

STATES OF JERSEY



DRAFT CIVIL PARTNERSHIP (JERSEY) LAW 201- (P.85/2011): COMMENTS

**Presented to the States on 11th July 2011
by the Education and Home Affairs Scrutiny Panel**

STATES GREFFE

COMMENTS

Introduction

The Education and Home Affairs Scrutiny Panel fully supports the principle of Draft Civil Partnership (Jersey) Law 201- (P.85/2011) (the ‘draft Law’). The intention of the draft Law is to confer as great a level of parity between civil partners and married spouses (male and female) as possible. The Panel decided to scrutinise the draft law in order to satisfy ourselves that this intention has been realised.

The Panel does not have the expertise or resources to examine in detail all the various laws and arrangements which are affected by the draft Law. In our brief review we have focussed on a limited number of issues listed below –

- (i) civil partnerships on religious premises. We have reported on this issue in our amendment to the draft Law;
- (ii) the implications for inheritance;
- (iii) housing and work rights.

We spoke to a number of witnesses on these matters, namely the Deputy Chief Minister, the Community Relations Trust, the Dean of Jersey, representatives of the Quakers and Advocate N. Benest and are grateful for their contribution. Full transcripts of the hearings are available on the Scrutiny website.

General Background

In the debate in the States on the principle of allowing civil partnerships it was made clear that the option chosen for Jersey was to preserve a distinction between marriage and civil partnerships.

The draft Law sets out to establish a legal relationship for same-sex couples which is equivalent, but not fully identical, to marriage. The definition of marriage in the eyes of the States of Jersey is the stated relationship between husband and wife, the contract made by man and a woman to live as husband and wife, whereas a civil partnership is only available to same sex couples.

Some jurisdictions have opted for different arrangements including allowing marriage between homosexual couples (Spain, for example) and there is an evolving debate on the matter in other jurisdictions (e.g. France has recently voted against a Bill to legalise same-sex marriages).

There is also a debate on the question of broadening civil partnerships to extend to heterosexual couples or siblings. These questions are beyond the scope of the current law. Jersey has opted to follow the same route as the UK by reserving marriage for heterosexual couples and civil partnerships for same sex couples.

A recent judgement relating to the European Convention on Human Rights has found that there is no breach of the Convention in maintaining this distinction. The Deputy Chief Minister told us that the ruling clearly allows national jurisdictions to determine how this matter is treated for its citizens –

In the recent case of Schalk and Kopf v Austria, against the European Convention on Human Rights found that marriage only for opposite sex couples and civil partnerships only for same-sex couples did not breach Article 8, the right to private and family life; Article 12, the right to marry; and Article 14, the prohibition of discrimination in the rights granted by the E.C.H.R. (European Convention on Human Rights). It also found that it is for national law to determine whether or not to permit same-sex marriage. So that is a fairly definitive statement.

The blanket prohibition of Civil Partnerships in Religious Buildings

Currently, there is an article in the draft Law that prohibits Civil Partnerships being solemnized in ‘places of worship’¹ The Panel came to the opinion that the inclusion of this clause is unnecessary and divisive in that it prohibits those religious institutions who would wish to perform such ceremonies on their premises from doing so. Whilst the Panel acknowledges that this part of the legislation mirrors current practice in the UK, the Panel came to the conclusion that this prohibition should be left out, leaving the choice with each denomination, rather than with the State. The removal of this provision would not oblige any denomination or religious group to perform such a ceremony if it did not wish to, however it would permit any church or recognised religious group to ‘opt in’.

The Panel had fully intended to lodge an amendment in this area, but having taken advice from the Law Draftsman, recognised that such an amendment, if successful, might be likely to delay the introduction of the law – something which the Panel stated from the outset they would be reluctant to do: whilst it is still the opinion of the Panel that this part of the law *should* be amended, it is more important that the law (which is long overdue) is brought in as soon as possible.

The Panel was also mindful of the fact that during the time of its review the UK were in the final stages of an extensive consultation in relation to the very same area of moving towards an ‘opt in’ for religious groups to be able to perform civil partnerships. It was therefore decided, after discussions with the Law Draftsman and the Minister, that a sensible ‘compromise’ would be to lodge an amendment (P.85/2011 Amd.) enabling any desired future changes in this area to be made by regulation.

