

# STATES OF JERSEY



## DRAFT CHILDREN AND ADOPTION (AMENDMENT) (JERSEY) LAW 201-

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Lodged au Greffe on 26th July 2016  
by the Minister for Health and Social Services

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STATES GREFFE





Jersey

## **DRAFT CHILDREN AND ADOPTION (AMENDMENT) (JERSEY) LAW 201-**

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

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000, the Minister for Health and Social Services has made the following statement –

In the view of the Minister for Health and Social Services, the provisions of the Draft Children and Adoption (Amendment) (Jersey) Law 201- are compatible with the Convention Rights.

Signed: **Senator A.K.F. Green, M.B.E.**

*Minister for Health and Social Services*

Dated: 22nd July 2016

## REPORT

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### A. Background

Under Jersey law there are a number of ways in which an unmarried father, who is the stated biological father of the child, can be named on a child's birth certificate. These include –

- requesting his registration on the birth certificate with the mother, or
- seeking registration, at his own request, on production of parental declarations made by the mother and him<sup>1</sup>.

Being named on a birth certificate does not, however, automatically confer the unmarried father with parental responsibility. In order to acquire parental responsibility an unmarried father must either –

- apply to the Court for an order, or
- the mother and father may by agreement provide that he shall have parental responsibility for the child<sup>2</sup>.

This position is out of step with the approach in the UK, where an unmarried father will acquire parental responsibility if he becomes registered as the child's father, whether at birth or at a later date.

In September 2015 the States Assembly debated a proposition lodged by the Chief Minister entitled '*Same-sex marriage, divorce and dissolution*' ([P.77/2015](#)), part of which concerned reforms to parental responsibility. The States agreed in principle that "*legislation should be amended to automatically confer parental responsibility on unmarried fathers who are named on birth certificates*".

This draft Law brings forward the required changes through amendments to the Children (Jersey) Law 2002 (the "Children Law") and the Adoption (Jersey) Law 1961 (the "Adoption Law"). It does so, however, only in relation to unmarried fathers who are the stated biological father of the child. The amendments do not cover parents who are in a same-sex relationship (i.e. father/father or mother/mother parents).

Provision will, however, need to be made for same-sex parents at the point at which same-sex marriage is introduced (and as set out in [P.77/2015](#)). This will include allowing for –

- (i) same-sex couples who are married or in a civil partnership to automatically be conferred parental responsibility; and
- (ii) for unmarried same-sex couples to be conferred parental responsibility in certain circumstances.

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<sup>1</sup> See Article 55(2) of the Marriage and Civil Status (Jersey) Law 2001. Article 55 of the 2001 Law makes reference to the "stated father", which is interpreted as meaning the biological father of the child. The effect of this is that if, at the point of registration, the father or the mother were to state that the person seeking registration as father was not in fact the biological father of the child, the registrar should refuse entry of that person's name onto the register.

<sup>2</sup> Article 3(2) and 5(1) of the 2002 Law – the unmarried father can either apply to the Court for an order that he shall have parental responsibility for the child, or the mother and father may by agreement provide that the father is to have parental responsibility for the child.

The changes relating to same-sex parents cannot be implemented until same-sex marriage legislation comes into force at the end of 2017. In the meantime, however, the Minister for Health and Social Services (the “Minister for HSS”) has determined that the changes relating to the automatic conferral of parental responsibility on unmarried fathers should be progressed as soon as possible, ahead of reforms relating to parental responsibility for same-sex parents.

It is understood that it is generally undesirable to bring forward staggered amendments to primary legislation, however, the Minister for HSS believes that this matter should be addressed as a priority, due to the ongoing and immediate distress caused to some unmarried fathers. Moreover, the issue is a growing problem in Jersey, as increasingly more children are born to unmarried parents – approximately 40% of children born in Jersey have unmarried parents<sup>3</sup>, and as shown by the increase in parental responsibility agreements recorded by the Family Court.

**Number of parental responsibility agreements recorded by the Family Court**

<i>Year</i>	<i>No.</i>
2005	14
2006	33
2007	51
2008	37
2009	25
2010	46
2011	54
2012	48
2013	54
2014	48
2015	63
2016 to date	9

**B. The draft Law**

The draft Law amends the Children Law and the Adoption Law.

It amends the Children Law so that an unmarried father who is named on the birth certificate is automatically conferred parental responsibility, as is currently the case with married fathers. The unmarried father can be named on the birth certificate at the point of initial registration of birth or at a later date.

