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Deputy Catherine Curtis
Chair, Children, Education and Home Affairs Scrutiny Panel

BY EMAIL

14th February 2024

Dear Chair,

Draft Children and Civil Status (Amendments) (Jersey) Law 202- (P.104/2023)

Thank you for your letter of 7th of February requesting information for your review of the Draft Children and Civil Status (Amendments) (Jersey) Law 202- (P.104/2023) (the 'draft Law') that was lodged on 21st December 2023.

Please see the below answers to many of your questions and as agreed I commit to provide the remainder by Friday 23rd February. Please do not hesitate to contact me again if you require anything further.

1. Please can you provide your assessment of whether the draft Law will provide parity for every child in Jersey with regards to:

(a) Their formal birth registration;

The draft Law will, as far as possible, provide parity for every child in Jersey. However, due to differences between same sex female and male couples in the way that children are conceived and enter the lives of couples, by necessity, different processes and provisions of the Law are required to suit these different circumstances. As such, some children will have a birth certificate, some children will have a parental order certificate and some children may have an adoption certificate as their birth registration document. The legislative provisions that provide for these documents have been designed in such a way that the certificates all have the same effect.

(b) Their right to a name;

A child's right to have a name is established by Part 5 of the Marriage and Civil Status (Jersey) Law 2001. The provisions that require a child to be given a name were amended by the Marriage and Civil Status (Amendment No.5) (Jersey) Law 2023 and are not altered by the draft Law.

(c) Their right to acquire a nationality; and

A child's right to acquire a nationality remains unaltered by the draft Law. Acquisition of British citizenship is governed by the British Nationality Act 1981 and this right is unaffected by the draft Law.

(d) The right to know and be cared for by their parents.

The draft Law will provide parity as far as possible for children to know and be cared for by their parents.

The draft Law expands who can be deemed to be a child's legal parents so that both parents in a same sex couple can be a child's legal parents for the first time. It also removes the customary law presumption that the husband of the birth mother is the child's father which may not always be the case and has proven problematic in the past. Automatic acquisition of parental responsibility flows from having legal parent status, in other cases someone would have to acquire parental responsibility by an order of Court.

2. The Panel understands that there will be a large number of consequential amendments required if P.104/2023 is adopted. Please could you provide a list of all the laws which have been identified and, for each of these, also:

- (a) provide detail about the scale of the changes that will be required;**
- (b) confirm the anticipated timescale for bringing forward the change; and**
- (c) confirm if the amendments will be made by Regulations laid before the States Assembly.**

The consequential amendments will be made by Regulations lodged in the States Assembly, as per Paragraphs 9 and 129 of the report that accompanies the draft Law. It is currently estimated that 33 separate pieces of legislation (including Laws, Regulations and Orders) will require amendments (please see below for a current working list). However, this work remains ongoing at this time and that number may rise further. It is envisaged that these Regulations will be lodged in the States Assembly in Autumn 2024. As the amendments are being made by separate Regulations, officers will offer briefings to include full details of the changes made by the Regulations to the Panel during the summer.

Title of legislation being consequentially amended
Adoption (Jersey) Law 1961
Aircraft Registration (Births, Deaths and Missing Persons) (Jersey) Regulations 2015
Bank (Recovery and Resolution) (Jersey) Law 2017
Bankruptcy (Désastre) (Jersey) Law 1990
Bankruptcy (Recovery and Resolution) (Jersey) Law 2017
Capacity and Self-Determination (Capacity and Liberty Assessors) (Jersey) Regulations 2018
Companies (Jersey) Law 1991
Control of Housing and Work (Residential and Employment Status) (Jersey) Regulations 2013
Criminal Law (Child Abduction) (Jersey) Law 2005
Data Protection (Jersey) Law 2018
Employment (Jersey) Law 2003
Fatal Accidents (Jersey) Law 1962
Gambling Commission (Jersey) Law 2010
Gender Recognition (Jersey) Law 2010
Financial Services (Investment Business (Qualifying Segregated Managed Accounts - Exemption)) (Jersey) Order 2014
Incorporated Limited Partnerships (Jersey) Regulations 2011
Legitimacy and Illegitimacy (Re-registration of Births) (Jersey) Regulations 1974
Legitimacy (Jersey) Law 1963
Legitimacy (Jersey) Law 1973
Mental Health (Jersey) Law 2016

