

# STATES OF JERSEY



## DRAFT INTELLECTUAL PROPERTY (PLANT VARIETIES) (JERSEY) LAW 201-

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Lodged au Greffe on 2nd March 2016  
by the Chief Minister

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STATES GREFFE





Jersey

## **DRAFT INTELLECTUAL PROPERTY (PLANT VARIETIES) (JERSEY) LAW 201-**

### **European Convention on Human Rights**

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000, the Chief Minister has made the following statement –

In the view of the Chief Minister, the provisions of the Draft Intellectual Property (Plant Varieties) (Jersey) Law 201- are compatible with the Convention Rights.

Signed: **Senator I.J. Gorst**

*Chief Minister*

Dated: 29th February 2016

## REPORT

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### Overview

The importance of intellectual property (“IP”) rights to support innovative activity in many business sectors has been acknowledged in the Island by the recent adoption of the [Intellectual Property \(Registered Rights\) \(Miscellaneous Provisions\) \(Jersey\) Law 2015](#) (“IPRERL”) (P.69/2015). The Report on that Law explained the role of intellectual property in ensuring that innovative concepts, and investment in making, developing and commercialising a product or service based on those concepts, cannot easily be undermined by competitors copying what has been done. That Report also referred to the [Intellectual Property \(Unregistered Rights\) \(Jersey\) Law 2011](#) (“IPURL”) (P.141/2010), which updated the Island’s laws about unregistered IP rights.

Although having modern IP laws consistent with international standards is therefore an important policy objective by itself, especially in order to encourage businesses of many types to locate and invest in the Island, the two earlier Laws are also important if Jersey wishes to have the UK’s membership of the World Trade Organisation (“WTO”) extended to the Island. The Report on IPRERL explained that membership of the WTO amongst other things requires compliance with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”). The provisions in IPRERL and IPURL ensure that this compliance is achieved in the existing Jersey laws about registered IP rights and the new Law about unregistered IP rights.

The Report on IPRERL did, however, explain that there is a type of registered IP right that is required for TRIPS compliance and which does not currently exist in the Island, namely IP rights in new plant varieties. The Report indicated that a draft Law to make provision in the Island for IP rights in new plant varieties was therefore being developed. This draft Law makes that provision.

The extension of WTO membership to Jersey has been a long-term aim of the government. This aspiration acquired a higher degree of urgency when in 2015 the UK government called for a referendum on the UK’s membership of the EU. It was thought prudent to accelerate the process of becoming part of the WTO arrangements, to provide a safety-net in the event of a change in Jersey’s trade relationship with the EU.

The extension of WTO arrangements to Jersey is effected by the UK writing to the WTO making a declaration of extension. It is the UK’s responsibility because the UK is the sovereign member of the WTO. However, in order for the UK to make such an extension, it has to be satisfied that Jersey can meet the requirements of the WTO.

Our analysis is that, other than the requirements in TRIPS, Jersey does meet WTO requirements. The introduction of this Law should mean that we have put in place the final element of our compliance with TRIPS. This will clear the way for our formal submission of a TRIPS compliance matrix to the UK authorities, and a request that WTO membership be extended to Jersey.

### International Conventions and Treaties

The WTO TRIPS Agreement requires the possibility of IP rights in new plant varieties as part of the requirements set out for patents. Patents are a form of IP right that apply to inventions, whether products or processes, provided they are new, involve an inventive step and are capable of industrial application. The TRIPS Agreement does, though, permit certain things to be excluded from patentability, including plant varieties. But this exclusion is qualified by a requirement to provide protection for

plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. A “*sui generis*” system would be one of “its own kind” and so a special form of IP protection for plant varieties that is particularly adapted to the specific subject and/or circumstances of the protection would comply with TRIPS.

A number of countries, including the UK, rely on this flexibility to specify that plant varieties in general are not patentable inventions and then make provision for IP rights in plant varieties in a *sui generis* system. If this approach is taken, the detailed requirements in the TRIPS Agreement relating to patents do not, then apply, but the *sui generis* system must be “effective” in order to comply with TRIPS.

There is an international convention that is specifically about IP rights in plant varieties, namely the International Convention for the Protection of New Varieties of Plants, as adopted on 2nd December 1961 and revised on 10th November 1972, 23rd October 1978 and 19th March 1991 (“the UPOV Convention”). The International Union for the Protection of New Varieties of Plants, which is established by the UPOV Convention, states that its mission is to provide and promote an effective system of plant variety protection, with the aim of encouraging the development of new varieties of plants, for the benefit of society. A *sui generis* system which makes provision for IP rights in plant varieties in a way that complies with the UPOV Convention is therefore very likely to meet the requirement in the TRIPS Agreement that the system is “effective”.

In more detail, the UPOV Convention recognises that sustained and long-term breeding efforts are only worthwhile if there is a chance to be rewarded for the investment made. To recover the costs of this research and development, the breeder is therefore able to seek protection to obtain exclusive rights for exploitation of the new variety. Successful breeding requires great skill and knowledge. It takes a long time to develop a successful plant variety (10 to 15 years in the case of many plant species), and not all new plant varieties developed will be successful. Plant breeding can, however, result in the availability of varieties with increased output and improved quality for the benefit of society. Exclusive rights therefore provide a breeder with a mechanism for a fair opportunity to benefit from his or her investment, as otherwise a new variety, once released, can often be easily reproduced by others without any benefit to the breeder. The exclusive rights for a breeder set out in the UPOV Convention are, however, limited in the time that they can last, and are balanced by certain exceptions to rights. Exceptions to rights (situations where rights in a plant variety cannot be used to stop an activity) include ones that enable other breeders to use a protected variety to breed other new varieties, and regarding seed saved by farmers from a crop of a protected variety they have grown to grow the variety again.

There are currently 74 countries, territories and intergovernmental organisations that are members of the UPOV Convention, including the UK, other EU Member States and the EU.

### **UK law about IP rights in plant varieties**

The UK Plant Varieties Act 1997, as amended, establishes a system providing for the granting of IP rights in new plant varieties. Rights are granted after an application has been made to the Controller of Plant Varieties, who is head of the Plant Varieties Rights Office. However, rights are only granted if the conditions for grant of rights are met, including that a variety is distinct, uniform, stable and new. The Controller can carry out tests, or require the applicant to provide the results of such tests and/or provide any information needed in order to ascertain whether or not rights should be granted. The applicant must be the person who bred the variety, or discovered and developed it, or his or her successor in title, except where that person does this in the

course of employment when the employer is the person entitled to apply for grant of rights in the variety.

The 1997 Act makes provision about the scope of the rights granted and exceptions to those rights. The most important rights enable the holder of rights to prevent anyone else doing certain things with propagating material for a protected variety without his or her permission. In some situations rights may also apply to harvested material, but only where there has not been a reasonable opportunity to exercise rights against propagating material before harvest. The rights applying to use of propagating material without authorisation include production or reproduction of the material, selling, exporting or importing it and stocking it for these purposes. Exceptions to rights (activity that does not require the authorisation of the holder of the rights) cover acts done for private and non-commercial purposes, for experimental purposes, and for the purpose of breeding another variety. There is also a specific exception applying to farm-saved seed, which relates to a farmer's use as seed on his own holding of harvested material obtained from the holding. Where this exemption applies, a farmer is, though, liable to pay the right holder equitable remuneration, but small farmers are exempt from this requirement.

Many of the provisions in the 1997 Act reflect the requirements set out in the UPOV Convention, but there are also references in places to the Council Regulation (EC) No 2100/94 of 27th July 1994 on Community plant variety rights, including for the meaning of "small farmers". The Council Regulation establishes a system for the grant of Community plant variety rights which can be applied for instead of, or after being granted, UK rights, but there is provision in the Council Regulation and 1997 Act which ensures that UK rights cannot be invoked if Community plant variety rights exist.

The remaining provisions in the 1997 Act are also in line with provision in the UPOV Convention, such as on duration of rights and the name or denomination of a protected variety. In addition, the 1997 Act also makes provision about remedies for infringement of rights, which are the same as the remedies for infringement of other IP rights, and so include the possibility of an award of damages or an injunction for infringement of rights. There are then criminal offences relating to knowingly giving false information to the Controller of Plant Varieties and making false representations about entitlement to exercise rights.

As already indicated, the UK is a member of the UPOV Convention, and so it is assumed that the provisions in the 1997 Act, and the secondary legislation made under it, complies with that Convention. Regarding the references in the 1997 Act to the Council Regulation, as the EU is also a member of the UPOV Convention, it is assumed that provisions in the Council Regulation are similarly compliant with that Convention. The UK is also a member of the WTO and so must comply with TRIPS. It is assumed that the provisions in the 1997 Act also comply with the requirements in TRIPS.

### **Approach taken in this draft Law**

The current Law in Jersey making provision about patents is the Patents (Jersey) Law 1957 ("the Patents Law"). That Law has been amended on a number of occasions, most recently by IPRERL, in order to make it compliant with the most important international convention in the area, the Paris Convention for the Protection of Industrial Property, and the WTO TRIPS Agreement. However, there has been no change to the secondary registration approach to patents in Jersey. Patents can be obtained in Jersey, but only by registration of patents that are in force in the UK. As

explained above, a specific new plant variety is generally not a patentable invention in the UK and so there also cannot be any patent rights in Jersey.

It would, of course, be possible to change the nature of the Patents Law in Jersey so that patents are not linked to UK ones. Such a Law could then be devised to also permit patents to be granted in Jersey for inventions that are new plant varieties. But that would be a change that has implications well beyond what is needed to deliver TRIPS compliance, as it would affect patents in general. It would require very careful consideration of, and consultation about, the impact of such changes. It is not, therefore, considered appropriate at the moment to adopt this approach to delivering TRIPS compliance regarding the obligation to provide IP rights in new plant varieties, not least because there would be a considerable delay in delivering TRIPS compliance if an assessment of changes to the law on patents needs to be undertaken, and then those changes need to be developed.

The preferred approach to delivering TRIPS compliance is therefore the one adopted in the draft Law. This draft Law provides for IP rights in new plant varieties in Jersey by the same approach as in the UK, that is by a system specifically making provision about IP rights in plant varieties. The drafting of the Law on many issues closely follows that in UK law and the most relevant international convention, the UPOV Convention. As already indicated, the UK is a contracting party to the UPOV Convention as well as the WTO, so it is assumed that this approach will therefore ensure that the Jersey Law is “effective” as required by TRIPS.

The draft Law does, however, vary from the UK law in one important respect. It does not provide for the grant of rights in a plant variety after an examination to ascertain whether the variety is distinct, uniform, stable and new. These requirements are defined in both UK law and the UPOV Convention as necessary in order for there to be IP rights in a new plant variety. Rights are only granted in the UK after it has been established that these requirements are met, often by growing the variety after an application for grant of rights has been made. It is therefore appropriate for rights to only apply in Jersey where a variety meets these requirements but, as is the case for the current Jersey Law about patents, the draft Law does not create a system for such original grant of rights in new plant varieties. It does, rather, provide for rights in Jersey for a new plant variety on the basis of an original grant of rights in that variety elsewhere. It does, therefore, only permit plant varieties to be registered in Jersey in order to have IP rights in Jersey where those plant varieties have already been granted rights elsewhere after an appropriate examination. Unlike Jersey’s patent law, there is not, however, a restriction to registration in Jersey only where rights are valid in the UK. In this draft Law, there can be an application for registration of a plant variety in Jersey where there has been an original grant of rights in that variety in a country or by an intergovernmental organisation under a system in compliance with the provisions in the UPOV Convention.