The Panel also noted that there was an inherent tension with the spirit of the law, which sought to provide equality for same sex couples, whilst at the same time wanting to maintain a distinction between the two. The Panel understands that this was seen to be a pragmatic approach to accommodate the social and religious sensitivities of some members of society; however the Panel feels that this distinction is ultimately illogical and that access to a single civil institution for both same sex and non same sex couples may be required in the long term.

Implications for Inheritance

The general laws of succession in Jersey have for some time been under review in the light of the Human Rights (Jersey) Law 2000. The draft Law takes account of a reform which will affect married couples once a proposed amendment to the Wills and Succession (Jersey) Law 1993 has been approved by the States.

¹ Article 13(5)

The proposed reform will remove the difference that currently exists between widows and widowers in relation to inheritance. The current law distinguishes between *viduité* and *douaire*, ie different treatment between widows and widower in respect of inheritance. The distinction is outdated as there is a general tendency for couples to own property in joint names.

- *Douaire* provides some protection to a widow where the husband might wish to will his property elsewhere. A widow has a right of dower or life enjoyment of one third of her deceased husband's immovable property.
- *Viduité* A widower has a claim of *viduité* or life enjoyment of all of the deceased wife's immovable property. This right is very rarely invoked - it is to be abolished in a forthcoming amendment to the Wills and Succession (Jersey) Law 1993 (due this year). Widowers will be given right of *douaire* instead.

The distinction in treatment between widow and widower are based on ancient Norman law; however, this is no longer appropriate and could be challenged under the Human Rights (Jersey) Law 2000.

Schedule 4 of the Draft Civil Partnership (Jersey) Law 201- indicates that the Wills and Succession (Jersey) Law 1993 will be amended to give both civil partners the right of *douaire*, which will be the position for married couples once the States adopts a further amendment to the Wills and Succession (Jersey) Law 1993 when this is brought forward by the Chief Minister (due later this year).

The Community Relations Trust informed us that the draft Law had been reviewed by an expert who had carried out for them in 2009 a general review of inheritance laws. She had reported that the draft law had dealt with and resolved all the issues she had identified.

Housing and work rights

It was brought to our attention that no provision appeared to have been made either to amend the current Housing (Jersey) Law 1949 or to amend the forthcoming Draft Control of Housing and Work (Jersey) Law 201- so as to allow civil partners the same rights as spouses to join property transactions, despite the need for such amendments being highlighted in the 2009 proposition.

The Draft Control of Housing and Work (Jersey) Law 201-, which is due to be debated on 5th July 2011, reforms current controls on immigration and replaces both the Housing (Jersey) Law 1949 and the Regulation of Undertakings and Development (Jersey) Law 1973.

As the Draft Control of Housing and Work (Jersey) Law 201- was to be debated before the Draft Civil Partnership (Jersey) Law 201- it could not take account of or make reference to another prospective Law, such as the Draft Civil Partnership (Jersey) Law 201-.

However, Article 71 of the Draft Civil Partnership (Jersey) Law 201- will give power to the States to amend by Regulations any enactment, including the Draft Control of

Housing and Work (Jersey) Law 201-, to make further provision in connexion with civil partnerships.

Thus, Regulations making the necessary changes to the Draft Control of Housing and Work (Jersey) Law 201-, to refer to civil partners and whatever else, can be made after the Draft Civil Partnership (Jersey) Law 201- has been enacted.

The same position applies with the Regulation of Undertakings legislation.

The Chief Minister's department forwarded instructions on the required changes with regards both the Housing and RUD legislation as part of the general work done in preparation of the law drafting of the Civil Partnership Law so all is in hand.

If, for whatever reason, the Draft Control of Housing and Work (Jersey) Law 201- doesn't get enacted but the Draft Civil Partnership (Jersey) Law 201- does, then whatever changes are necessary to the Housing Law or Regulations can also be made under Article 71 of the Draft Civil Partnership (Jersey) Law 201-.

Amendments to other legislation

The draft Law lists a large number of current laws which require to be amended to take account of civil partnerships and to put them on the same footing as married couples.

For example, the amendments to the Adoption (Jersey) Law 1961 specified in Schedule 4 of the draft Law make it explicit that civil partners can make an application jointly to adopt children. The fact that the same sex relationship will be legally recognised under the new law will enable civil partners to demonstrate a stable relationship which is an important factor in considering joint adoption applications.

The Community Relations Trust told us that they were satisfied that a comprehensive review had been undertaken by the Law instructing team.