Nursing Homes (Jersey) Law 1994
Public Employees (Contributory Retirement Scheme) (Jersey) Regulations 1967
Public Employees (Contributory Retirement Scheme) (Existing Members) (Jersey) Regulations 1989
Public Employees (Contributory Retirement Scheme) (Former Hospital Scheme) (Jersey) Regulations 1992
Public Employees (Contributory Retirement Scheme) (New Employees) (Jersey) Regulations 1989
Public Employees (Pensions Scheme) (Membership and Benefits) (Jersey) Regulations 2015
Sexual Offences (Jersey) Law 1989
Social Security (Death Grant) (Jersey) Order 1974
Social Security (Jersey) Law 1974
Stamp Duties and Fees (Jersey) Law 1998
Teachers' Superannuation (Existing Members) (Jersey) Order 1986
Teachers' Superannuation (New Members) (Jersey) Order 2007
Wills and Succession (Jersey) Law 1993

3. **From briefings the Panel has received we have been advised that the number of children and families impacted by the issues that the draft Law seeks to resolve is relatively small. Please could you confirm what data is available (from the previous five years) which may help to illustrate numbers impacted by various scenarios?**

- (a) **If there is limited data available, please could you confirm if the changes proposed by the draft Law will see the capture of the information in future?**

The figures mentioned in the briefings were that less than 10 parental orders had been granted by courts in England and Wales for Jersey born children and sent on to the Superintendent Registrar. Therefore, this is the maximum number of children that Article 9N (that the draft Law inserts into the Children (Jersey) Law 2002) could impact.

In terms of parental orders granted in Jersey by the Royal Court, officers have estimated the potential number of parental orders based on the ratio of adoption orders to parental orders granted in England and Wales over 5 previous years. Using these estimations and applying them to Jersey's historic rates of adoption it is envisaged that the rate of parental orders granted will settle at approximately 2 per year.

Regarding registration of births by same-sex couples, as it has not been possible for a same-sex couple to register a birth in Jersey previously this data does not exist. However, as all births are registered by the Superintendent Registrar, and this will continue to be the case, it is not envisaged that Jersey's currently falling birth rate will be impacted significantly by this law change.

As all births are required to be registered by Law this data will be accurately captured and will include both same-sex female couples and parental orders, albeit in a separate parental order register. As birth registers are public registers, they will continue to be searchable by the public in the future.

4. **The Panel understands that the draft Law has been largely based on legislation in the United Kingdom. Please could you outline whether process and law from other jurisdictions was reviewed and advise why the UK approach was deemed most appropriate?**

Elements of the draft Law have been based on legislation in the United Kingdom. However, large parts are based on Jersey's existing legislation or are bespoke because of Jersey's existing legislative framework in this area of Law. The provisions that drive registration (to include Articles 55, 55A, 55B, 55C, 56, 56A, 56B 56C and others if the draft Law is approved by the States Assembly) are based on the adaptation and expansion of existing birth registration provisions that currently feature in the Marriage and Civil Status (Jersey) Law 2001. The provisions that govern the effect of Parental Orders are largely based on the Adoption (Jersey) Law 1961; this is so that both orders have the same effect once granted.

Other jurisdictions were researched at the policy development stage of the project. However, given the differences in other jurisdictions' legal systems (including within the Commonwealth) it was decided to focus on the legislation of the United Kingdom when considering how Jersey's legislation could be drafted to achieve the desired policy effects. The United Kingdom's – and specifically England's – laws are also closest in nature to Jersey's Children's Law, Registration Law and Adoption Law. Therefore, it was decided that it was most practicable to mirror relevant parts of the Human Fertilisation and Embryology Act 1990 ("the 1990 Act") (as amended by the Human Fertilisation and Embryology Act 2008) in the draft Law. The two Acts have also been in force for a considerable period, during which it has been revised, updated and subject to review. On balance, it is for these reasons that some parts of the draft Law (such as Schedule A1) have been largely based on provisions in the 2008 Act.

(a) Are there any key differences that you wish to highlight to the Panel?

A comprehensive account of these many differences is beyond the scope of this response, but some key or notable differences are noted below –

i) Parental order and recognition order provisions

New Articles 9G – 9K of the Children Law would make provision for parental orders. These provisions are equivalent to provision made in the HFEA 2008 and in the Human Fertilisation and Embryology (Parental

Orders) Regulations 2018, which are United Kingdom regulations made under the HFEA 2008.

Article 9N – recognition of pre-existing parental orders made in England and Wales – that the draft Law inserts into the Children (Jersey) Law 2002. This is the first example in Jersey's history where an order can be granted by the court to recognise the effect of an order made by another jurisdiction that is not governed by an international treaty.