It is not currently expected that there will be very much interest in securing IP rights in new plant varieties in Jersey. But the approach of permitting rights to be sought in Jersey on the basis of rights that have been granted in the UK and elsewhere may be helpful in the future. If a person cannot obtain rights in a new variety in Jersey, they may not sell propagating material for the variety in Jersey, and this could disadvantage Jersey farmers who wish to grow it. IP rights are possible in all new species of plant, so long as they meet the requirements of being distinct, uniform, stable and new. In many cases the new varieties that are of interest to Jersey farmers are likely to have rights valid in the UK. But climate change could affect what varieties are best grown where, and what varieties are of most interest in Jersey may not follow exactly what is

of interest in the UK. There may, therefore, be varieties of interest in Jersey that do not have rights in the UK. The draft Law will, however, still enable such varieties to be registered in Jersey so long as they have an original grant of rights from a country, territory or intergovernmental organisation which is bound by the UPOV Convention.

### **Main features of this draft Law**

As already noted, the draft Law establishes a system for IP rights in new plant varieties. The general approach taken in the draft Law has also been explained, namely that applications for the registration of a plant variety in Jersey, which provides exclusive rights in Jersey in that variety, must follow an original grant of rights in that variety by a country, territory or intergovernmental organisation which is bound by the UPOV Convention. The draft Law sets out more detail about what is meant by an original grant of rights on which an application in Jersey can be based, who can make an application in Jersey, and that the applicant will need to provide evidence of that original grant of rights. But in general, there will be no examination in Jersey to determine whether a variety is distinct, uniform, stable and new, because this should have been established before there was an original grant of rights elsewhere.

In more detail, the draft Law makes provision about the following matters:

#### *(a) Plant varieties that can be registered*

Varieties of all plant genera and species can be registered in Jersey in accordance with the draft Law, so long as they are “qualifying varieties”. This term is defined as a variety which is distinct, uniform, stable and new, with those terms then also being defined. The definitions follow those in UK law and the UPOV Convention. The requirement that a variety must be distinct, uniform and stable, often referred to as DUS, usually requires growing tests carried out over several years in order to establish whether or not this is the case. In order to be “distinct”, a variety must have one or more characteristic capable of precise description so that it is clearly distinguishable from any other variety in common knowledge. This test is about the variety being new in a technical sense. But it must also be new in a commercial sense as the meaning of “new” is a test that prevents there being rights if the variety has been exploited commercially by or with the consent of the applicant for an original grant of rights for a long time before that application. IP rights in plant varieties can only apply to varieties where all of these criteria are met, but, as already explained, examination to establish that a variety is a “qualifying variety” should have taken place before the original grant of rights in that variety on which the Jersey application for registration is based.

#### *(b) Registrar of Plant Varieties and Register of plant varieties*

The Chief Executive Officer of the Department of the Environment is the Registrar of Plant Varieties, and must keep a Register of plant varieties with the details about what must be on the Register specified in the draft Law. The Register includes information about applications for registration of a plant variety in Jersey, and applications that have been granted. The Registrar has the power to, amongst other things, request documents and other evidence, and grow any plant variety or cause it to be grown as necessary, for the purposes of carrying out the functions of Registrar under the draft Law. The Registrar may authorise any other States’ employee to exercise the functions of the Registrar and also use the services of other persons to carry out tests and assess the results of tests or trials.

#### *(c) Applications for registration of a plant variety in Jersey*

The person able to apply for registration of a plant variety in Jersey is defined as the person who at the time of the application is registered as proprietor of rights in that



variety in the UPOV country that made the original grant of rights. The draft Law then makes provision about various matters relating to applications, including what is permitted when there is a grant of rights in more than one UPOV country for the variety, the time limits for making an application, and the form and manner in which an application must be made. On some issues, the Registrar has the discretion to accept an application that does not meet the specified requirement where it would be in the public interest to do so.

*(d) Grant of an application for registration of a plant variety in Jersey*

Before an application for registration can be granted, it must be advertised by the applicant in the Jersey Gazette, and any interested party then has an opportunity to oppose the registration on the specified grounds, including that the variety is not a “qualifying variety”. The provision of a period in which there can be an opposition to the grant of an application is not modelled on UK law but, rather, provision in the Patents (Jersey) Law 1957. If there is a notice of opposition or it appears doubtful to the Registrar that an application should be granted, the question of whether or not to grant the application and so register the plant variety in Jersey is referred to the court to determine. The Registrar does not, therefore, have any obligation to examine whether all the conditions for rights to be valid in a plant variety in Jersey have been met, so long as the application has been made in accordance with the specified requirements, which include the need for evidence of an original grant of rights elsewhere. But it is possible for the Registrar to question anything doubtful and for interested parties to take action to oppose an application for registration on the grounds specified.

*(e) Rights in plant varieties registered in Jersey and their duration*

The exclusive rights in a plant variety given to a registered proprietor where the variety is registered in Jersey are defined in the draft Law and are equivalent to rights that would exist in the UK after grant of rights in a variety in the UK. The main rights therefore enable the registered proprietor to prevent commercialisation of propagating material of the variety, including production, selling and importing it, and stocking it for these purposes, when done without his or her authorisation. Rights in harvested material obtained through unauthorised use of propagating material only apply where the registered proprietor has not had a reasonable opportunity to exercise rights in the propagating material. There is the possibility under the draft Law of also prescribing rights in products made from harvested material, but there are no plans to prescribe anything at the moment. The registered proprietor is entitled, after a plant variety has been registered, to reasonable compensation for things done during the application period for registration of that variety where those things would amount to an infringement of rights after registration. The rights in Jersey last for as long as the rights under the original grant of rights, but this is qualified to ensure that the duration cannot be more than 30 years for varieties of potatoes, trees and vines, and 25 years for any other varieties. These are the terms that apply to rights that have been granted in the UK and so this qualification ensures that a variety cannot be protected longer in Jersey than the UK.

*(f) Exceptions to rights in plant varieties*

The draft Law provides exceptions to the rights in a plant variety equivalent to those that apply in the UK. There are general exceptions to rights applying to acts done for private and non-commercial purposes, experimental purposes and for the purpose of breeding another variety. There is also a specific exception that applies to farm-saved seed for some varieties (fodder plants, cereals, potatoes, and oil and fibre plants). This is about use for propagating purposes of seeds from a harvest from a variety that has

been grown by a farmer on his or her own holding. The exception only permits such use on the farmer's holding. A farmer who has acquired propagating material for a protected variety to which this exception applies from the holder of rights in that variety, or a source that has been authorised by the rights' holder, is therefore able to save seed when growing that variety on his or her holding and use that seed to grow the variety again on his or her holding. However, except in the case of a small farmer and those already saving seed when the draft Law comes into force, equitable remuneration must be paid to the right holder. "Equitable remuneration" is defined as an amount sensibly lower than the amount charged for production of propagating material. This term copies the definition in UK law and what is permitted by the UPOV Convention. The definition of "small farmer" is also copied from UK law, where its meaning is as defined in Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights. The term therefore has the same meaning across the EU. For cereals, a small farmer is one who does not grow them on an area bigger than one needed to produce 92 tonnes of cereals, and the term has an equivalent meaning for other crops. This provision will therefore put small farmers in Jersey on an equal footing with those throughout the EU. The draft Law does, however, permit the exception for small farmers to be applied more widely by prescribing other descriptions of farmer. Additional varieties to which the farm saved seed exception applies can also be prescribed.

*(g) Registration of other matters after initial registration of a plant variety*

The draft Law makes it clear that the rights of a registered proprietor are personal or movable property and that the rights can be transferred to another person, such as by making an assignment of the rights. A registered proprietor is also able to grant licences to others which authorise them to do one or more of the acts that would otherwise be restricted by the exclusive rights in a registered plant variety. The draft Law makes provision for applications to register changes to who is the registered proprietor of rights in a plant variety that has been registered in Jersey, and to register minor interests such as licences. It is also possible for the Registrar to correct minor errors on the register, and for applications from the registered proprietor to the Registrar to change his or her name and/or address, to delete the registration of the plant variety, or to revoke or cancel the registration where this replicates what has happened to the original grant of rights.

*(h) Revocation and cancellation of a plant variety registration*

A plant variety may sometimes be registered in Jersey, or continue to be registered in Jersey, in circumstances where this should not be the case. For example, a plant variety may be registered when in fact it should not have been because it was not new or distinct and this was not realised either during the application elsewhere which resulted in the original grant of rights or during the application for registration in Jersey. Even where a registration was appropriate, there is an obligation on the registered proprietor to ensure that it continues to be possible to propagate the variety and supply propagating material to the Registrar when requested, and the variety must remain uniform and stable. The draft Law therefore provides for a person who is aggrieved either that the variety should not have been registered, or that the conditions for a registration to continue are not met, to apply to the court seeking revocation, or cancellation, of the plant variety registration.

*(i) Remedies for infringement of rights in plant varieties*

When a protected plant variety is used without the authorisation of the registered proprietor in a way that is restricted by the rights in the variety and outside the scope of one of the exceptions to the rights, the draft Law ensures that this infringement of

rights is actionable by the registered proprietor. The remedies that can then apply are the same as apply to the infringement of any other property right and so include the possible award of damages or an injunction. The draft Law does, though, prevent an award of damages against a person who was not aware and had no reasonable grounds for supposing that the right infringed was a right in a protected variety.

*(j) Compulsory licences*

The draft Law makes provision for the grant by the court of compulsory licences to use a protected plant variety so long as at least 3 years have passed from the date of registration of the variety. A compulsory licence is possible where the registered proprietor has unreasonably refused to grant another person a licence to use the protected variety, or has imposed unreasonable terms on a licence. Before the court grants a compulsory licence it must, though, be satisfied about a number of things, including that it is necessary to ensure that the variety is available to the Public at reasonable prices, or is widely distributed, or maintained in quality. In these situations, there is likely to be a public interest in granting a compulsory licence to ensure that rights in a plant variety are not being used to withhold a protected variety from those who wish to grow or use it.

*(k) Plant variety denomination*

The name or denomination of a plant variety that has been registered is important, as this will be used to sell a variety. The UPOV Convention lays down broad principles for naming varieties, and so far as possible the name by which a variety is known should be the same in any UPOV country in which it is protected. The denomination used in Jersey should therefore generally be the one used for the original grant of rights in the plant variety on which the Jersey application for registration of that variety is based. There may be some situations where it would, though, be appropriate for a different denomination to be used in Jersey, such as where the Jersey application is based on an original grant of rights other than in the UK, and there is an original grant of rights in the UK under a different denomination. The draft Law therefore makes provision to permit an application to be made to use a different denomination. The draft Law also makes provision to require use only of the registered denomination for a protected variety, and provide a remedy for the registered proprietor, where another person knowingly uses the registered denomination for a different variety.

*(l) Offences*

There are 3 things that could happen where it is appropriate to create new criminal offences because of the public interest in deterring these activities. The first is where a person knowingly uses a name other than the registered denomination for a protected variety when selling it, because this could mislead those considering buying it. The second is where a person knowingly gives false information to the Registrar when making an application for registration under the draft Law, or when requested by the Registrar to supply information, as this could lead to registrations that should not have been made. The third is where a person knowingly or recklessly, but falsely, represents that he or she has rights in a plant variety as this could mean that people are misled regarding what they can only do with the authorisation of a right holder.

*(m) Regulations amending the Law*

IPRERL includes new powers that permit the 3 current Jersey Laws about registered IP rights to be updated in the future by Regulations. These enable the Laws to be updated faster than a process that requires a new Law and, with the growing importance of IP to many businesses, this could be very important. Regulations do, of course, still require approval by the States, so the essential scrutiny of any changes is

not removed by this type of provision. This draft Law includes the equivalent provision for updating provision in the Island about IP rights in new plant varieties. As for the provisions in IPRERL, this could be updating to give effect to international conventions, copying provision in EU and UK law even where there is no obligation to do so, and changing the type of registration system for plant varieties.

