STATES OF JERSEY

DRAFT MARRIAGE AND CIVIL STATUS (AMENDMENT No. 2) (JERSEY) LAW 200- (P.61/2008): COMMENTS

Presented to the States on 2nd June 2008
by the Education and Home Affairs Scrutiny Panel

STATES GREFFE

COMMENTS

1. Introduction

1.1 On 16th May 2008, the Education and Home Affairs Scrutiny Panel held a Public Hearing with the Minister for Home Affairs on the proposed amendment to the *Marriage and Civil Status (Jersey) Law 2001*. In addition, background research on the topic was undertaken. All relevant documents considered by the Panel, including the transcript of the Hearing, are available on the Scrutiny website: www.scrutiny.gov.je The Panel's objectives for its work may also be found on the website.

1.2 It was evident that this topic could lend itself to a detailed review. The Panel's work programme did not allow this, but the Panel presents these comments to highlight the issues covered with the Minister at the Public Hearing. It is hoped that they will assist and inform Members during the debate on the proposition. Whilst the amendments of the Deputy of St. Martin did not form a primary focus of the Panel's work, the issues covered are also pertinent to these amendments and reference is therefore at times made to them.

2. Why change the law?

2.1 The primary reason for changing the law appears to be the lack of choice that currently exists with regard to the registration of births. The report accompanying P.61/2008 indicated that the Minister had received "*several representations*" from parents who were unable to register the births of their children as they would wish. At the Public Hearing, the Minister further advised that "*perhaps six to eight*" couples had expressed concerns at the lack of flexibility in the current legislation. She also advised that the introduction in 2001 of the current shortened birth certificate had led to this lack of clarity; prior to that time, the position had in the Minister's view been clear.

2.2 The Minister stated that the current lack of flexibility did not reflect the modern reality that "*couples quite often have children before they are married*". She added that "*the law really has not kept up […] with some of the changing circumstances that we have in our society today*." The Panel was told that the Minister had explored the possibility that the law, as it currently stood, could allow the desired flexibility. However, it had been concluded that this was not feasible and hence an amendment to the law was necessary.

3. The principles underlying the Minister's Amendment

3.1 The Panel sought to understand the principles that underlay the Minister's amendment and questioned the Minister on various aspects of the proposition. The first issue covered was the question of how much choice should be afforded to parents at the time of registration. The Minister's report in P.61/2008 indicated that the amendment "*has been prepared on the basis that the surname of the child should be linked to the child's mother or father*." This differs somewhat to the amendments of the Deputy of St. Martin which is based on the principle that parents should effectively have complete choice in the registration of births. The Minister acknowledged during the Public Hearing that her amendment would allow parents a choice, albeit a limited one. She also advised that one principle underlying the amendment was that registrars should not be left in a position where they would have to exercise discretion.

3.2 The Panel asked why the principle of a 'limited choice' had been chosen and why the Minister had not opted to provide parents complete choice. The Minister explained that one of her focuses had been on the welfare of the child "*rather than necessarily the rights or preferences of the adults concerned*." The Minister also spoke of the need to balance between "*minority views and those views that are likely perhaps to be held by the wider community*." This idea of balancing community and minority views was raised on more than one occasion during the Hearing. For example, the Panel asked whether the Minister's proposition suggested that parents could not be trusted. The Minister again referred to the need to consider the community's values. She subsequently stated that there should be flexibility but indicated her awareness that the community in Jersey was quite traditional. The Minister had therefore attempted to take a 'middle road' between these two apparent contrasting views.

3.3 The Minister's report indicates that parents in England, Wales and Northern Ireland effectively have an unlimited choice in the name under which the birth of a child may be registered. The report also states that there are "*important public policy issues to be considered*" in relation to the options that could be made available. The Panel questioned the Minister on what constituted an 'important public policy issue'.

3.4 In relation to England, Wales and Northern Ireland, the Minister advised that the position in these jurisdictions lay at one end of a 'continuum' running through other jurisdictions. Indeed, the position in these jurisdictions was somewhat exceptional and the vast majority of jurisdictions that had been investigated had some form of restriction. The Panel sought to understand whether any problems had arisen in England, Wales and Northern Ireland and were advised of the potential problems in allowing complete freedom of choice. A variety of examples were provided:

- The provision of a name unconnected to the family could potentially lead to identity crises for the child concerned;
- The sense of family solidarity and unity could be eroded;
- A child with a surname unrelated to his or her parents could ultimately face legal or administrative hurdles; and
- The reputations of others (e.g. celebrities) could be harmed if parents chose to name a child after such a person.

3.5 The Panel questioned the Minister on other aspects of the principle, for example why one choice allowed by the amendment was only that the mother's maiden name could be provided and not the mother's actual surname (the amendments of the Deputy of St. Martin offer an alternative provision in this regard). In response to questioning on this matter, the Minister advised that the mother "*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*."

3.6 The Panel also asked why parents had to choose jointly the surname under which to register their child. This question of a 'joint choice' is also apparent in the amendments of the Deputy of St. Martin. For both the Minister's proposition and the Deputy's amendments, parents have to be in agreement for there to be an element of choice; otherwise, a default position applies (albeit different ones in the proposition and amendments). When asked why parents would have to choose jointly, the Minister advised that a number of issues had to be considered, such as the right for every child to have a name and the potential disadvantages for mothers in creating a situation whereby the first parent to register would decide the name of the child. It had been decided to create a default position in order that registrars would not be required to exercise discretion.

