

# STATES OF JERSEY



## **DRAFT LOI (201-) (AMENDEMENT No. 6) SUR LA PROPRIÉTÉ FONCIÈRE**

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Lodged au Greffe on 11th October 2017  
by the Chief Minister

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**STATES GREFFE**





Jersey

## **DRAFT LOI (201-) (AMENDEMENT No. 6) SUR LA PROPRIÉTÉ FONCIÈRE**

### **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 Loi (201-) (Amendement No. 6) sur la propriété foncière are compatible with the Convention Rights.

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

*Chief Minister*

Dated: 25th September 2017

## REPORT

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This matter concerns what would be regarded in English law as amendments of the system of mortgages on land. The Jersey equivalent is the law of hypothecation, which was codified by the *Loi (1880) sur la propriété foncière* (“the Law of 1880”).

The Jersey Law Commission (“the Commission”) in its Topic Report No. 1/2008/TR March 2008 entitled SECURITY ON IMMOVEABLE PROPERTY stated that it was “*in no doubt that hypothecation<sup>1</sup> should continue to be the method of obtaining security on immovable property in Jersey. However, there [were] many aspects of existing Jersey law in this area that need[ed] clarifying, codifying and updating to meet present-day requirements*”.

The Commission made several far-reaching recommendations, including suggested reforms of bankruptcy laws where immovable property was involved (*i.e.* the laws relating to *dégrévement* and *désastre*). The Report also made other recommendations of a more straightforward nature.

A number of the Commission’s recommendations have already been put into effect, *e.g.* the different usufructuary rights of dower and *viduité* respectively for widows and widowers have now given way to a standard usufructuary right in accordance with the revised Part 3 of the Wills and Successions (Jersey) Law 1993 and the associated amendments made to the Law of 1880.<sup>2</sup>

The purpose of this draft Law is to amend the Law of 1880 in order to deal with the following matters (which have been the subject of discussion with members of the professional sector).

- *Registering a charge for a percentage of the value of land*

The Commission considered the suggestion<sup>3</sup> that it should be possible to register a hypothec for a percentage of the value of a property as an alternative to a specific capital sum (which is the present requirement under both Articles 13 and 19 of the Law of 1880 at present – *see further below*). The Commission noted that the argument for this was that some shared equity schemes operated on that basis in the United Kingdom and that it should be available to facilitate the introduction of such schemes in Jersey, and concluded –

*“At the time we were not convinced of the need for this . . . , but in view of recent moves in the political sphere for the introduction of shared equity schemes we have now decided that the law should make provision for hypothecs of this type.”*

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<sup>1</sup> Hypothecs are of 3 kinds:

- (a) legal hypothecs, arising by operation of law (including ‘Social Security Hypothecs’);
- (b) judicial hypothecs, resulting from the registration of court judgments;
- (c) conventional hypothecs, created by contract passed before the Royal Court.

<sup>2</sup> *See* Wills and Successions (Amendment No. 2) (Jersey) Law 2013 (in force 1st January 2014) <https://www.jerseylaw.je/laws/enacted/PDFs/L-16-2013.pdf>

<sup>3</sup> At paragraph 14.10 of its Consultation Paper: <https://jerseylawcommission.files.wordpress.com/2015/06/2006-security-on-immovable-property.pdf>

The draft Law would amend –

- (a) Article 13 of the Law of 1880 in relation judicial hypothecs<sup>4</sup>; and
- (b) Article 19 of the Law of 1880 in relation to conventional hypothecs<sup>5</sup>.

The amendment in each case would make it clear that the existing requirement for the amount secured to be a specific capital sum would be subject to the amount of the secured claim being able to be calculated by reference to the value from time to time, or percentage of the value from time to time, of the land that is being hypothecated.