As indicated above, there can be an application for registration of any plant variety that is a qualifying variety and is the subject of an original grant of rights in a UPOV country. The new variety may have been bred in any way, including by using GM technology. The draft Law does not in any way change whether or not GM seeds can be imported into or grown in Jersey though. Even if there are rights in Jersey in a variety that has been developed by GM technology, other laws can still affect whether or not that variety can be used in Jersey. At the moment there is no legislation specifically controlling cultivation of GMOs in Jersey, but other laws may be relevant sometimes. The policy on this issue will not be affected by adoption of this draft Law. This draft Law would not, moreover, comply with the UPOV Convention if it allowed a variety to be refused protection because it is genetically modified. Furthermore, in the short to medium term, a specific piece of legislation on GMOs is expected to be introduced.

#### **Process leading to proposals in this draft Law**

As explained above, the reason for bringing forward this draft Law now is to put in place an effective system to provide IP rights in new plant varieties to comply with the TRIPS Agreement and so remove a barrier to Jersey seeking an extension of the UK's membership of the WTO to the Island. Seeking views about whether or not a Law making provision about IP rights in plant varieties should be developed would not, therefore, have made sense, as provision about IP rights in new plant varieties is essential for WTO membership, which is a very much wider policy issue. It was, moreover, decided that a Law permitting primary grant of rights in plant varieties is not appropriate at the moment. There is not believed to be significant interest in IP rights in plant varieties in the Island. There have been no approaches to the States seeking such protection in the Island. Having a system for IP rights in plant varieties out of line with the current system of secondary registration for patents does not, therefore, make sense. A formal consultation on these principles was not, therefore, considered justified. There have, though, been extensive consultations between the Economic Development Department, which was until recently responsible for IP policy generally, and the Department of the Environment, in developing the approach taken in the draft Law, and the detailed drafting of the Law. The Department of the Environment has touched on the issue of a secondary registration system for plant varieties in Jersey in some informal encounters with stakeholders.

Drafting of a new Law making provision about IP rights in new plant varieties under a system of secondary registration of the variety was therefore taken forward with the aim of copying the approach taken in UK law and so the UPOV Convention, on issues other than the nature of the registration system. As indicated above, it was also decided that the system of secondary registration should not be limited to registration only of plant varieties that have been registered in the UK but, rather, to enable any plant variety that has an original grant of rights from a country, territory or intergovernmental organisation that is bound by the requirements of the UPOV Convention to be the basis of an application in Jersey. The draft Law does, however, include safeguards by making provision where the conditions that must be met for rights to be valid, in particular that a variety is distinct, uniform, stable and new, and so a qualifying variety, can be considered in Jersey when appropriate. It is also possible for the Minister by Order to exclude grants from forming the basis for an

application in Jersey where they are from a country that does not have in place adequate procedures for ensuring that rights are only granted for qualifying varieties.

The draft Law has recently been finalised, and it has now been decided that it should be lodged without delay given the need not to delay removal of what is believed to be the final barrier in the IP area to the extension of the UK's membership of the WTO to Jersey. However, those who are most likely to have an interest in the provisions of the draft Law are being alerted to the fact that the Law is being lodged. Should any of these stakeholders identify any significant problems with the draft Law which cannot be resolved, the draft Law will be withdrawn and amended as appropriate. It is, of course, possible to amend the Law in the future by the provision permitting such changes by Regulations, should any problems emerge at a later date. However, significant problems are not anticipated given the approach to closely model the draft Law on UK law and the UPOV Convention requirements, the latter of which have been applied in a large number of countries for a number of years.

As indicated above, the draft Law designates the Chief Executive Officer of the Department of the Environment as the Registrar of Plant Varieties; and the functions of accepting applications for registration of plant varieties, maintaining the register, and so on, all lie in the Department of the Environment. The Minister who can prescribe or specify various matters under the Law is the Minister for the Environment. The expertise on IP matters does, however, lie in the Chief Minister's Department. Until recently, the lead was in the Economic Development Department, which led on the 2011 and 2015 Laws referred to above making provision about unregistered and registered IP rights respectively. The Economic Development Department did, therefore, take the lead on developing this draft Law, in close consultation with the Department of the Environment. The Minister for the Environment has agreed that this draft Law can be lodged by another Minister, and so the draft Law is being lodged by the Chief Minister, even though the new functions created under the Law lie in the Department of the Environment.

### **Financial and manpower implications**

The draft Law establishes a Registrar of Plant Varieties, and the Registrar must act under the Law to receive applications for registration of plant varieties, keep a register and so on. The draft Law provides that the Chief Executive Officer of the Department of the Environment is the Registrar, but the Registrar can delegate the exercise of any functions under the Law to others in the Department of the Environment. As has been indicated above, very few applications for registration of plant varieties are anticipated, and so exercising the role of the Registrar is not expected to require significant resources. The Department of the Environment is currently taking on the role without additional resources.

Applications to register plant varieties can be subject to the payment of an application fee, and it is proposed to specify a fee of £200. This will cover some of the costs incurred in operating the registration and related functions. It is, moreover, possible to specify or prescribe additional fees for some other matters that could happen under the draft Law, and increase the amount to be paid for an initial application to register a plant variety. The draft Law also allows the Registrar to require a charge to be paid by any person in respect of costs reasonably incurred by the Registrar, such as in carrying out tests on or trials of a plant variety. In general the Registrar is unlikely to do such things, but has the power to do so, or commission others to do so, where this is appropriate to ensure plant varieties are not registered in Jersey when they do not meet the necessary conditions. There is, therefore, sufficient flexibility in the draft Law to ensure that the functions of the Registrar can continue to be met by setting appropriate

fees and charging for some activities, and so avoid the need for additional resources to be made available to the Department of the Environment, even if the assessment that very few applications for registration are likely is incorrect.

The draft Law does mean that there could be a dispute about rights in plant varieties that must be resolved by the court. Such disputes are very rare indeed for the 3 types of registered IP rights in current Jersey laws, and there is no reason to believe that there would be a different outcome for this new type of IP right. The court could also become involved where there is doubt about or an opposition to a registration, if anyone were to seek a compulsory licence, or if one of the offences were to be committed. These provisions are, though, in the draft Law more as a deterrence rather than with any expectation that they might be used. They are equivalent to provision in the Patents (Jersey) Law 1957 as amended by IPRERL and, also regarding compulsory licences and offences, similar to provisions in the UK. In both cases there is very little evidence of their use. Use of these provisions in the draft Law that would require anything to be decided by the court therefore seems extremely unlikely. There are therefore most unlikely to be any financial or manpower implications arising from these provisions in the draft Law.

### **Human Rights**

The notes on the human rights aspects of the draft Law in the Appendix have been prepared by the Law Officers' Department and are included for the information of States Members. They are not, and should not be taken as, legal advice.

**Human Rights Notes on the  
Draft Intellectual Property (Plant Varieties) (Jersey) Law 201-**

This Note has been prepared in respect of the Draft Intellectual Property (Plant Varieties) (Jersey) Law 201- by the Law Officers' Department. It explains why, in the Law Officers' opinion, the draft Law is compatible with the European Convention on Human Rights ("ECHR") as implemented under the Human Rights (Jersey) Law 2000.

**This note is included for the information of States Members. It is not, and should not be taken as, legal advice.**

The draft Law creates a regime for the creation and regulation of intellectual property rights in respect of plants. The draft Law's provisions are designed to be in line with international norms. As is stated in the Explanatory Note:

*"Such a scheme is required for Jersey to be compliant with the World Trade Organization agreement on Trade-Related Aspects of Intellectual Property rights and with relevant provisions of the Acts of the International Union for the Protection of New Varieties of Plants..."*

Insofar as creating and regulating property rights in respect of plant varieties touches on issues of property rights, the balance struck by the international community can be safely assumed to be fair.

In respect of offences created by the draft Law, these are at Articles 38 to 41, and give rise to no human rights concerns. They are typical offences to support compliance with the regulatory framework.

The draft Law thus gives rise to no conceivable human rights issues.

## Explanatory Note

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This draft Law would enact in Jersey a scheme for the registration of new plant varieties, to provide intellectual property rights for the person registered as the proprietor, and remedies for infringement of such rights. Such a scheme is required for Jersey to be compliant with the World Trade Organization agreement on Trade-Related Aspects of Intellectual Property Rights and with relevant provisions of the Acts of the International Union for the Protection of New Varieties of Plants (the “UPOV Convention” as defined in *Article 1*, which is the interpretation provision). Article 1 also gives the definition of what is a plant variety for the purposes of the Law.

*Article 2* provides that plant varieties may be registered in Jersey and that such registration confers rights on the registered proprietor. These are rights to prevent any other person from doing, without permission, the acts listed in *Article 17* in respect of propagating material of the protected variety, or in respect of any variety which is dependent on the protected variety as described in *Article 18*. Article 2 also provides that rights may subsist in all varieties of plants, but (for the purpose of registration) only in those which are qualifying varieties within the meaning given by *Article 13*. Article 13(2) states that a qualifying variety is one which is distinct, uniform, stable, and new, and the technical meaning of each of these terms is given by paragraphs (3) to (6) respectively of Article 13.

*Article 3* creates the office, and describes the functions and general powers, of the Registrar of plant varieties. In particular the Registrar must keep a register in accordance with *Article 4*, may prescribe the form of applications to be made to the Registrar under the Law, and may carry out tests, examinations and trials of or relating to plant varieties, including by growing them (or by requiring another person to do so). The Registrar may also apply to the Royal Court where necessary for directions or determination of questions relating to registration under the Law; and (under *Article 12*) may maintain reference collections of plant material. *Article 4* specifies the details which must be contained in the register, as to the denomination of a plant variety and the identity of the applicant for registration, registered proprietor, or (as the case may be) person to whom any rights are assigned or otherwise transmitted. The register is to be open to inspection by the public.

*Article 5* provides that a person may apply for initial registration in Jersey as the proprietor of rights in a plant variety if at the time of the application the person is registered as the proprietor of such rights in the country which made an original grant of rights in that variety. An original grant of rights is defined in Article 5(3) as one which was made prior to the application and elsewhere than in Jersey by a ‘recognized entity’ (essentially, as defined in Article 5(7), a country, territory or intergovernmental organization which has acceded to the UPOV Convention, but subject to certain qualifications set out in Article 5(8)). A person to whom rights are transferred following initial registration may apply to be registered as proprietor of those rights, under Article 5(5).

Where a plant variety is bred, discovered and developed by more than one person independently, *Article 6* applies to determine that the first such person to apply for registration in Jersey shall have priority. *Article 7* states that an application for registration must be made within a year of the original grant of rights, but confers a discretion on the Registrar to accept late applications where the Registrar considers it is in the public interest to do so. Under paragraph (3) of this Article, as under Article 5(6), where a person seeking to make an application who is aggrieved by a



decision of the Registrar not to accept it, the question of whether acceptance of the application would be in the public interest may be referred to the court for determination.

*Article 8* provides for the procedures relating to applications for registration, and which must be accompanied by evidence of the registration of the original grant of rights, or of the transfer of rights, as the case may be, and by any fee which may be specified by the Minister. Under *Article 8(2)* the Registrar must record the particulars of an application for initial registration and notify the applicant that this has been done, following which *Article 8(3)* requires the applicant to advertise the fact of the application. Opposition to an application for initial registration may be given to the Registrar under *Article 9* within 2 months of the date of such advertisement, by the Attorney General or any person interested, on any of the grounds stated in *Article 9(2)*. Once this time period has expired, *Article 10* provides that the Registrar must grant an application which is duly made and in relation to which no notice of opposition has been received, unless it appears doubtful that the application should be granted. If that is the case the Registrar may carry out further tests of the variety, including by growing it, or require any further evidence from the applicant. If the doubt is not resolved, or if a notice of opposition is received, the Registrar must refer the matter to the court under *Article 10(6)*, so that the court may determine whether or not the application should be granted. Under *Article 11* the Registrar must issue a certificate of the grant of an application.