Where an unmarried father is not named on the birth certificate, but wants parental responsibility, he will either need to enter into a parental responsibility agreement with

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<sup>3</sup> Based on analysis of the register of births.

the child's mother or obtain a Court order. This provides an important safeguard in certain circumstances, for example where a child has been conceived through rape.

The draft Law amends the Adoption Law so that where an order freeing a child for adoption is revoked, the unmarried father's parental responsibility as well as the married father's parental responsibility, will be revived.

The title of the draft Law includes the word "adoption" because it brings forward changes to the Adoption Law. For the purposes of clarity, it does not in any way infer that an unmarried father is adopting or is required to adopt his own child. He is not.

The changes brought forward by the draft Law will not be retrospective, i.e. parental responsibility will only automatically be conferred on unmarried fathers who are named on birth certificates after the draft Law comes into effect. Any unmarried fathers already named on the birth certificate will still have to acquire parental responsibility via a parental responsibility agreement with the child's mother or via a Court order.

Whilst consideration was given to retrospective application in order to benefit unmarried father who are already named on birth certificates, there were a number of associated risks. For example, retrospective application could result in claims from unmarried fathers on the basis that the mothers had taken actions, with regard to children, that did not account for the father's parental responsibility. In addition, there are very real concerns that retrospective application could potentially cause unintended complications in relation to ongoing child care proceedings.

#### **C. Financial and manpower implications**

There are no financial or manpower implications arising from the implementation of the draft Law.

#### **D. 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 Children and Adoption (Amendment) (Jersey) Law 201-**

These Notes have been prepared in respect of the Draft Children and Adoption (Amendment) (Jersey) Law 201- (the “**draft Law**”) by the Law Officers’ Department. They summarise the principal human rights issues arising from the contents of the draft Law and explain 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.**

The draft Law would amend the Children (Jersey) Law 2002 (the “**2002 Law**”) and the Adoption (Jersey) Law 1961 so as to, amongst other things, confer parental responsibility on an unmarried father in respect of his child, at the point at which he becomes officially registered as the child’s father under Article 55 or 56 of the Marriage and Civil Status (Jersey) Law 2001. This amendment is being brought forward ahead of changes to the law relating to parental responsibility for parents in same-sex relationships, which are being developed separately.

From an ECHR perspective, an amendment to the law to enhance parental responsibility rights for unmarried fathers only, ahead of measures that would confer similar rights on parents in same-sex relationships, falls to be considered in the context of Article 8 ECHR, read in conjunction with Article 14 ECHR. Article 8 ECHR provides for the right to family life, which extends to matters relating to parental responsibility, and Article 14 ECHR provides for the right not to be discriminated against, including on grounds relating to sexual orientation.

The right not to be discriminated against in the enjoyment of the rights guaranteed under the ECHR is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification. The key question in an Article 14 ECHR assessment of the draft Law is, therefore, whether the relevant comparators are, in fact, in analogous positions. In the context of the draft Law, those relevant comparators are, on the one hand, unmarried fathers who are the biological father of the child and, on the other, same-sex (or non-biological) parents.

In a number of family law cases where Article 14 ECHR has been engaged<sup>4</sup>, the European Court of Human Rights has recognised that certain features associated with parenthood, such as paternity and parental ties, can lead to the relevant comparators involved being viewed as being in a non-analogous situation, the result being that there can be no question of discrimination between them. In addition, the House of Lords has acknowledged, in a leading judgment,<sup>5</sup> the significance of the unique position of the natural, genetic father, and the distinction of that role from other forms of social and psychological parenthood, such as is provided by adoptive parents or those in same-sex relationships.

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<sup>4</sup> For example, *Hulsmann v Germany*, App.No.33375/03; *Odievre v France* (2004) 38 EHRR 43.

<sup>5</sup> *In re G (children) (FC)*, [2006] UKHL 43.

These judicial precedents support a conclusion that the genetic or biological link which a natural father possesses with his child, and the resulting familial and legal ramifications of that link, should be considered sufficiently distinct from a parent in a same-sex relationship. From an Article 14 ECHR perspective, these factors establish that unmarried fathers and same-sex prospective parents (i.e. non-biological parents) are not in an analogous situation, so there can be no question of discrimination between them in the context of the measures proposed by the draft Law. Accordingly, the draft Law is compatible with Article 14 ECHR, read in conjunction with Article 8 ECHR.

## Explanatory Note

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This Law would amend the Children (Jersey) Law 2002 (the “Children Law”) and the Adoption (Jersey) Law 1961 (the “Adoption Law”).