- *The need to renew judicial hypothecs ('reconnaissances') after 10 years (prescription)*

Judicial hypothecs under Article 13 of the Law of 1880 have almost entirely taken over from the simple conventional hypothec (under Article 19 of the Law of 1880) as the usual form of house mortgage in Jersey. This is done by way of an acknowledgment of debt – or *reconnaissance* – for which judgment is taken, giving rise to the hypothec. But in the case of judicial hypothecs the right of recourse against successors in title (known as the *droit de suite*)<sup>6</sup> runs out – under Article 29 of the Law of 1880 – after 10 years if it is not renewed.

The Commission observed that: “*the ten-year prescription period ... for judicial hypothecs ... is clearly too short. If a loan secured on a property remains outstanding after ten years, it has to be re-registered to conserve the droit de suite; this may cause problems if in the meantime a second charge has been registered against the property and its holder refuses to reinstate the original order of priority .... We recommend that the prescription period ... be increased from ten to 25 years.*”

The draft Law would amend Article 29 of the Law of 1880 so that, in relation to judicial hypothecs which result from simple acknowledgments of debt (*reconnaissances*), the prescription period in respect of the *droit de suite* is extended from 10 years to 30 years, *i.e.* slightly longer than the 25 years recommended by the Commission.

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<sup>4</sup> See footnote 1: a judicial hypothec is obtained by registering an act or judgment of Court in the register of *Obligations* at the Public Registry. Originally the Law of 1880 provided for registration of acts of the Royal Court only, but those of the Petty Debts Court were made registrable by the *Loi (2005) (Amendement No. 5) sur la propriété foncière*.

<sup>5</sup> See footnote 1: conventional hypothecs are created voluntarily by contract between the debtor and creditor passed before the Royal Court. Note also that conventional hypothecs are of 2 kinds: (a) *foncier* or ground hypothecs for the security of *rentes*; and (b) simple hypothecs for the security of a capital sum of money.

<sup>6</sup> The *droit de suite* is the right of the creditor to follow the property into the hands of third parties. What this means is that, if a debtor has ‘mortgaged’ (*i.e.* hypothecated) his or her land, but has later sold that land, and cannot pay the debt, the secured creditor has the right to ‘foreclose’ (*i.e.* claim in a *dégrévement*) on the land even though it is no longer owned by the debtor, and compel the new owner to pay off whatever balance remains due or to give up the property to satisfy the debt. Nowadays, when portions of a property are sold off, it is common practice for secured creditors to be made parties to each contract to give up their rights voluntarily, but otherwise the *droit de suite* remains even if the third party has not been directly charged by his or her contract of title with payment of the secured debt. Note however that unless the third party has specifically agreed to be liable for the debt, the creditor cannot take any steps to enforce the hypothec against him or her until the principal debtor’s assets have been exhausted.

The prescription period of the *droit de suite* would remain at 10 years in respect of other judicial hypothecs, that is to say judicial hypothecs which result from court judgments otherwise than in relation to simple acknowledgments of debt (*reconnaisances*). It would also remain at 10 years in respect of legal hypothecs other than hypothecs securing dower rights and social security hypothecs<sup>7</sup> both of which are imprescriptible.

#### **Collective responsibility under Standing Order 21(3A)**

The Council of Ministers has a single policy position on this proposition, and as such, all Ministers, and the Assistant Ministers to the Chief Minister, are bound by the principle of collective responsibility to support the proposition, as outlined in the Code of Conduct and Practice for Ministers and Assistant Ministers ([R.11/2015](#) refers).

#### **Financial and manpower implications**

At present, a fee of £80 is payable to the Judicial Greffe to cover the administrative cost of renewing a judicial hypothec at 10-yearly intervals. The stamp duty collected on immoveable property transactions and borrowings is approximately £25 million per year, of which this fee generates approximately 1% or £225,000. The fee will now be payable at 30-year intervals and, consequentially, there will be a reduction in the revenue from this fee to the Treasury.

There are no manpower implications for the States arising from the adoption of this draft Law.

#### **Human Rights**

No human rights notes are annexed because the Law Officers' Department has indicated that the draft Law does not give rise to any human rights issues.

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<sup>7</sup> Under the Social Security Hypothecs (Jersey) Law 2014.