*Article 14* deals with registration of interests other than proprietary interests, such as mortgages or licences (other than compulsory licences granted by the court under *Article 34*), and makes similar provision as is made by *Article 8*, for the procedure in relation to applications for such registration. *Article 15* provides that it is not necessary, for the purposes of an application for registration under either *Article 5* or *14*, for the applicant or the applicant's representative to be present in Jersey, provided an address for communication in Jersey is notified to the Registrar.

*Articles 16 to 20* deal with the effects of registration. A person registered as proprietor is entitled to compensation for anything done during the application period (as defined in *Article 16*) which would amount to an infringement of rights if it were done after the application is granted. As already mentioned, *Article 17* provides that a registered proprietor is entitled to prevent any person from producing, selling, exporting or importing propagating material of the protected variety (among other acts, which may also be prescribed) without permission. Qualified rights are also conferred in respect of harvested material obtained through unauthorized use of propagating material, as described in *Article 17(4)*. *Article 18* confers, in relation to any variety dependent on a protected variety, the same rights as conferred by *Article 17(1)*, unless the existence of the dependent variety was common knowledge (as defined by *Article 18(6)*) before this Law comes into force. *Article 19* creates a general exception, providing that rights are not enforceable where an act is done for private and non-commercial purposes, for experimental purposes, or for the purposes of breeding another variety. *Article 20* creates an exception for use by a farmer of propagating material (as further defined in that Article) for propagating purposes in the field and on the farmer's own land. However under *Article 20(4)* a farmer who is not a small farmer or a farmer of any other prescribed description must pay equitable remuneration to the registered proprietor for such use. (Expressions used in *Article 20* are to be interpreted in accordance with *Article 20(9)* and Council Regulation (EC) No. 2100/94 of 27 July 1994 on Community plant variety rights, OJ L 227 01/09/1994 p. 1.)

*Article 21* provides that rights do not extend to any act concerning material of a plant variety if the material has been sold or otherwise marketed in Jersey with the consent of the proprietor of the rights, unless the act involves further propagation of the variety or, in certain circumstances, its export. *Article 22* provides that rights shall subsist for either as long as the registration pursuant to an original grant of rights, or for 30 years in the case of varieties of potatoes, trees and vines or 25 years for all other varieties, whichever period is shorter. Rights are personal property which is transferable in accordance with *Article 23*.

*Articles 24 to 27* provide for the circumstances and manner in which changes may be made to the register. Minor errors may be corrected by the Registrar under *Article 24*, on notice to the registered proprietor and other persons with sufficient interest. A registration may also be deleted, or the name and address of the registered proprietor changed, at the latter's request under *Article 25*. A registration may be revoked by order of the court under *Article 26* following an application made by the Attorney General or by a person aggrieved, on any of the grounds stated in *Article 26(5)*, namely that the variety in question was not distinct, new, uniform or stable, or that it was registered following an application by an applicant who was not entitled to make the application, or that the original grant of rights has been revoked. A registration revoked under this Article is deemed (by paragraph (6)) never to have had effect. *Article 27* also confers a general power upon the court to order rectification of the register.

*Article 28* requires a registered proprietor to ensure that the propagating material of a protected variety can be provided to the Registrar throughout the period of registration. *Article 29* confers power on the court to order cancellation of the registration of a protected variety on specific grounds, including the ground that the registered proprietor is no longer able to maintain the variety as required by *Article 28*.

Remedies for infringement of registered rights are provided by *Article 30*, under which the proprietor may seek all such relief by way of damages, injunctions, accounts or other remedies available in respect of the infringement of any property right, but damages cannot be awarded against a person who was not aware and had no grounds for supposing that the right infringed was a right in a protected variety. *Articles 31 and 32* set out presumptions which may apply in proceedings for infringement of rights in relation to harvested material and products made from harvested material respectively: thus, where the registered proprietor proves that an information notice has been given to the defendant and the defendant has not provided the information requested, it is to be presumed that the material or product was obtained through unauthorized use of propagating material. *Article 33* provides that information obtained pursuant to an information notice must be regarded as confidential by the registered proprietor, except for the purposes of proceedings.

*Article 34* creates a right to apply to the court, after the period of 3 years following registration has expired, for a compulsory licence to use a variety, where the registered proprietor has unreasonably refused to grant such a licence to the applicant. The court may grant the application for a licence if it is satisfied as to the matters listed in *Article 34(3)*. Under *Article 35* the court may suspend the exercise by the registered proprietor of rights under which a licence is granted if the registered proprietor is in breach of any obligation imposed by the licence, so long as the breach subsists.

*Article 36* prohibits the use of any denomination other than the registered denomination of any protected variety in selling or marketing propagating material of that variety, and provides that a person contravening this prohibition is guilty of an offence punishable by a fine of up to level 3 on the standard scale (currently a

maximum of £2,000 according to the standard scale of fines prescribed by the Criminal Justice (Standard Scale of Fines) (Jersey) Law 1993). However a person may request the registration of a plant variety under a denomination other than that which was registered in relation to the variety upon the original grant of rights, under *Article 37*. *Article 38* makes wrongful use of a registered denomination actionable in civil proceedings by the registered proprietor. In each case it is a defence for a person to prove that they took all reasonable precautions against committing the offence (or the wrong, as the case may be) and had not any reason to suspect that they were committing an offence (or acting wrongfully).

*Article 39* creates an offence of knowingly or wilfully giving false information in or in connection with an application to the Registrar or in response to a request by the Registrar, and *Article 40* creates an offence of knowingly or recklessly making a false representation as to the proprietorship of rights. Each of these offences is punishable by a fine of up to level 3 on the standard scale. *Article 41* imposes liability, in respect of offences committed by corporate and similar bodies, on the officers of such bodies.

*Article 42* confers powers on the Minister to specify matters and to make Orders, and *Article 43* gives the Registrar power to make charges in respect of costs reasonably incurred in carrying out functions, under this Law. *Article 44* extends the power of the Royal Court to the making of Rules for the purposes of this Law and proceedings under it. *Article 45* enables the States to make Regulations for making further provision as to the registration of plant varieties in Jersey, including in particular for the purpose of giving effect to international conventions or obligations of the European Community Treaties or UK Law.

*Article 46* gives the title by which this Law may be cited and provides for it to come into force 7 days after registration.





Jersey

## DRAFT INTELLECTUAL PROPERTY (PLANT VARIETIES) (JERSEY) LAW 201-

### Arrangement

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Jersey

## DRAFT INTELLECTUAL PROPERTY (PLANT VARIETIES) (JERSEY) LAW 201-

A LAW to enable the registration, in Jersey, of new varieties of plants; to provide for creation of the office of Registrar and the creation and maintenance of a register of plant varieties, and for the manner and effect of registration; to confer powers on the Registrar and on the court to revoke or cancel registration and otherwise to correct the register; to make provision in relation to the nature, duration and enjoyment of the proprietor's rights arising from registration, and to create remedies for infringement of those rights; to create offences of failure to use registered denominations of plant varieties, and of giving false information in respect of applications for registration, and to provide for the penalties for those offences; and for connected purposes.

*Adopted by the States* [date to be inserted]

*Sanctioned by Order of Her Majesty in Council* [date to be inserted]

*Registered by the Royal Court* [date to be inserted]

**THE STATES**, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

### 1 Interpretation

(1) In this Law –

“common knowledge” is to be construed in accordance with Article 18(6);

“court” means the Royal Court;

“Minister” means the Minister for the Environment;

“original grant of rights” has the meaning given by Article 5(3);

“prescribed” means prescribed by Order of the Minister;

“protected variety” means a variety registered in Jersey in which the rights conferred by this Law subsist;

“qualifying variety” means a variety which meets the criteria set out in Article 13;

“recognized entity” has the meaning given by Article 5(7);

“register” means the register of plant varieties to be kept by the Registrar in accordance with Article 4;

“registered proprietor” means the person registered as the proprietor of rights under this Law under Article 4(2)(b), and reference to the rights of a registered proprietor is to the rights conferred by Articles 17 or, as the case may be, 18;

“Registrar” means the person holding that office under Article 3(1);

“UPOV Convention” means the Acts of the International Union for the Protection of New Varieties of Plants, as revised up to and including 19 March 1991;

“UPOV country” means a country, territory or intergovernmental organization which has acceded to, or is otherwise bound by, the UPOV Convention;

“variety” means a plant grouping within a single botanical taxon of the lowest known rank, which grouping can be –

- (a) defined by the expression of the characteristics resulting from a given genotype or combination of genotypes;
  - (b) distinguished from any other plant grouping by the expression of at least one of those characteristics; and
  - (c) considered as a unit with regard to its suitability for being propagated unchanged.
- (2) A reference in this Law to provisions of an instrument of the European Union, the European Community or the European Economic Community shall be to those provisions, or to provisions of any European Union instrument implementing or replacing them, as amended from time to time.

## **2 Rights conferred by registration**

- (1) Plant varieties may be registered in Jersey in accordance with this Law.
- (2) Such registration shall be effective to confer rights in Jersey, in accordance with Articles 17 and 18, upon the registered proprietor.
- (3) Such rights may subsist –
  - (a) in varieties of all plant genera and species; but
  - (b) only in such varieties as are qualifying varieties.

## **3 Office and functions of Registrar**

- (1) The Chief Executive Officer of the Department of the Environment, or such other person as the Minister may designate by Order, shall be the Registrar of Plant Varieties in Jersey.
- (2) The Registrar shall exercise the functions conferred by this Law or any other enactment and shall in particular keep a register in accordance with Article 4.



- 
- (3) The Registrar shall have power to do anything that appears to the Registrar to be necessary or expedient for the purpose of exercising the Registrar's functions, including (in particular and without derogation from this general power or from any other power conferred by this Law) the power –
    - (a) to request any person, in writing, to produce such documents and information (including test, examination or trial results) within such periods and at such times and intervals as the Registrar thinks fit;
    - (b) to grow, or cause to be grown, any plant variety and to carry out, or cause to be carried out, any tests, examinations or trials of or relating to a plant variety;
    - (c) to specify the form of any application to be made to the Registrar under this Law;
    - (d) subject to any provision to the contrary in this Law or any other enactment, to publish documents and information in such manner as the Registrar thinks fit; and
    - (e) where the Registrar is of the opinion that to do so would assist in the proper exercise of the Registrar's functions, to apply to the court for directions or for a determination of any question of fact, law or procedure.
  - (4) The Minister may direct a seal to be prepared and to be used by the Registrar for the authentication of documents in connection with the registration of plant varieties.
  - (5) Any functions of the Registrar under this Law may be exercised, to the extent authorized by the Registrar, by any other officer on the Registrar's behalf.
  - (6) Without derogation from paragraph (5), the Registrar may use the services of persons who are not officers –
    - (a) in carrying out any tests or trials which the Registrar considers expedient or necessary for the purposes of this Law; and
    - (b) in assessing the results of any such tests or trials (whether carried out by the Registrar or not).
  - (7) In paragraphs (5) and (6), "officer" means a States' employee within the meaning of Article 2 of the Employment of States of Jersey Employees (Jersey) Law 2005<sup>1</sup>.