Notable differences in the Law with these provisions are –

- Section 54 and 54A of the HFEA 2008 make separate provision for joint applicants and for individual applicants for a parental order. These provisions are largely duplicative. The Law makes similar provision but by means of a single Article (Article 9I) permitting both joint and individual applications, and setting out the conditions applicable to both situations. It is considered that the drafting of the Law in this way makes the application requirements for a parental order clearer than the corresponding United Kingdom provision.
- The conditions on which a parental order is granted under the Law would vary slightly from corresponding United Kingdom provision.

The Law would require that, among other things, the birth of the child who is the subject of the parental order application is registered in Jersey (Article 9I(2)(b)). There is no corresponding provision in section 54 or 54A HFEA 2008 requiring that a birth registration in England and Wales. The policy intent for this distinction in the Jersey law is to operate against couples with children whose birth is registered outside Jersey travelling to Jersey and using it as a forum for obtaining a parental order. This ensures that the Royal Court hears applications from families whose child's birth was registered in Jersey and, whereby, there is a tangible connection with the Island.

ii) Position of prospective parent who dies before application for parental order can be made

New Article 9G would provide for applications to the Royal Court for a parental order and new Article 9I would provide for the conditions on which the Court is to determine an application for a parental order. Corresponding English law provision is made in section 54 and 54A HFEA 2008.

There is a distinction between the Law and the corresponding HFEA provision in relation to the legal status of a prospective parent who dies before an application for a parental order is made or determined. This distinction is discussed at length in the human rights notes appended to the report accompanying the proposition (see pages 35-36).

In brief, the provisions of the HFEA 2008 which enable joint applications for parental orders, and the associated conditions on which a parental order could be made by the English court, are silent as to what would happen should an applicant for a parental order die before the parental order is made or determined. This was considered in the English case *Re X (Parental Order: Death of Intended Parent Prior to Birth)* in which, in very brief terms, the English court considered the absence of any provision to enable the establishment of legal parent status in the case of a deceased parent was incompatible with the Article 8 ECHR right to family life of the child concerned. The English court held, however, that it could use its interpretative power under the Human Rights Act 1998 to read section 54 HFEA 2008 in a manner compatible with the ECHR.

Though the Jersey court has similar interpretative powers to the English court and, as such, could be expected to give effect to an identical legislative scheme in Jersey law if faced with a similar factual context, in contrast to the HFEA 2008, the Law has been drafted to make explicit provision for the position of deceased prospective parents and the relevant child, in these factual situations. This has been done in the interests of legal certainty, and to reflect the latest case law developments in England as a comparative jurisdiction. Proposed Article 9I(9) provides that modifications to the conditions for the making of parental orders, set out in Article 9I(2), are to be applied if, after a surrogacy arrangement is made, one of the parties to the surrogacy agreement who, or is intended to be, an applicant for a parental order dies before the parental order is made. The modifications, set out in Article 9I(10), when applied by operation of Article 9I(9), would address specifically the conditions relating to the age of the applicants when the application for a parental order is made and the relationship status of the applicants when that application is made, and would apply a corrective modification generally across Article 9I to account for the situation identified in Article 9I(9).

iii) Position of female partner of a birth mother whose child is born pre-commencement

New Schedule A1, paragraph 9, to the Children Law read in conjunction with new Article 56C of the Marriage Law, would deal with the legal parent status of a female partner of a birth mother who has given birth prior to the commencement of the Law. In essence, the provisions would enable the re-registration of the birth of the child to enable the female partner to be registered as the parent of the child and for that person to be treated in law as the second parent of the child. The amendments to the Children Law and the Marriage Law would enable female partners of birth mothers, whether married, civil partnered, or in an enduring family relationship, to acquire legal parent status for a child born to their relationship, and to be recorded as the second parent of the child. Those Laws would provide for this, in general terms, by provisions that would automatically confer second parent status by virtue of the female partner being married or civil partnered to the birth mother, or, in the case of an unmarried or non-civil partnered couple, enable the acquisition of second parent status by means of agreed female parenthood conditions being confirmed through relevant fertility treatment.

There is currently, other than through adoption, no means by which a female partner of a birth mother can be recognised in law as the parent of the child born to that relationship. There are other means through the 2002 Law by which the female partner could exercise parental responsibility for the child (e.g. a residence order) but the exercise of parental responsibility does not equate to legal parent status as regards the child. The provisions in new Schedule A1, paragraph 9, to the Children Law and new Article 56C of the Marriage Law would operate to enable female partners to establish legal parent status for a child in this context.