## Explanatory Note

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This Law would amend the Loi (1880) sur la propriété foncière (“1880 Loi”).

*Article 1* is an interpretation provision.

*Articles 2 and 3* amend Articles 13 and 19 of the 1880 Loi to allow the amount of a secured claim in the case of a judicial or contractual hypothec to be calculated by reference to the value from time to time, or percentage of the value from time to time, of one or more particular *bien-fonds* of the debtor. The term ‘*bien-fonds*’ broadly speaking means a plot of land and all that is affixed to it (a ‘corporeal hereditament’ in the equivalent English terminology).

*Article 4* amends Article 29 of the 1880 Loi so as to lengthen from 10 to 30 years the period of time after which a creditor’s right of recourse against third persons (*droit de suite*) is barred by lapse of time in certain circumstances. Those circumstances are where the right of recourse arises by virtue of a judicial hypothec derived from a simple acknowledgement of a debt (*reconnaissance*).

The amendments to the 1880 Loi can be translated as follows –

*Article 1*

### Interpretation

In this Law “the principal Law” means “la Loi (1880) sur la propriété foncière”.

*Article 2*

### Article 13 amended

In Article 13 of the principal Law, after paragraph (1) there shall be inserted the following paragraph –

“(1A) For the purposes of paragraph (1), the amount of the secured claim may be calculated by reference to the value from time to time, or percentage of the value from time to time, of one or more particular *bien-fonds* of the defendant.”.

*Article 3*

### Article 19 amended

In Article 19 of the principal Law –

- (a) the existing paragraph shall be numbered (1);
- (b) in that paragraph there shall be deleted the words “Any agreement contrary to this Article is void.”;
- (c) after that paragraph there shall be inserted the following paragraphs –
  - “(2) Notwithstanding paragraph (1), the amount of a claim secured by a simple hypothec may be calculated by reference to the value from time to time, or percentage of the value from time to time, of one or more particular *bien-fonds* of the debtor.
  - (3) Any agreement contrary to this Article is void.”.

Article 4

**Article 29 amended**

In Article 29 of the principal Law for the second paragraph (which starts with the words “En ce qui touche le droit” and ends with the words “depuis leur date”) there shall be substituted the following paragraph –

“As regards the right of action against successors in title (*droit de suite*) –

- (a) a judicial hypothec resulting from a simple acknowledgement of a debt shall be prescribed at the expiration of 30 years or more after the date it was created provided that it was created –
  - (i) on or after the date of commencement of the Loi (201-) (Amendement No. 6) sur la propriété foncière, or
  - (ii) in the 10 year period immediately before the commencement of that Law;
- (b) all other judicial and legal hypothecs shall be prescribed at the expiration of 10 years or more after the date the hypothec was created, with the exception of –
  - (i) a hypothec for dower, and
  - (ii) a hypothec by virtue of the Social Security Hypothecs (Jersey) Law 2014.”.

Article 5 makes a consequential amendment to the Social Security Hypothecs (Jersey) Law 2014 and the words of amendment can be translated as follows –

**Consequential amendment: Social Security Hypothecs (Jersey) Law 2014**

In paragraph 4 of the Schedule to the Social Security Hypothecs (Jersey) Law 2014, for the second paragraph of the translated Article 29, there shall be substituted the following paragraph –

Article 6 sets out the title of the Law and provides that it will come into force 7 days after it is registered.



Jersey

## **DRAFT LOI (201-) (AMENDEMENT No. 6) SUR LA PROPRIÉTÉ FONCIÈRE**

### **Arrangement**

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Jersey

## DRAFT LOI (201-) (AMENDEMENT No. 6) SUR LA PROPRIÉTÉ FONCIÈRE

**LOI** pour modifier en plus la Loi (1880) sur la propriété foncière.

*Adopté par les Etats* [date à insérer]

*Sanctionné par Ordre de Sa Majesté en Conseil* [date à insérer]

*Enregistré par la Cour Royale* [date à insérer]

**LES ETATS**, moyennant la sanction de Sa Très Excellente Majesté en Conseil, ont adopté la Loi suivante –

### 1 Interprétation

Dans cette Loi, “la Loi principale” signifie la Loi (1880) sur la propriété foncière<sup>1</sup>.