#### **4 Register of plant varieties**

- (1) A register of plant varieties shall be kept at the Department of the Environment, and need not be kept in documentary form.
- (2) The register shall comprise –
  - (a) a record of plant varieties in respect of which applications for registration in Jersey have been made;

- 
- (b) a record of plant varieties in respect of which applications have been granted, and of the persons registered as proprietors of rights in those varieties;
  - (c) a record of assignment or transmission of rights by any person registered as proprietor under sub-paragraph (b), and of the person to whom the rights are so assigned or transmitted;
  - (d) a record of minor interests registered under Article 14, and of the persons entitled to such interests; and
  - (e) a record of compulsory licences under Article 34, and of the persons to whom such licences are granted.
- (3) For the purpose of the record mentioned in paragraph (2)(a), the register shall contain –
- (a) the date on which an application is received;
  - (b) the applicant's name and address (including in particular any address notified under Article 15);
  - (c) the description provided by the applicant of the characteristics of the plant variety to which the application relates;
  - (d) the date on which details of the application are published;
  - (e) the denomination used in such publication to refer to the plant variety;
  - (f) the reference number allocated by the Registrar to the application;
  - (g) the name of the recognized entity making any original grant of rights upon which the application is founded;
  - (h) the dates of the application to, and of the original grant of rights by, that entity;
  - (i) the denomination and any other relevant characteristics of the variety as registered by that entity;
  - (j) details of any limitations subject to which the original grant of rights was made by that entity.
- (4) For the purpose of the record mentioned in paragraph (2)(b), the register shall contain –
- (a) the name and address (including in particular any address notified under Article 15) of the registered proprietor;
  - (b) the denomination and any other relevant characteristics of the plant variety;
  - (c) the date on which the application is granted;
  - (d) the reference number allocated by the Registrar to the registration;
  - (e) details of any limitations to which the rights in the registered plant variety are subject.
- (5) For the purpose of the record mentioned in paragraph (2)(c), the register shall contain, in addition to the details required under paragraph (4) –
- (a) the name and address (including in particular any address notified under Article 15) of each person to whom rights are assigned or otherwise transmitted; and
  - (b) the date on which the application is granted.

- (6) There may also be entered in the register such other matters as the Registrar may think fit or as may be prescribed.
- (7) The register shall be open to inspection by the public at such reasonable times and places as the Registrar may specify.
- (8) The register shall be prima facie evidence of any matters entered in it as authorized or required by this Law, and a certified copy of an entry in the register –
  - (a) shall be provided to any person upon request and upon payment of such fee (if any) as the Minister may specify; and
  - (b) is admissible in evidence without further proof and without any requirement for production of the original entry.
- (9) Notwithstanding paragraph (2)(c), no notice of any trust, whether express, implied or constructive, shall be entered in the register nor shall the Registrar be affected by any such notice.

## **5 Persons who may apply for registration**

- (1) Subject to Articles 6 and 7, a person may apply for initial registration in Jersey –
  - (a) of a plant variety; and
  - (b) to be registered as the proprietor of rights in that variety,if the person fulfils the requirements of paragraph (2).
- (2) A person fulfils the requirements of this paragraph if, at the time the application mentioned in paragraph (1) is made, the person is registered –
  - (a) as the proprietor of rights in the plant variety;
  - (b) in the country which made an original grant of rights in the variety.
- (3) An original grant of rights is a grant –
  - (a) which was made elsewhere than in Jersey prior to any application for registration under this Law;
  - (b) which was made by a recognized entity –
    - (i) in accordance with the laws of, or applicable to, that entity relating to the grant of rights in plant varieties (the “relevant laws”),
    - (ii) where the relevant laws require an examination to be conducted to confirm that the plant variety is a qualifying variety; and
  - (c) where rights in respect of the same variety have been granted by more than one recognized entity, which was –
    - (i) the first such grant to be made by a recognized entity, or
    - (ii) the grant made pursuant to the first application received by a recognized entity in respect of that variety.
- (4) Notwithstanding paragraph (3)(c), the Registrar may accept an application which does not fulfil the requirements of either clause (i) or (ii) of that provision, where the person seeking to make the application

can show reasonable cause and the Registrar considers that it is in the public interest to do so.

- (5) A person who is a successor (by assignment, transmission or other operation of law) to a person who is registered in Jersey pursuant to an application made under paragraph (1) may apply to be registered in Jersey as the proprietor of rights in the plant variety protected by the initial registration.
- (6) Where –
- (a) a person seeking to make an application is aggrieved by a decision of the Registrar not to accept the application; or
  - (b) the Registrar entertains any doubt as to whether or not to accept an application,

the question of whether acceptance of the application would be in the public interest may be referred to the court for its determination.

- (7) In paragraph (3), “recognized entity” means –
- (a) subject to paragraph (8), a UPOV country;
  - (b) a country, territory, organization or other body, designated by the Minister by Order as recognized for the purposes of this Article (whether or not, at the date of such designation, the country, territory, organization or body has acceded to the UPOV Convention).
- (8) If the Minister considers that a particular UPOV country does not have in place, or has ceased to have, adequate procedures for ensuring that grants are made only in respect of qualifying varieties, the Minister may by Order provide that the UPOV country in question shall not be a recognized entity for the purposes of this Article.

## **6 Priority between applicants for registration**

- (1) This Article applies where –
- (a) a plant variety is bred, discovered and developed by more than one person independently; and
  - (b) an application for registration of the variety is made under Article 5(1) by more than one person.
- (2) Where this Article applies, the person who is entitled to be registered as proprietor in Jersey of rights in the plant variety is the person who is the first in time to make an application for registration in relation to that variety.
- (3) In paragraph (1)(a), “discovered” refers to discovery of a plant variety whether growing in the wild or occurring (whether artificially induced to do so or not) as a genetic variant (whether artificially induced or not).

**7 Time limits on applications**

- (1) Subject to paragraph (2), an application for registration under Article 5(1) shall be made within the period of one year beginning with the date of the original grant of rights.
- (2) An application may be made later than the time limit expressed in paragraph (1), in a case where the person making the late application can show reasonable cause for failing to comply with that time limit; but the Registrar shall not accept such an application unless the Registrar considers that it is in the public interest to do so.
- (3) Where –
  - (a) a person seeking to make an application is aggrieved by a decision of the Registrar under paragraph (2) not to accept the application; or
  - (b) the Registrar entertains any doubt as to whether or not to accept an application under that paragraph,the question of whether acceptance of the application would be in the public interest may be referred to the court for its determination.

**8 Procedure on application for registration**

- (1) If the Registrar specifies a form of application for registration under Article 5, such an application shall be made in that form or in writing to the same effect, but in any event the application shall be accompanied –
  - (a) in the case of an application under Article 5(1), by –
    - (i) a copy, certified as true by the recognized entity or by such other person as the Minister may specify, of the registration of the original grant of rights by virtue of which the person seeking to make the application (the “applicant”) claims to be entitled to do so, and
    - (ii) all such other certificates or documents as are necessary to supply or to evidence the matters mentioned in Article 4(3)(b), (c), and (g) to (j);
  - (b) in the case of an application under Article 5(5), by all such certificates or documents as are necessary to evidence the transfer of the rights in a registered variety to the applicant; and
  - (c) if a fee is specified by the Minister, by the fee.
- (2) Upon receipt of an application –
  - (a) under paragraph 5(1); and
  - (b) accompanied by the matters specified in paragraph (1)(a) and (c),the Registrar shall enter on the Register the matters mentioned in Article 4(3)(a) to (c), and (f) to (j), and shall notify the applicant in writing that this has been done.
- (3) Within 8 days of receiving notification under paragraph (2), the applicant shall publish by means of advertisement in the Jersey Gazette and by any other means as the Registrar may specify –

- (a) the fact that an application has been made under this Law for registration of a plant variety;
  - (b) a description of the variety which it is proposed should be registered, including the denomination; and
  - (c) a statement that the details of the application, including any documents accompanying the application under paragraph (1)(a), are available for inspection upon a request made to the Registrar for that purpose.
- (4) Within 8 days of the date of publication of the advertisement under paragraph (3), the applicant shall notify the Registrar in writing of that date and of the denomination used in that publication to refer to the plant variety.
  - (5) Upon receipt of notification under paragraph (4), the Registrar shall enter on the register the matters so notified and mentioned in Article 4(3)(d) and (e).
  - (6) An application under Article 5(1) or (5) may be withdrawn by notice in writing to the Registrar at any time before it is determined, but any fee paid by the applicant shall not be repayable upon such withdrawal.

## **9 Opposition to an application for initial registration**

- (1) A notice of opposition to an application under Article 5(1) may be given to the Registrar in writing within 2 months of the date of the advertisement under Article 8(3), by a person mentioned in paragraph (2).
- (2) The Attorney General or any person interested may oppose the registration on any one or more of the following grounds, namely that –
  - (a) the applicant is not entitled under this Law to make an application;
  - (b) the variety to which the application relates is not a qualifying variety;
  - (c) the proposed denomination is not suitable to be registered;
  - (d) since the plant variety in question was first exploited, with the consent of the applicant, anywhere in the world –
    - (i) more than 4 years (or, in the case of a variety which is a tree or vine, more than 6 years) have elapsed, and
    - (ii) the variety has been exploited in Jersey on a commercial scale.

## **10 Grant or refusal of application for registration**

- (1) Subject to paragraphs (3), (4) and (6), the Registrar shall grant an application duly made in accordance with Article 8, and shall record the grant in the Register.
- (2) No grant of an application or record of a grant shall be made until after the expiration of the time period for opposition to a proposed registration mentioned in Article 9(1).

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- (3) If the Registrar considers that an application does not comply with the requirements of Article 8, the Registrar shall not grant the application, but shall give the applicant a statement in writing of the reasons why the application has not been granted.
  - (4) If, in a case where no notice of opposition has been received, it nevertheless appears doubtful to the Registrar that the application should be granted, the Registrar may –
    - (a) grow, or cause to be grown, the plant variety in question;
    - (b) carry out, or cause to be carried out, any further or additional tests or investigations; and
    - (c) require the applicant to provide any further or additional information, documents, plant or other material, or test or trial results as the Registrar may reasonably require.
  - (5) If, as a result of any action taken under paragraph (4), the Registrar is no longer doubtful that the application should be granted, the Registrar shall grant the application and shall record the grant in the Register.
  - (6) If –
    - (a) a notice of opposition is received; or
    - (b) in a case where no notice of opposition has been received and (regardless of any action which may have been taken under paragraph (4)) –
      - (i) it appears doubtful to the Registrar that the application should be granted, or
      - (ii) any question arises in relation to the application,the Registrar shall refer the matter in question to the court for its determination.
  - (7) Subject to Rules of Court, in relation to any matter referred under paragraph (6), the court –
    - (a) may order such persons to be convened, such evidence to be taken and such enquiries to be made as it considers necessary; and
    - (b) shall determine whether or not any application referred to it under paragraph (6) should be granted.
  - (8) If the court determines that the application should be granted, the court shall order the Registrar to record the grant in the register.
  - (9) If the court determines that the application should not be granted, it shall inform the applicant of the reasons for that decision.

## **11 Certificate and date of registration**

- (1) In any case where the Registrar records a grant under Article 10, the Registrar shall issue to the applicant a certificate of registration.
- (2) If the Minister specifies a form for the purpose of paragraph (1), the Registrar shall issue the certificate in that form.

- (3) Registration (whether of a plant variety or of a person as proprietor) has effect on and from the date recorded in the register as required by Article 4(4) or (5).

## **12 Reference collections of plant material**

- (1) The Registrar may maintain, whether separately from or together with the register or in any other manner, reference collections of plant material.
- (2) The Registrar may defray or contribute to the expenses of any other person in maintaining a reference collection of plant material, by means of grants of such amounts as the Registrar may determine.

