)*