The position taken in these cases in Jersey law differs from United Kingdom law. Amendments to United Kingdom legislation (i.e. the Births and Deaths Registration Act 1953 and the Children Act 1989) which were made to extend legal parent status and parental responsibility to same sex female couples made no provision, at their commencement, for the situation of same sex female couples to whose relationship a child had been born before the commencement of those United Kingdom provisions. The provisions noted above in the Children Law and the Marriage Law represent a distinct policy shift from the position in the United Kingdom, whereby a mechanism has been provided to enable female second parents in this pre-commencement category access to legal means to acquire legal parent status as would be available to same sex female parents to whom children are born post-commencement of the Law.

5. Please can you provide some details about the anticipated resource and funding implications of the draft Law, if it is adopted?

The answer to this question will be provided at a later date as previously notified.

(a) The Panel notes that the proposition's accompanying report references that counselling services should be offered to individuals who apply for disclosure of their birth records when they are subject to a parental order and that these are the duty of Minister for Health and Social Services. Please can you advise where this duty is established in the law?

6. Please can you provide details about the discussion and consultation undertaken with stakeholders during the policy development and law drafting process?

The mandate for the work emerged during the debate on P.77/2015 in the States Assembly, where the States Assembly noted that:

“in amending the law to allow for same-sex marriage, consideration should be given to matters relating to parental responsibility for:

- A female same-sex couple who are either married or in a civil partnership at the time at which one of them becomes pregnant or gives birth. Both the birth mother and the second parent should be allowed to be named in the Register of Births, therefore automatically conferring both mothers with parental responsibility.*
- A male same-sex couple who are either married or in a civil partnership at the time at which a child is conceived or born using sperm from one of them, should both be allowed to be registered as the child’s parents and therefore conferred with parental responsibility.”*

The following stakeholders/groups were consulted during the policy development and law drafting process:

- **The Bailiff** - provided with the draft Law and briefed by officers
- **The Deputy Bailiff** - provided with the draft Law and briefed by officers
- **Family Court Registrar** - provided with the draft Law and briefed by officers
- **Jersey’s Same-Sex Parental Responsibility Group** - provided with draft Law and briefed by officers on a number of occasions,
- **Liberate Jersey** - provided with the draft Law and briefed by officers on a number of occasions
- **Advocate Barbara Corbett (as a member of the Jersey Law Commission and Jersey Family Law expert)** - provided with the draft Law and briefed by officers
- **The senior leadership team of Children’s Services including all Heads of Service** - briefed by officers
- **The Fostering and Adoption Service** - briefed by officers
- **The Jersey Community Relations Trust** - provided with the draft Law for comment and questions answered
- **The Judicial Greffier** - provided with the draft Law and briefed by officers on a number of occasions
- **The Superintendent Registrar** - provided with the draft Law and briefed by officers on a number of occasions
- **The Clinician in charge of the Assisted Reproduction Unit** - provided with draft Law and briefed by officers on a number of occasions
- **The Greffier of the States of Guernsey** - briefed by officers

7. How will changes which result from the draft Law be communicated to Islanders?

(a) Will there be any targeted communications to advise of changes and, if so, where will these be directed?

If the draft primary Law is approved by the States Assembly, then work will begin to deliver the communications plan for the run up to the Law, Regulations and Orders coming into force. It is envisaged this will be led by the government services that this legislation affects, such as the: Office of the Superintendent Registrar, Judicial Greffe, Jersey Family Court Advisory Service, Assisted Reproduction Unit supported by the Government Communications Unit. It is also envisaged that Liberate Jersey, the Same Sex Parental Responsibility Group and Jersey Surrogacy Networks will publicise the effects of the Law to those who may be affected by these changes.

Parents who have sought a parental order from courts in England and Wales will also be targeted to make them aware that they may make an application to the court for a recognition order.

8. If the draft Law was approved by the States Assembly in 2024, what is your assessment of a realistic timeframe for it being brought into effect?

The answer to this question will be provided at a later date as previously notified.

(a) Please can you list the practical matters that would require action before the law is operational (for example, changes to forms / registers / information access, etc) and include details about estimated timescales where possible?

9. If adopted and subsequently brought into effect, how and when would the Government review the adequacy of the law?

Whilst it is unusual to provide for a statutory review timescale in Jersey Law, a watching brief will be kept on developments within this area of policy and legislation. One area, for example, where there are likely to be developments is in the introduction of pre-birth surrogacy agreements which is currently under consideration in a number of jurisdictions.

Children (Jersey) Law 2022 (Children Law)

10. The Panel understands that some local families have sought parental orders from England and Wales but these have no legal recognition in Jersey. If adopted, how will the draft Law (particularly Article 9N of the Children Law) impact those families?

The new Article 9N of the Children Law, as inserted by the draft Law, would make provision for the recognition in Jersey law of pre-existing parental orders made in England and Wales.