## **13 Qualifying varieties**

- (1) This Article applies in any case under this Law in which the question arises as to whether or not a particular variety is a qualifying variety.
- (2) A qualifying variety is one which is –
  - (a) distinct;
  - (b) uniform;
  - (c) stable; and
  - (d) new.
- (3) A variety is “distinct” if it is clearly distinguishable, by one or more characteristics which are capable of precise description, from any other variety whose existence is a matter of common knowledge at the date of filing the application which resulted in the original grant of rights.
- (4) A variety is “uniform” if, subject to such variation as may be expected from the particular features of its propagation, it is sufficiently uniform in those of its characteristics which are included in the examination for distinctness.
- (5) A variety is “stable” if those characteristics which are included in the examination for distinctness, as well as any others used in the variety description, remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle.
- (6) A variety is “new” if, at the date of filing the application for the original grant of rights, no sale or other disposal of propagating or harvested material of the variety in question has taken place, with the consent of the applicant, for the purposes of exploitation of the variety –
  - (a) in the territory in relation to which the original grant was made, earlier than one year before that date; and
  - (b) in any other place, earlier than 4 years (or, in the case of a variety which is a tree or vine, earlier than 6 years) before that date.
- (7) In applying paragraph (6), a sale or other disposal of propagating or harvested material of a variety for the purposes of exploiting the variety shall, if the variety is related to another variety, be treated as being also a sale or other disposal of propagating or harvested material of the other variety for the purposes of exploiting that variety.



- (8) In paragraph (7), a variety shall be taken to be related to another variety if the nature of the first variety is such that repeated production of the first variety is not possible without repeated use of the other variety.

#### **14 Registration of minor interests of licensees, etc.**

- (1) Where a person becomes entitled to any interest in plant variety rights other than a proprietary interest, as mortgagee, licensee (other than under a compulsory licence granted under Article 34) or otherwise (a “minor interest”), the person may make an application in writing to the Registrar for registration of notice of the minor interest.
- (2) Where the Registrar receives an application for registration under this Article, the Registrar –
- (a) shall serve notice in writing of that application on the registered proprietor of the rights in which the minor interest is claimed; and
- (b) shall not register the minor interest until the registered proprietor has consented to the registration or has had sufficient opportunity to do so.
- (3) If the Registrar specifies a form of application for registration under paragraph (1), such an application shall be made in that form or in writing to the same effect, but in any event the application shall be accompanied –
- (a) by all such certificates or other documents as are necessary to supply or to evidence –
- (i) the name and address (including in particular any address notified under Article 15) of the applicant,
- (ii) the nature of the interest in question and the instrument or event by which it is created;
- and
- (b) if a fee is specified by the Minister, by the fee.
- (4) Subject to paragraphs (2)(b) and (5), the Registrar shall grant an application duly made in accordance with paragraph (3), and shall record the grant in the Register.
- (5) If –
- (a) it appears doubtful to the Registrar that the application should be granted; or
- (b) the registered proprietor opposes the application or any other question arises in relation to the application,
- the Registrar shall present a statement of the matter in question to the Bailiff for the directions of the court.
- (6) Subject to Rules of Court, in relation to any matter referred to it under paragraph (5), the court –
- (a) may order such persons to be convened, such evidence to be taken and such enquiries to be made as it considers necessary; and

- (b) shall determine whether any application referred to it under paragraph (5) should be granted.
- (7) If the court determines that the application should be granted, the court shall order the Registrar to record the grant in the register.
- (8) If the court determines that the application should not be granted, it shall inform the applicant of the reasons for its decision.
- (9) In any case where the Registrar records a grant under this Article, the Registrar shall issue to the applicant a certificate of registration.
- (10) If the Minister specifies a form for the purpose of paragraph (9), the Registrar shall issue the certificate in that form.

### **15 Legal presence in Jersey unnecessary for purpose of making applications**

- (1) A person may make an application for registration under Article 5 or 14 notwithstanding the fact that neither the applicant nor any representative of the applicant is present in Jersey, but only if the applicant notifies the Registrar in writing of an address in Jersey to which any notice, summons or other communication in connection with any matter relating to the application or to the registration may be sent.
- (2) Any notice, summons or other communication sent to the address notified in accordance with paragraph (1) shall be deemed to have been sufficiently served.

### **16 Rights during application period**

- (1) Where an application for initial registration of a plant variety is granted, the registered proprietor shall be entitled to reasonable compensation for anything done during the application period which, if it were done after the date on which the application is granted, would constitute an infringement of the registered proprietor's rights.
- (2) In paragraph (1), the "application period" is the period beginning with the date of publication of an advertisement in accordance with Article 8(3) and ending with the date on which the application is granted.

### **17 Effect of registration: protected variety**

- (1) Registration of a plant variety in Jersey entitles the registered proprietor to prevent any person from doing any of the acts listed in paragraph (2), in respect of the propagating material of the protected variety, without the registered proprietor's authority.
- (2) The acts mentioned in paragraph (1) are as follows –
  - (a) production or reproduction (multiplication);
  - (b) conditioning for the purpose of propagation;
  - (c) offering for sale;
  - (d) selling or other marketing;
  - (e) exporting;

- (f) importing;
  - (g) stocking for any of the purposes listed in sub-paragraphs (a) to (f); and
  - (h) any other act which may be prescribed for the purposes of this provision.
- (3) The registered proprietor may give authority for the purposes of paragraph (1) with or without conditions or limitations.
- (4) The rights conferred on the registered proprietor by paragraph (1) shall apply in respect of harvested material only if –
- (a) that material was obtained through the unauthorized use of propagating material of the protected variety; and
  - (b) the registered proprietor has had no reasonable opportunity, before the harvested material is obtained, to exercise his rights in relation to the unauthorized use of the propagating material.
- (5) In the case of a variety of a prescribed description, the rights conferred on the registered proprietor by paragraph (1) shall also apply, unless paragraph (6) applies, in respect of any product which is of a prescribed description and is obtained directly from harvested material in relation to which paragraph (4) applies.
- (6) This paragraph applies if, before the product mentioned in paragraph (5) was made, an act listed in paragraph (2) was done in respect of the harvested material from which the product was made and either –
- (a) the act was done with the authority of the registered proprietor; or
  - (b) the registered proprietor had a reasonable opportunity to exercise his or her rights in relation to the doing of the act.
- (7) In this Article, a reference to “harvested material” includes entire plants and parts of plants.

### **18 Effect of registration: dependent variety**

- (1) In relation to any variety which is dependent on the protected variety, the registered proprietor shall have the same rights as conferred by Article 17(1).
- (2) For the purposes of this Article, a variety is dependent on another (the “initial variety”) if –
- (a) repeated production of it is not possible without repeated use of the initial variety; or
  - (b) it is essentially derived from the initial variety (and the initial variety is not itself essentially derived from a third variety).
- (3) In paragraph (2), a variety shall be deemed to be “essentially derived” from an initial variety where –
- (a) it is predominantly derived from –
    - (i) the initial variety, or
    - (ii) a variety which is itself predominantly derived from the initial variety,

- while retaining the expression of the essential characteristics resulting from the genotype or combination of genotypes of the initial variety;
- (b) it is clearly distinguishable from the initial variety by one or more characteristics which are capable of precise description; and
  - (c) except for the differences which result from the act of derivation, it conforms to the initial variety in the expression of the essential characteristics which result from the genotype or combination of genotypes of the initial variety.
- (4) For the purposes of paragraph (3), derivation may occur (by way of example and without imposing any limitation) by means of –
- (a) the selection of –
    - (i) a natural or induced mutant,
    - (ii) a somaclonal variant, or
    - (iii) a variant individual from plants of the initial variety;
  - (b) backcrossing; or
  - (c) transformation by genetic engineering.
- (5) Paragraph (1) shall not apply where the existence of the dependent variety was common knowledge immediately before the coming into force of this Law.
- (6) The existence of a variety –
- (a) shall be taken to be a matter of common knowledge where the variety –
    - (i) is, or has been, the subject of a plant variety right under any jurisdiction or entered in an official register of plant varieties under any jurisdiction, or
    - (ii) is the subject of an application which results in its falling within clause (i);
  - (b) may be established as being a matter of common knowledge by reference to plant varieties –
    - (i) already in cultivation or exploited for commercial purposes,
    - (ii) included in a recognized commercial or botanical reference collection, or
    - (iii) of which there are precise descriptions in any publication.

## **19 Exceptions to plant variety rights: general**

The rights of a registered proprietor shall not be enforceable in relation to any act done –

- (a) for private and non-commercial purposes;
- (b) for experimental purposes; or
- (c) for the purpose of breeding another variety.

**20 Exceptions to plant variety rights: farm saved seed**

- (1) Subject to paragraph (3), the rights of a registered proprietor shall not be enforceable in relation to any use further described in paragraph (2), of propagating material of the protected variety or of a variety which is essentially derived from the protected variety.
- (2) The use which is excepted by paragraph (1) is use –
  - (a) by a farmer;
  - (b) for propagating purposes in the field; and
  - (c) on the farmer's own holding,of the product of a harvest obtained by planting the propagating material on that holding.
- (3) Paragraph (1) applies only where the propagating material is of a variety of a species or group –
  - (a) specified in Article 14(2) of the Council Regulation; or
  - (b) otherwise prescribed for the purposes of this Article.
- (4) Subject to paragraphs (5) and (6), where a farmer's use of propagating material is excepted by virtue of paragraph (1) the farmer shall, at the time of the use, become liable to pay the registered proprietor equitable remuneration which shall be sensibly lower than the amount charged for production of propagating material of the same variety in the same area with the proprietor's authority.
- (5) Paragraph (4) shall not apply to a farmer who is –
  - (a) considered to be a small farmer for the purposes of Article 14(3), third indent, of the Council Regulation; or
  - (b) of such other description as may be prescribed.
- (6) Paragraph (4) shall not apply where, before the day on which this Law comes into force –
  - (a) a farmer has, in relation to the variety concerned, engaged in use such as described in paragraph (2); and
  - (b) no remuneration was payable in respect of that use.
- (7) There may be prescribed for the purposes of this Article a date, no earlier than 5 years from the commencement of this Law, on which paragraph (6) shall cease to have effect in relation to specified varieties or to varieties of a specified species or group.
- (8) The Minister may by Order make provision –
  - (a) enabling –
    - (i) registered proprietors of plant variety rights to require farmers or seed processors, and
    - (ii) farmers or seed processors to require registered proprietors, to supply such information as may be specified and as may be considered necessary for the purposes of this Article;
  - (b) restricting the circumstances in which the product of a harvest of a protected variety may be moved, for the purpose of being

processed for planting, from the holding on which it was obtained;  
and

- (c) enabling the Minister to monitor the operation of any provision of, or under, this Article,

and provision under sub-paragraph (a) may include, without derogation to that general power, provision imposing obligations of confidence in relation to information required to be supplied.

- (9) In this Article –

“Council Regulation” means Council Regulation (EC) No. 2100/94 of 27 July 1994 on community plant variety rights;

“essentially derived” has the same meaning as is given to that expression by Article 18(3);

“in the field” includes in a glasshouse or under any other protective covering;

reference to a “farmer’s own holding” includes reference to any land actually exploited by the farmer for plant growing, whether as the farmer’s property or as otherwise managed under the farmer’s responsibility and on the farmer’s account; and

remuneration shall be taken to be “sensibly lower” if it would be taken as such as that expression is applied by Article 14(3), fourth indent, of the Council Regulation.

## **21 Exhaustion of rights**

- (1) Subject to paragraph (2), the rights of a registered proprietor shall not extend to any act concerning material of a variety if the material –
- (a) has been sold or otherwise marketed in Jersey by, or with the consent of, the proprietor of the rights; or
- (b) is derived from material which has been so sold or otherwise marketed.
- (2) Paragraph (1) shall not apply where the act involves –
- (a) further propagation of the variety; or
- (b) the export of material which enables propagation of the variety in a non-qualifying country, otherwise than for the purposes of final consumption.
- (3) For the purposes of paragraph (2)(b), a “non-qualifying country” is one which does not provide for the protection of varieties of the genus or species to which the variety in question belongs.
- (4) In this Article, “material” means –
- (a) any kind of propagating material of a variety;
- (b) harvested material of the variety, including entire plants and parts of plants; and
- (c) any product made directly from material falling within sub-paragraph (b).