### 2 Amendement de l’Article 13

Dans l’Article 13 de la Loi principale après l’alinéa (1) sera inséré l’alinéa suivant –

“(1A) Aux fins de l’alinéa (1), le montant de la réclamation hypothéquée pourra être calculé par référence à la valeur de temps en temps, ou à un pourcentage de la valeur de temps en temps, d’un ou plusieurs biens-fonds particuliers du défendeur.”.

### 3 Amendement de l’Article 19

Dans l’Article 19 de la Loi principale –

- (a) le présent Article sera désigné l’alinéa (1);
- (b) dans ledit alinéa seront supprimés les mots “Toute convention contraire à cet Article est nulle.”;
- (c) après ledit alinéa seront insérés les alinéas suivants –

“(2) Nonobstant l’alinéa (1), le montant d’une réclamation hypothéquée par voie d’hypothèque simple pourra être calculé par référence à la valeur de temps en temps, ou à un pourcentage de la valeur de

temps en temps, d'un ou plusieurs biens-fonds particuliers du débiteur.

- (3) Toute convention contraire à cet Article est nulle.”.

#### 4 Amendement de l'Article 29

Dans l'Article 29 de la Loi principale au deuxième alinéa (qui commence avec les mots “En ce qui touche le droit” et qui se termine par les mots “depuis leur date”) sera substitué l'alinéa suivant –

“En ce qui touche le droit de suite –

- (a) l'hypothèque judiciaire d'une simple reconnaissance d'une obligation sera prescrite par le laps de 30 ans et au delà depuis la date à laquelle l'hypothèque a pris naissance, pourvu qu'elle a pris naissance soit –
- (i) le jour de l'entrée en vigueur de la Loi (201-) (Amendement No. 6) sur la propriété foncière<sup>2</sup> ou après cette date, soit
  - (ii) dans les 10 ans immédiatement avant l'entrée en vigueur de ladite Loi;
- (b) toute autre hypothèque judiciaire et toute hypothèque légale sera prescrite par le laps de 10 ans et au delà depuis la date à laquelle l'hypothèque a pris naissance, à l'exception de –
- (i) l'hypothèque légale de douaire, et
  - (ii) l'hypothèque en vertu de la Loi dite ‘Social Security Hypothecs (Jersey) Law 2014<sup>3</sup>’.”.

#### 5 Amendement consécutif: Social Security Hypothecs (Jersey) Law 2014

A l'alinéa 4 de la Cédule à la Loi dite Social Security Hypothecs (Jersey) Law 2014<sup>4</sup>, au deuxième alinéa de l'Article 29 traduit en anglais sera substitué l'alinéa suivant –

“As regards the right of action against successors in title (*droit de suite*) –

- (a) a judicial hypothec resulting from a simple acknowledgment of a debt shall be prescribed at the expiration of 30 years or more after the date it was created provided that it was created –
- (i) on or after the date of commencement of the Loi (201-) (Amendement No. 6) sur la propriété foncière<sup>5</sup>, or
  - (ii) in the 10 year period immediately before the commencement of that Law;
- (b) all other judicial and legal hypothecs shall be prescribed at the expiration of 10 years or more after the date the hypothec was created, with the exception of –
- (i) a hypothec for dower, and
  - (ii) a hypothec by virtue of the Social Security Hypothecs (Jersey) Law 2014<sup>6</sup>.”.

**6 Citation et entrée en vigueur**

La présente Loi pourra être citée sous le titre de Loi (201-) (Amendement No. 6) sur la propriété foncière et entrera en vigueur le 7ème jour après son enregistrement.

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- 1* chapter 18.495  
*2* P.94/2017  
*3* chapter 26.850  
*4* chapter 26.850  
*5* P.94/2017  
*6* chapter 26.850