

STATES OF JERSEY



DRAFT ADOPTION (AMENDMENT No. 6) (JERSEY) LAW 201-

Lodged au Greffe on 25th June 2013
by the Chief Minister

STATES GREFFE



Jersey

DRAFT ADOPTION (AMENDMENT No. 6) (JERSEY) LAW 201-

European Convention on Human Rights

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

In the view of the Deputy Chief Minister the provisions of the Draft Adoption (Amendment No. 6) (Jersey) Law 201- are compatible with the Convention Rights.

Signed: **Senator B.I. Le Marquand**

Deputy Chief Minister

Dated: 21st June 2013

REPORT

This *Projet de Loi* contains an amendment of the Adoption (Jersey) Law 1961. The amendment's purpose is to repeal paragraph (3) of Article 11 of the 1961 Law which prevents a single male from adopting a female child unless the Court determines that there are "special circumstances". The article in questions states –

“An adoption order shall not be made in respect of a female infant in favour of a sole applicant who is a male unless the Court is satisfied that there are special circumstances which justify as an exceptional measure the making of an adoption order.”

As Article 3 of the 1961 Law imposes a duty on the Royal Court to promote the welfare of the child in reaching any decision relating to the adoption of infants, repealing Article 11(3) will not affect the Court's need to prioritise the child's best interests. The Court will continue to be duty bound, as stated in article 3, to give consideration to –

“the need to safeguard and promote the welfare of the infant throughout the infant's childhood, and shall, so far as practicable, ascertain the wishes and feelings of the infant regarding the decision and give due consideration to them, having regard to the infant's age and understanding.”

Article 11(3) replicates a similar provision contained in the Adoption of Children (Jersey) Law 1947 which was repealed by the 1961 Law. It would appear the inclusion of this provision in Jersey legislation was motivated by its recurring presence in United Kingdom statutes such as the Adoption Act 1958, the Adoption Act 1950 and the Adoption and Children Act 1926.

However, this provision was removed from the United Kingdom statute books when the enactment of the Children Act 1975 repealed and replaced section 2(3) of the Adoption Act 1958; thereby implementing the recommendation of the Departmental Committee on the Adoption of Children [Cmnd 5107 – 'the Houghton Report'] of 1972. The rationale that underlay the Houghton Report's recommendation was based on the understanding that section 7(b) of the 1958 Act already required the Court to be satisfied that, were an adoption order made, it would be for the welfare of the child. It was, therefore, felt redundant 'to single out this one set of circumstances where adoption will rarely be for the welfare of the child'. As such section 11 of the 1975 Law stated –

- (1) *An adoption order may be made on the application of one person where he has attained the age of 21 years and –*
 - (a) *is not married, or*
 - (b) *is married and the court is satisfied that –*
 - (i) *his spouse cannot be found, or*
 - (ii) *the spouses have separated and are living apart, and the separation is likely to be permanent, or*
 - (iii) *his spouse is by reason of ill-health, whether physical or mental, incapable of making an application for an adoption order.*

- (2) *An adoption order shall not be made on the application of one person unless –*
- (a) *he is domiciled in a part of the United Kingdom, or in the Channel Islands or the Isle of Man, or*
 - (b) *the application is for a Convention adoption order and section 17 is complied with.*
- (3) *An adoption order shall not be made on the application of the mother or father of the child alone unless the court is satisfied that –*
- (a) *the other natural parent is dead or cannot be found, or*
 - (b) *there is some other reason justifying the exclusion of the other natural parent,*

and where such an order is made the reason justifying the exclusion of the other natural parent shall be recorded by the court.

In Jersey the Royal Court continues to be referred cases pursuant to article 11(3) of the 1961 Law in order that it may determine whether “special circumstances” exist. Indeed, the Court has delivered judgements on 2 recent occasions, in March 2009 and May 2011, involving applications by the same male applicant. The first case concerned the adoption of a pair of twins, where one of the infants was female, whilst the second concerned the adoption of a single female infant.

In the absence of any clear guidelines determining what amounted to “special circumstances” the Court surmised, in its March 2009 case, that the rationale of article 11(3) may be twofold. Firstly, the Court understood that the provision’s inclusion may have been motivated by the risk that a female child might be abused sexually or otherwise by a sole male applicant. Secondly, the emotional needs of a female child, particularly during and after puberty, may not be so easily addressed by a sole male parent. The Court felt the wording and rationale of the provision clearly indicated a pre-disposition on the part of the legislature of the time that an adoption order in respect of a female should not generally be made in favour of a sole male applicant. Although the rationale supporting this thinking was no longer considered well founded, the facts of the 2 cases were nevertheless considered in accordance with it. The Court judged that in both cases special circumstances were present which justified the making of an adoption order. The level of care and insight which the applicant brought to the task of parenting proved to be exceptional and the applicant provided an unprecedented level of stability to the children’s lives along with his long-term male partner.

It is worth noting that since these 2 cases the 1961 Law has been amended to take account of the Civil Partnerships (Jersey) Law 2012 which has accorded civil partners the same rights as married couples when adopting. Nevertheless, as occurred in 2009 and 2011, homosexual male partners who are not in a civil partnership continue to be prevented from making a joint application to adopt female children. Consequently, in its written judgements to both cases, the Court expressed the hope that the legislature might consider whether article 11(3) of the 1961 Law ought not to be repealed.