**22 Duration of rights**

- (1) The rights of a registered proprietor shall subsist –
  - (a) for as long as the original registration subsists; or
  - (b) for 25 years, or (in the case of potatoes, trees and vines) for 30 years, from the date of original registration,  
whichever period is shorter.
- (2) In paragraph (1), “original registration” means the registration made pursuant to an original grant of rights.
- (3) The period for which rights subsist shall not be affected by suspension either of the original registration or under Article 35.

**23 Nature and transferability of rights**

- (1) The rights of a registered proprietor are personal or movable property.
- (2) Such rights are transferable by assignment, testamentary disposition or operation of law.
- (3) Rights under Article 18 may not be transferred or otherwise dealt with separately to the rights under Article 17 on which they depend.

**24 Changes to the register: correction of minor errors**

- (1) The Registrar may correct a minor error in the register, either –
  - (a) subject to paragraphs (2) and (3), where a person having a sufficient interest makes a request in writing for such a correction; or
  - (b) of the Registrar’s own motion,  
in accordance with paragraph (4).
- (2) A request for a correction under paragraph (1)(a) shall be accompanied by –
  - (a) all such certificates or other documents as are necessary to support or to evidence the correction requested; and
  - (b) if a fee is specified by the Minister, the fee.
- (3) Where the Registrar –
  - (a) receives a request for a correction under paragraph (1)(a); and
  - (b) considers that the correction sought would materially affect rights conferred by the registration,  
the Registrar shall require the person making the request to apply to the court for rectification of the register under Article 27.
- (4) Where the Registrar proposes to make a correction under paragraph (1), the Registrar shall give notice of the proposal to the registered proprietor and (as the case may require) any licensee registered under Article 14, and to any other person appearing to the Registrar to have a sufficient interest.

- (5) Before making a correction the Registrar shall give such persons as may have been notified under paragraph (4) a reasonable opportunity to make representations with regard to the proposal.

## **25 Other changes to the register to be made by Registrar**

- (1) The Registrar may –
  - (a) delete the registration of any variety; or
  - (b) amend the register to make a change to the name or address of the registered proprietor,upon a request to such effect being made in writing by the registered proprietor.
- (2) The Registrar may amend the register to make a change to the name or address of a holder of a minor interest registered under Article 14, upon a request to such effect being made in writing by the holder of the interest.
- (3) If a fee is specified by the Minister, a request under paragraph (1) or (2) shall be accompanied by the fee.
- (4) Where, following registration of a plant variety in Jersey, the original grant of rights in that variety has been revoked, cancelled or reinstated, the Registrar may amend the register as necessary in order to replicate any such modification of the original grant, upon application being made in writing by the registered proprietor.
- (5) If the Registrar specifies a form of application for the purposes of paragraph (4), an application under that paragraph shall be made in that form or in writing to the same effect, but in any event such an application shall be accompanied –
  - (a) by a certified copy, from the recognized entity which made the original grant of rights, of the registration by that entity showing the modification of which replication is sought; and
  - (b) if a fee is specified by the Minister, by the fee.
- (6) If it appears doubtful to the Registrar that an application under paragraph (4) should be granted, the Registrar shall apply to the court for determination of the question whether the application should be granted or not.
- (7) For the purposes of paragraph (6) the court may order such persons to be convened, such evidence to be taken and such enquiries to be made as it considers necessary.
- (8) If the court determines that an application under paragraph (4) should be granted, the court shall order the Registrar to amend the register accordingly.

## **26 Revocation of registration by order of the court**

- (1) Upon an application being made by the Attorney General or by any person aggrieved, on any of the grounds listed in paragraph (5), the court



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may order the Registrar to revoke a registration of a plant variety and to amend the register accordingly.

- (2) In addition to and not in derogation from the power conferred by paragraph (1), where an application to the court is made on the ground stated in paragraph (5)(c) the court may order the Registrar to substitute, as registered proprietor, a person properly entitled to be so registered, and to amend the register accordingly.
- (3) In proceedings under this Article, the court may determine any question which it considers to be necessary or expedient to determine and, subject to Rules of Court, may order such persons to be convened, such evidence to be taken and such enquiries to be made as it considers necessary.
- (4) The court may in particular, and without derogation from the general power conferred by paragraph (3), order –
  - (a) that the Registrar or any other person –
    - (i) should grow, or cause to be grown, the plant variety in question,
    - (ii) should carry out, or cause to be carried out, any further or additional tests or investigations,whether or not all or any of these particular actions have been carried out, prior to the court’s order under this paragraph; and
  - (b) that the registered proprietor or the applicant should –
    - (i) provide such further or additional information, documents, plant or other material, facilities or test or trial results, and
    - (ii) pay to the Registrar any such fee,as the court may reasonably require.
- (5) The grounds on which an application to the court may be made under paragraph (1) are the following, namely –
  - (a) that the variety in question was not, at the date of registration, a variety which was new or distinct;
  - (b) where the registration was essentially based on information or documents provided by the applicant, that the variety in question was not, at the date of registration, a variety which was uniform or stable;
  - (c) that the variety in question was registered on the application of a person not entitled to make such application under this Law; or
  - (d) that the original grant of rights in the variety in question has been revoked by the recognized entity which made the original grant.
- (6) A registration revoked by the court under paragraph (1) shall be deemed never to have had effect.
- (7) In this Article and in Article 27, a “person aggrieved” means a person whose interests have been prejudicially affected by a particular registration of a particular plant variety.

**27 Other rectification of the register by order of the court**

- (1) Upon an application being made by the Attorney General or by any person aggrieved, the court may order the Registrar to rectify the register by making or amending an entry in it.
- (2) In proceedings under this Article, the court may determine any question which it considers to be necessary or expedient to determine and, subject to Rules of Court, may order such persons to be convened, such evidence to be taken and such enquiries to be made as it considers necessary.
- (3) A rectification of the register pursuant to an order under this Article shall have effect from such date as the court may order.

**28 Maintenance of protected variety**

- (1) A registered proprietor shall ensure that, throughout the period during which the protected variety remains registered in Jersey, propagating material which is capable of producing the protected variety can be provided by the registered proprietor to the Registrar.
- (2) The registered proprietor shall provide to the Registrar, within such reasonable time as may be specified, all such information and facilities as the Registrar may require for the purpose of determining whether or not the registered proprietor is fulfilling the duty imposed by paragraph (1).
- (3) For the purposes of paragraph (2) –  
“information” includes, but is not limited to, such certified or other copies of any documentation relevant to the original grant of rights and the maintenance of such rights, as the Registrar may consider necessary; and  
“facilities” includes, but is not limited to, facilities for the inspection by or on behalf of the Registrar of the measures being taken for preservation of the protected variety.
- (4) Without prejudice to any other powers to amend the register which are conferred on the Registrar by this Law, the Registrar may cancel any registration of a plant variety on the grounds that the registered proprietor has failed to comply with a request by the Registrar under paragraph (2).

**29 Cancellation of rights on specific grounds by court**

- (1) Without prejudice to any other powers of the court to order amendment of the register (whether general or conferred on the court by this Law), the court may, on an application by any person on any of the grounds stated in paragraph (2), order the Registrar to cancel the registration of a protected variety.
- (2) The grounds mentioned in paragraph (1) are that –
  - (a) the protected variety has ceased to be uniform or stable;
  - (b) the registered proprietor is no longer in a position to fulfil the duty to provide propagating material of the protected variety as required by Article 28(1); or

- (c) that the original grant of rights in the protected variety has been cancelled.
- (3) In proceedings under this Article, the court may determine any question which it considers to be necessary or expedient to determine and, subject to Rules of Court, may order such persons to be convened, such evidence to be taken and such enquiries to be made as it considers necessary, and may in particular –
- (a) order the registered proprietor to provide all such additional information, documents and specimens as may reasonably be required;
  - (b) order that the Registrar, the registered proprietor or any other person –
    - (i) should grow, or cause to be grown, the plant variety in question, and
    - (ii) should pay any such fee (including a fee relating to the cost of growing the plant variety pursuant to the court's order) as the court may require.
- (4) Where the court is satisfied not only that the protected variety is no longer uniform or stable, but also that it ceased to be so at some date earlier than that of the application under this Article, the court may order that the cancellation should have effect from that earlier date.

### **30 Remedies for infringement of rights**

- (1) An infringement of rights in a protected variety is actionable by the registered proprietor of those rights.
- (2) Subject to paragraph (3), in an action for infringement of rights all such relief by way of damages, injunctions, accounts or otherwise is available to a person claiming such infringement as is available in respect of the infringement of any other property right.
- (3) Damages shall not be awarded in proceedings for the infringement of rights against a person who proves that at the date of the infringement, the person was not aware and had no reasonable grounds for supposing that the right infringed was a right in a protected variety.

### **31 Presumptions in infringement proceedings: harvested material**

- (1) Where, in proceedings for infringement of rights in respect of harvested material, the registered proprietor proves, in relation to any of the material (the “subject material”) –
  - (a) that the subject material has been the subject of an information notice given to the defendant by or on behalf of the registered proprietor; and
  - (b) that the defendant has not, within such time as may be specified (or, where a time is prescribed for this purpose, within that time) after service of the notice, provided the registered proprietor with the information requested in the notice,

the presumptions as to the subject material set out in paragraph (2) shall apply unless the defendant can show proof to the contrary or other reasonable excuse for not providing the information.

- (2) The presumptions mentioned in paragraph (1) are –
  - (a) that the subject material was obtained through unauthorized use of propagating material; and
  - (b) that the registered proprietor did not have a reasonable opportunity, before the subject material was obtained, to exercise his or her rights in relation to the unauthorized use.
- (3) In paragraph (1)(a), an “information notice” is a notice in writing and in such form, if any, as may be specified by the Registrar, which –
  - (a) specifies the subject material and the details of the registration relating to that material as recorded under Article 4;
  - (b) contains, in relation to that material, a request for –
    - (i) the name and address of the person from whom the recipient acquired possession of the material specified in the notice,
    - (ii) the date on which the recipient acquired possession of that material, and
    - (iii) the size of the consignment of which that material formed part;
  - and
  - (c) contains such other particulars as may be prescribed.

### **32 Presumptions in infringement proceedings: products made from harvested material**

- (1) Where, in proceedings for infringement of rights in respect of any product made directly from harvested material, the registered proprietor proves, in relation to the product –
  - (a) that it has been the subject of an information notice given to the defendant by or on behalf of the registered proprietor; and
  - (b) that the defendant has not, within the prescribed time after service of the notice, provided the registered proprietor with the information requested in the notice,

the presumptions as to the product set out in paragraph (2) shall apply unless the defendant can show proof to the contrary or other reasonable excuse for not providing the information.

- (2) The presumptions mentioned in paragraph (1) are –
  - (a) that the harvested material from which the product was made was obtained through unauthorized use of propagating material;
  - (b) that the registered proprietor did not have a reasonable opportunity, before the harvested material was obtained, to exercise his or her rights in relation to the unauthorized use; and
  - (c) that no relevant act was done, before the product was made, in respect of the harvested material from which it was made.

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- (3) An act is relevant for the purposes of paragraph (2)(c) if it is an act listed in Article 17(2) and –
    - (a) is authorized by the registered proprietor; or
    - (b) is an act in relation to which the registered proprietor has a reasonable opportunity to exercise his or her rights.
  - (4) In paragraph (1)(a), an “information notice” is a notice in writing and in such form, if any, as may be specified by the Registrar, which –
    - (a) specifies the product;
    - (b) contains, in relation to that product, a request for the prescribed, but no other, information; and
    - (c) contains such other particulars as may be prescribed.