3.7 The amendments of the Deputy of St. Martin make provision for instances where one partner has died However, at the Public Hearing, the Panel raised another eventuality with the Minister where a 'joint choice' could potentially be restrictive. It was confirmed by the Minister that in the case of a married couple which had separated by the time of the birth of their child, the child could not be registered with any name but the father's unless he were in agreement and despite the mother's wishes.

4. The work on the Amendment

4.1 The Panel questioned the Minister on the work that had been undertaken in developing P.61/2008. In the accompanying report, mention is made of the situation found in other jurisdictions. At the Public Hearing, the Panel was provided with a list of those jurisdictions which had been considered during work on the amendment. This included England; Wales; Scotland; Northern Ireland; Isle of Man; Guernsey; France; Spain; Portugal; Germany; Austria; Sweden; Switzerland; Holland; the United States; and New South Wales, Australia.

4.2 The Minister advised that contact had been made with registering bodies in these other jurisdictions to glean which system of registration was used. These approaches had also allowed opinions to be gained

from the registering bodies on the systems under which they operated. For instance, the Minister advised that Guernsey's system of birth registration allowed parents more flexibility than did Jersey's current legislation; however, it was the view of the registering authority in Guernsey that reduced flexibility would in fact be desirable. The Minister also advised that no one jurisdiction had served as model on which the Minister's amendment had been based.

4.3 P.61/2008 refers to the situation in Switzerland and states that "*in Switzerland a child of a married couple can only take the father's surname*." At the Hearing, it was clarified that this statement in fact refers to the case of GMB and MK -v- Switzerland (itself referenced in P.61/2008) and not to the general situation in Switzerland. The situation is that children are registered with the family name: upon marriage, the couple chooses whether to take the husband's name or the wife's. As both options are available, it can be seen that a child in Switzerland could ultimately be registered with the mother's name.

4.4 The Minister's report indicates "*this legislation is of social importance*." The Panel asked the Minister what consultation had been undertaken on the draft amendment. The advice was that there had been no public consultation undertaken by the Department. However, the issues had been widely publicised and this publicity had almost done the consultation for the Department. It was stated that the Minister had consulted Senator Ozouf as well as individuals affected by the current legislative situation. Furthermore, the Parish of St. Helier had undertaken an informal 6-month survey to ascertain the potential impact of amending the law: in the survey, parents were asked if they would take advantage of increased options in the registration process.

4.5 As the Minister had spoken about the need to balance minority views against those of the community, the Panel asked how such community values could be measured. The Minister stated that it would be difficult to measure but that it could be done "*to some extent, [by] the number of people that might have contacted me about this particular issue and what they had to say on it*." At this juncture, the Minister advised that those people who had contacted her had been somewhat evenly split in their opinions over whether a change in the law was required.

5. The implications of adopting the Amendment

5.1 There were two specific implications of the Minister's amendment that the Panel covered at the Public Hearing: the fact that, if adopted, the amendment would act retrospectively to 1st May 2002; and the resource implications of the amendment. The amendments of the Deputy of St. Martin, if adopted, would act more retrospectively.

5.2 When questioned, the Minister stated that it was generally undesirable for legislation to act retrospectively but that it was appropriate in this case as the decision to amend the 2001 Law had been made early on. When asked why the law would not act before 1st May 2002, the Minister advised that the legal position had been clear before the 2001 Law and that due to this clarity, it would not be appropriate to extend the law back before 1st May 2002.

5.3 P.61/2008 indicates that any additional costs of staff and resources would be met by the Parish of St. Helier. It also states that any re-registration fee will be discussed with the Connétable of St. Helier but that it is likely that any such fee would be in the region of £50. The amendments of the Deputy of St. Martin mirror these provisions.

5.4 At the Hearing, the Panel was advised that two members of staff currently worked within the St. Helier Registrar's Office and that other Parishes were unlikely to be affected, given the relatively low number of births that took place there.[1] The registration of a birth currently cost approximately £10, although a figure of £50 had been identified for re-registration as this equated to the sum payable for a name to be changed by deed poll. According to the 6-month survey undertaken by St. Helier to ascertain the potential impact of allowing retrospective re-registration to 2002, it had been estimated that approximately 1,000 re-registrations might be required.

5.5 It could be argued that charging parents for re-registration would be unfair, as parents would thereby be paying for a mistake made by the States. This argument gains some credence from the statement in the amendments of the Deputy of St. Martin that the 2001 Law had been intended to provide "*a completely free choice of surname*". The Panel invited Senator Ozouf, President of the Etat Civil Committee in 2001, to make a submission, but none was received. The Panel was therefore unable to verify this position. However, if the 2001 Law were indeed intended to allow a free choice, it would appear that this did not occur.

5.6 This could be construed as a mistake on the part of the States rather than a fault of the parents.

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[1] According to *Births, Marriages and Deaths in 2007: Statement* (R.20/2008), 7 births were registered outside St. Helier in 2007.