This call was prompted in the first instance by the Court’s understanding that the provision is based on an outdated rationale which essentially holds that men pose a *de facto* risk to female infants. Furthermore, it assumes that fathers are unable to meet the emotional needs of a female infant whereas, presumably, a mother is capable of meeting those of a male infant; insofar that nothing prevents women from adopting a male child. As demonstrated by the facts of the 2 cases, this fallacious reasoning

excludes potential joint adoptive male parents who are partners in same-sex life partnerships and who would otherwise meet the criteria set out in the 1961 Law; article 3, as aforementioned, already requires the Court to promote the welfare of the child. Certainly this defeats the very essence and social purpose of adoption. As such by failing to accord paramountcy to the best interests of the child article 11(3) may deprive children of the possibility of a loving and stable family life.

Financial and manpower implications

There are no financial or resource implications for the States arising from the adoption of this 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.

APPENDIX TO REPORT

Human Rights Note on the Draft Adoption (Amendment No. 6) (Jersey) Law 201-

1. This note has been prepared in respect of the Draft Adoption (Amendment No. 6) (Jersey) Law 201- by the Law Officers' Department. It summarises the principal human rights issues arising from the contents of the draft Law and explains why, in the Law Officers' opinion, the draft Law is compatible with the European Convention on Human Rights ("ECHR").
These notes are included for the information of States Members. They are not, and should not be taken as, legal advice.
2. Article 11(3) of the Adoption (Jersey) Law 1961 ("the Adoption Law") prevents an adoption order in respect of a female child being made in favour of a sole male applicant "*unless the Court is satisfied that there are special circumstances which justify as an exceptional measure the making of [the] order.*"
3. The draft Law repeals Article 11(3).
4. Article 3 of the Adoption Law imposes a duty on the Royal Court to promote the welfare of the child. In reaching any decision relating to the adoption of children, the Court must have regard to all the circumstances, first consideration being given to the need to safeguard and promote the welfare of the child throughout its childhood, and must, so far as practicable, ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to the child's age and understanding.
5. It is not the repeal, but the continued existence, of Article 11(3) of the Adoption Law that might give rise to difficulty in terms of the European Convention on Human Rights ("ECHR") if it were not to be repealed. ECHR article 8 provides that everyone has the right to respect for his or her private and family life, home and correspondence. ECHR article 14 provides that the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
6. It was held by the European Court of Human Rights in [E.B. v FRANCE \[2008\] ECtHR \[GC\] \(No. 43546/02\) \(22 January 2008\)](#) that prospective adopters have rights under the private life limb of ECHR article 8 to a proper and non-discriminatory decision-making process as to their suitability to adopt.
7. It is at least arguable that Article 11(3) of the Adoption Law compromises such rights. Of course its repeal removes any doubt there may be in this respect.
8. The same provision in the legislation of England and Wales was repealed in 1975 in response to a recommendation in the Houghton Report which noted that the courts in that country were already required to be satisfied in every case that the adoption order, if made, would be for the welfare of the child and saw "no reason to single out this one set of circumstances".

Explanatory Note

Article 1 repeals paragraph (3) of Article 11 of the Adoption (Jersey) Law 1961. Article 11 restricts the persons in whose favour an adoption order may be made. The rules may be summarised as follows –

- A child may be adopted by its mother or father. The adoption may be by the mother or father alone, or by that person jointly with his or her spouse or civil partner. There is no requirement for the mother or father or, if relevant, his or her spouse or civil partner, to have attained a particular age at the time of the adoption.
- A child may be adopted by a relative (defined in Article 1 of the 1961 Law). The relative must, at the time of the adoption, have attained the age of 20. The adoption may be by the relative alone, or by that person jointly with his or her spouse or civil partner. In that case, the spouse or civil partner must also have attained the age of 20.
- A child may be adopted by any person. The person must, at the time of adoption, have attained the age of 25. The adoption may be by the person alone, or by the person jointly with his or her spouse or civil partner. In that case, the spouse or civil partner must have attained the age of 20.

Currently, paragraph (3) of Article 11 imposes a further restriction when an adoption order is to be made for the adoption of a female child by a sole, male applicant. In such a case, the Royal Court must be satisfied that there are special circumstances which justify the making of the adoption order as an exceptional measure.

Article 11 of the Adoption (Jersey) Law 1961 is set out below, with the provision to be repealed in italics.

“11 Age and sex of applicant

- (1) Subject to paragraph (2), an adoption order shall not be made in respect of an infant unless the applicant –
 - (a) is the mother or father of the infant; or
 - (b) is a relative of the infant, and has attained the age of 20 years; or
 - (c) has attained the age of 25 years.
- (2) An adoption order may be made in respect of an infant on the joint application of 2 spouses or both partners of a civil partnership –
 - (a) if either of the applicants is the mother or father of the infant; or
 - (b) if the condition set out in paragraph (1)(b) or (c) is satisfied in the case of one of the applicants, and the other of them has attained the age of 20 years.
- (3) *An adoption order shall not be made in respect of a female infant in favour of a sole applicant who is a male, unless the Court is satisfied that there are special circumstances which justify as an exceptional measure the making of an adoption order.”*

Article 2 provides for the citation of this Law and its commencement 7 days after it is registered in the Royal Court.



Jersey

DRAFT ADOPTION (AMENDMENT No. 6) (JERSEY) LAW 201-

A LAW to amend further the Adoption (Jersey) Law 1961

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 Article 11(3) of Adoption (Jersey) Law 1961 repealed

Article 11(3) of the Adoption (Jersey) Law 1961¹ is repealed.

2 Citation and commencement

This Law may be cited as the Adoption (Amendment No. 6) (Jersey) Law 201- and shall come into force 7 days after it is registered.

¹ *chapter 12.050*