### **33 Confidentiality of information obtained under Articles 31 and 32**

- (1) Where the registered proprietor obtains information pursuant to an information notice given for the purposes of Article 31 or 32, the registered proprietor owes an obligation of confidence in respect of that information to the person who supplied it.
- (2) But paragraph (1) does not restrict the disclosure of information –
  - (a) for the purposes of, or in connection with, establishing whether there has been an infringement of rights; or
  - (b) for the purposes of, or in connection with, proceedings for such infringement.

### **34 Compulsory licences – applications and grant**

- (1) At any time after the expiration of the period of 3 years (or such other period as may be prescribed) from the date of registration of a plant variety as certified in accordance with Article 11, a person may apply to the court for a licence under the rights in the plant variety on one of the grounds stated in paragraph (2).
- (2) The grounds on which an application may be made under paragraph (1) are that the registered proprietor of the rights in question –
  - (a) has unreasonably refused to grant a licence to the applicant; or
  - (b) in granting, offering or purporting to grant a licence to the applicant, has imposed or proposed unreasonable terms.
- (3) The court may not grant the application unless it is satisfied as to the ground on which the application is made, and is also satisfied –
  - (a) that it is necessary to grant the application for the purposes of securing that the variety to which the application relates is –
    - (i) available to the public at reasonable prices,
    - (ii) widely distributed, or
    - (iii) maintained in quality;

- (b) that the applicant is financially and otherwise in a position to exploit, in a competent and business-like manner, the right granted by any licence; and
  - (c) that the applicant intends so to exploit that right,
- and if it is so satisfied the court may grant the application and shall order the Registrar to record the grant in the register.
- (4) If the court is not satisfied as described in paragraph (3), it may dismiss the application.
- (5) A licence under this Article shall not be an exclusive licence and may be granted whether or not the registered proprietor has granted licences to the applicant or to any other person.
- (6) A licence under this Article shall be on such terms as the court may think fit, having regard in particular to the desirability of securing –
  - (a) that the variety to which the application relates is –
    - (i) available to the public at reasonable prices,
    - (ii) widely distributed, and
    - (iii) maintained in quality; and
  - (b) that there is reasonable remuneration for the registered proprietor of the rights under which the licence is granted.
- (7) Without derogation from the generality of paragraph (6), a licence may also include in particular terms obliging the registered proprietor to make propagating material available to the licensee.
- (8) The court may at any time and on the application of any person revoke, extend, limit or in any other respect vary a licence under this Article.
- (9) If and to the extent that any agreement purports to bind any person not to apply for a licence under this Article, the agreement shall be void.

### **35 Compulsory licences – suspension**

- (1) If, on an application by a licensee under Article 34, the court is satisfied that the registered proprietor of the rights under which the licence is granted is in breach of any obligation imposed by the licence, the court may order that the exercise of those rights be suspended.
- (2) If the registered proprietor proves to the satisfaction of the court that the breach no longer subsists, the court may order that any suspension under paragraph (1) shall cease.

### **36 Duty to use registered denomination**

- (1) A person (including the registered proprietor) may not use any denomination other than the denomination registered in relation to a protected variety (in this Article and Articles 37 and 38, the “registered denomination”), in offering for sale, selling, or otherwise marketing propagating material of that variety.

- (2) Paragraph (1) has effect in relation to a variety from the date of registration of the variety, and shall continue to apply after the period for which the registration has effect.
- (3) Paragraph (1) shall not preclude the use of any trade mark or trade name (whether registered under the Trade Marks (Jersey) Law 2000<sup>2</sup> or not) if –
  - (a) that mark or name and the registered denomination are juxtaposed; and
  - (b) the registered denomination is clearly recognizable.
- (4) A person who contravenes the prohibition in paragraph (1) is guilty of an offence and liable on conviction to a fine of level 3 on the standard scale.
- (5) In any proceedings for an offence under this Article, it is a defence to prove that the defendant –
  - (a) took all reasonable precautions against committing the offence; and
  - (b) when using the denomination, had no reason to suspect that it was an offence to do so.

### **37 Request to use new denomination**

- (1) This Article applies where –
  - (a) a person, being either an applicant for registration under Article 8 or a registered proprietor, requests in writing the registration of a plant variety under a denomination (a “new denomination”) other than the denomination registered in relation to that variety upon the original grant of rights (the “original denomination”); and
  - (b) the proposed new denomination is registered outside Jersey as part of a grant of rights by an entity other than that which made the original grant of rights.
- (2) Where this Article applies the Registrar shall grant the request and record the new denomination in the register, but the Registrar shall not do so if –
  - (a) there is opposition to the suitability of the new denomination; or
  - (b) it appears doubtful to the Registrar that the request should be granted, for any reason but in particular including because the new denomination is unsuitable to be registered, having regard to the criteria in Article 63 of the Council Regulation.
- (3) Where this Article applies, the requirements of Articles 8, 9 and 10 shall apply in relation to the request for registration under paragraph (1) –
  - (a) with all necessary modifications, as though that request were an application for first registration; and
  - (b) in particular, the matters required to be published by means of advertisement under Article 8(3) shall include both the proposed new denomination and the original denomination.
- (4) In this Article, “Council Regulation” has the same meaning as in Article 20(9).

- (5) If the Registrar specifies a form of request for a new denomination under this Article, such a request shall be made in that form or in writing to the same effect.

### **38 Improper use of registered denomination**

- (1) Where any person uses the registered denomination of a protected variety in offering for sale, selling, or otherwise marketing propagating material of a different variety, such wrongful use of the registered denomination is actionable in proceedings brought by the registered proprietor.
- (2) It is also wrongful, and actionable as provided by paragraph (1), for any person to use a denomination so nearly resembling a registered denomination as to be likely to deceive or to cause confusion, in offering for sale, selling or otherwise marketing propagating material of a variety other than the variety properly denominated by the registered denomination in question.
- (3) In any proceedings under this Article, it is a defence to prove that the defendant –
  - (a) took all reasonable precautions against committing the wrong; and
  - (b) when using the denomination, had no reason to suspect that it was wrongful to do so.

### **39 False information**

- (1) A person who, knowingly or recklessly, gives information –
  - (a) to which this Article applies; and
  - (b) which is false in a material particular,is guilty of an offence and liable on conviction to a fine of level 3 on the standard scale.
- (2) This Article applies –
  - (a) to any information given in, or in connection with, any application to the Registrar under this Law; and
  - (b) to any information given in response to a request for such information made by the Registrar under this Law.

### **40 False representations as to rights**

- (1) A person who, knowingly or recklessly, falsely represents that he, she or it is entitled to exercise rights of a registered proprietor, or any rights deriving from such rights, is guilty of an offence and liable on conviction to a fine of level 3 on the standard scale.
- (2) For the purposes of paragraph (1), it is immaterial whether or not the variety to which the false representation relates is in fact a protected variety in which enforceable rights subsist.



**41 Offences: liability of body corporate etc.**

- (1) Where an offence under this Law committed by a limited liability partnership, a separate liability partnership or a body corporate is proved to have been committed with the consent or connivance of –
  - (a) a person who is a partner of the partnership, or a director, manager, secretary or other similar officer of the body corporate; or
  - (b) any person purporting to act in any such capacity,the person shall also be guilty of the offence and liable in the same manner as the body corporate or the partnership to the penalty provided for that offence.
- (2) Where the affairs of a body corporate are managed by its members, paragraph (1) shall apply in relation to acts and defaults of a member in connection with the member's functions of management as if the member were a director of the body corporate.

**42 Minister's power to make Orders, and to specify matters**

- (1) The Minister may by Order make provision for the purposes of carrying this Law into effect and in particular for prescribing any matter which may be or is required to be prescribed by the Minister under this Law.
- (2) Provision under paragraph (1) may, in particular and without derogation from the general power conferred by that paragraph, be made –
  - (a) requiring and regulating the translation of documents and the filing and authentication of any translation;
  - (b) authorizing the rectification of irregularities of procedure;
  - (c) for restricting the making of repeated applications on the same subject;
  - (d) as to any fee or charge, including provision as to the level or amount; and
  - (e) time limits (including time limits as to the payment of fees, and the extension of any time limits),in respect of anything required to be done, or in connection with any proceeding, under this Law.
- (3) An Order under this Law may contain such incidental, supplementary or transitional provisions as the Minister may consider necessary or expedient.
- (4) The Minister shall have power to specify any matter which may be specified by the Minister under this Law, and shall do so in writing addressed to such persons as the Minister may reasonably consider to be concerned in the matter.

**43 Registrar's power to charge**

- (1) Subject to anything which may be prescribed under Article 42(2)(d), the Registrar may require a charge to be paid by any person in respect of

costs reasonably incurred by the Registrar, including (but not limited to) costs incurred in –

- (a) carrying out tests on, or investigations or trials of, a plant variety which is the subject of an application for registration, whether by the Registrar or by any person on the Registrar's behalf; and
  - (b) purchasing a report of such a test, investigation or trial from an authority or recognized entity outside Jersey whose functions include the testing of plant varieties.
- (2) In requiring payment of a charge under paragraph (1), the Registrar shall specify –
- (a) any reasonable time limit by which the charge must be paid;
  - (b) whether or not the charge may be refunded, and if so, any reasonable time limit by which such a refund may be paid; and
  - (c) any consequence of non-payment of the charge, including in particular the refusal of any application in relation to which the charge is required to be paid.

#### **44 Rules of Court**

- (1) The power to make rules of court under the Royal Court (Jersey) Law 1948<sup>3</sup> includes power to make rules regulating practice and procedure in or in connection with proceedings before the court under this Law, and in particular (but without derogation from the generality of this power) to make provision –
  - (a) for the appointment of advisers to assist the court in any proceedings including (but not limited to) proceedings for infringement of rights and for the regulation of the functions of such advisers;
  - (b) for enabling persons to take proceedings under this Law *in forma pauperis*;
  - (c) for the hearing by the court in vacation of all such matters under this Law as may require to be immediately or promptly heard.
- (2) The remuneration of any adviser appointed under Rules made in pursuance of this Article shall be defrayed out of the annual income of the States.

#### **45 Regulations**

- (1) The States by Regulations may make such further provision with respect to the registration of plant varieties as they think fit, including amendment of this Law or any other enactment, and in particular (but without derogation from the generality of this power) may make provision for the purposes of –
  - (a) the registration of plant varieties in Jersey (whether by way of first registration or re-registration), and the exercise and enforcement of any right or interest in a plant variety, including giving effect to any right or interest in a plant variety granted in a country or territory other than Jersey, in so far as such provision is, in the

- opinion of the States, consistent with any international treaty or agreement relating to plant varieties which applies to Jersey;
- (b) giving effect in Jersey to any international convention ratified by or on behalf of Jersey or which extends to Jersey;
  - (c) enabling the ratification or extension of any international convention;
  - (d) implementing, in Jersey, any obligation of the United Kingdom under the EU Treaties (as defined in the European Union (Jersey) Law 1973<sup>4</sup>), whether or not that obligation applies to Jersey;
  - (e) giving effect in Jersey to any provision that applies in the United Kingdom.
- (2) Furthermore such regulations may in particular (and without derogation from the generality of paragraph (1)) –
- (a) confer powers on any person or body with regard to the administration of, and decisions relating to, any right or interest in a variety, including allowing the Minister to make provision for such matters by Order;
  - (b) make provision for appeals;
  - (c) make further provision for enforcement including civil remedies or criminal penalties for infringement of any right or interest in a variety;
  - (d) make further provision for fees, including allowing the Minister to prescribe or specify the amount of any fee;
  - (e) make provision for such supplementary, transitional and incidental matters as the States may consider to be necessary or expedient.

#### **46 Citation and commencement**

This Law may be cited as the Intellectual Property (Plant Varieties) (Jersey) Law 201- and shall come into force 7 days after it is registered.

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- <sup>1</sup> *chapter 16.325*  
<sup>2</sup> *chapter 05.900*  
<sup>3</sup> *chapter 07.770*  
<sup>4</sup> *chapter 17.210*