*Article 1* amends Article 5(1) of the Children Law, by inserting a new subparagraph (aa), the effect of which would be to enable an unmarried father to acquire parental responsibility for his child at the point at which he becomes officially registered as the child’s father under Article 55 or 56 of the Marriage and Civil Status (Jersey) Law 2001 (the “2001 Law”). Article 55 of the 2001 Law provides for an unmarried father to be registered as the child’s father on the register of births. Article 56 provides for the re-registration of a child’s birth so as to enter an unmarried father’s name on the register of births, if this had not been recorded when the child’s birth was first registered. Parental responsibility acquired in accordance with amended Article 5 of the Children Law would not have any retrospective effect which means that unmarried fathers registered under the 2001 Law before the coming into force of this Law would continue only to be able to acquire parental responsibility by applying to the court for a parental responsibility order or entering into a parental responsibility agreement with the child’s mother.

*Article 2(2)* amends Articles 12 of the Adoption Law so that before the court makes an order freeing a child for adoption, the court must be satisfied that a person claiming to be the child’s father has no intention of acquiring parental responsibility for that child by requesting re-registration of the child’s birth under Article 56 of the 2001 Law.

*Article 2(3)* amends Articles 12B of the Adoption Law so that the effect of the revocation of an order freeing a child for adoption would include the revival of an unmarried father’s parental responsibility for his child acquired by virtue of new Article 5(1)(aa) of the Children Law and registration under the 2001 Law.

*Article 3* gives the title of this Law and provides for it to come into force 7 days after it is registered.





Jersey

## **DRAFT CHILDREN AND ADOPTION (AMENDMENT) (JERSEY) LAW 201-**

**A LAW** to amend the Children (Jersey) Law 2002 in relation to the acquisition of parental responsibility by unmarried fathers and make consequential amendments to the Adoption (Jersey) Law 1961

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<i>Adopted by the States</i>	<i>[date to be inserted]</i>
<i>Sanctioned by Order of Her Majesty in Council</i>	<i>[date to be inserted]</i>
<i>Registered by the Royal Court</i>	<i>[date to be inserted]</i>

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

### **1 Children (Jersey) Law 2002 amended**

In Article 5 of the Children (Jersey) Law 2002<sup>1</sup> –

- (a) in paragraph (1), before sub-paragraph (a), there is inserted the following sub-paragraph –

“(aa) subject to paragraph (1A), the father shall have parental responsibility for the child if he becomes registered as the child’s father under Article 55 or 56 of the Marriage and Civil Status (Jersey) Law 2001<sup>2</sup> (the ‘2001 Law’);”;

- (b) after paragraph (1) there is inserted the following paragraph –

“(1A) Paragraph (1)(aa) does not apply to a father who was registered under the 2001 Law before the commencement of the Children and Adoption (Amendment) (Jersey) Law 201<sup>-3</sup>.”.

### **2 Adoption (Jersey) Law 1961 amended**

- (1) In this Article “Law” means the Adoption (Jersey) Law 1961<sup>4</sup>.
- (2) For Article 12(7) of the Law there is substituted the following paragraph –

“(7) Before making an order under this Article, in the case of a child whose father does not have parental responsibility for the child, the

- Court shall satisfy itself in relation to any person claiming to be the father that –
- (a) the person has no intention, within the next 6 months, of –
    - (i) requesting registration as the child’s father under Article 56 of the Marriage and Civil Status (Jersey) Law 2001<sup>5</sup>, or
    - (ii) applying for an order under Article 5 of the Children (Jersey) Law 2002<sup>6</sup> or a residence order under Article 10 of that Law; or
  - (b) if the person did make an application referred to in subparagraph (a)(ii), it would be likely to be refused.”.
- (3) In Article 12B(3)(c) of the Law, before clause (i), there is inserted the following clause –
- “(ai) parental responsibility acquired by a father in accordance with the requirements of Article 5(1)(aa) of the Children (Jersey) Law 2002<sup>7</sup>.”.

### 3 Citation and commencement

This Law may be cited as the Children and Adoption (Amendment) (Jersey) Law 201- and shall come into force 7 days after the day it is registered.

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- 1 *chapter 12.200*
  - 2 *chapter 12.600*
  - 3 *P.76/2016*
  - 4 *chapter 12.050*
  - 5 *chapter 12.600*
  - 6 *chapter 12.200*
  - 7 *chapter 12.200*