This provision would apply to parental orders obtained by Jersey applicants under section 54 (joint applicants) or 54A (sole applicants) of the HFEA 2008. Those sections provide for the issue of a parental order by the courts of England and Wales which, in the laws of that jurisdiction, have the effect of conferring legal parent status on the applicants for the order.

Article 9N would apply only to those parental orders issued prior to the commencement of the Law and which remain in force at that time. Article 9N would not apply to any parental order obtained under the HFEA 2008 following the commencement of the Law. This is because Article 9N is intended to make specific provision for the cases of individuals or couples who obtained a parental order in England and Wales before provision under Jersey law for parental orders had become available. From the commencement of the Law, the Children Law (as amended) would provide the means to Jersey applicants to apply to the Royal Court for a parental order (under new Article 9G, and related provision), and as such any parental orders newly obtained under the HFEA 2008 would not be recognised under Article 9N.

The Law would require those individuals or couples who have a pre-existing parental order under the HFEA 2008 (hereafter, an English parental order) to apply to the Royal Court for a recognition order.

A recognition order, issued by the Royal Court, would have the effect of recognising the English parental order, in Jersey law, as having the same effect as a parental order made under Article 9G of the Children Law, on the same day as the English parental order was made.

In other words, on the making of a recognition order, the individual or couple named in the English parental order would be recognised, in Jersey law, as being the legal parents of the child named in the order. This recognition in Jersey law would extend back to the date on which the English parental order was made, essentially spanning the entire existing life of the child.

The positive impacts of Article 9N for families in Jersey who hold a pre-existing English parental order are clear. There is legal uncertainty as to the effect in Jersey law of parental orders obtained under the HFEA 2008. As such, Article 9N provides the means for these families to obtain certainty in Jersey law as to their legal parent status, and will determine in law that the child is a child of that couple or individual and not the child of any other person (i.e. the surrogate parents). It also provides direct means to obtain this legal certainty, by way of application to the Jersey court. In the absence of provision to obtain a recognition order, Jersey families in these cases would face either continued uncertainty as to their legal parent status in Jersey law, and their rights as parents and the rights of their child, or would face the prospect of pursuing other means to confirm their legal status as parents, such as adoption, which can often be a drawn out and complicated process.

11. Please could you advise what safeguards would be in place around the acquisition of parental responsibility by a stepparent. For example, will the court have a procedure in place to check for coercion regarding the agreement of legal parent(s) and, if age appropriate, also ask the child's views?

The answer to this question will be provided at a later date as previously notified.

(a) Is there any ability for a stepparent to acquire parental responsibility for a child if one of the child's legal parents does not agree?

12. The Panel notes that there has been a deliberate distinction made between "fertility treatment services" and "relevant fertility treatment services" in the draft Law and understands that this is to draw the distinction between couples who have a legal union and those who do not. Therefore, those who are not married or in a civil partnership would require a clinician to formalise the agreed parenthood decisions. Please could you outline why this approach been taken for the draft Law?

Schedule 1 inserts a new Schedule A1 into the Children Law. This Schedule specifies who is to be treated as a parent of a child who is born as the result of fertility treatment or artificial insemination. It includes provision for determining legal parenthood in assisted reproduction circumstances in the case of –

- i) a child born to a man and a woman where they are married or in a civil partnership (Circumstance A, see Schedule 1 paragraph 2);
- ii) a child born to a man and a woman where they are not married or in a civil partnership (Circumstance B, see Schedule 1 paragraph 3);
- iii) a child born to a same sex female couple where those persons are married or in a civil partnership (Circumstance C, Schedule 1 paragraph 6); and
- iv) a child born to a same sex female couple where those persons are not married or in a civil partnership (Circumstance D, Schedule 1 paragraph 7).

The Law makes a distinction in the cases noted above as to the basis on which legal parent status is conferred by the Law. In Circumstance B and D cases, i.e. those cases in which the parties are not married or in a civil partnership, the Law requires that the child was conceived by way of 'relevant fertility treatment services' in order for legal parent status to be conferred on the birth partner by operation of the Children Law. 'Relevant fertility treatment' involves, essentially, treatment in a licensed clinic (see new definitions of 'relevant fertility treatment services' and 'relevant fertility treatment' that would be inserted by the Law to Article 1(1) of the Children Law). In Circumstance A and C cases, i.e. those in which the parties are married or in a civil partnership, there is no requirement for the child to be conceived through relevant fertility treatment services in order for legal parent status to be conferred on the birth partner by operation of Law. In these cases, the Law would operate to confer legal parent status on the birth partner on the basis that, and by virtue of, the couple being married or in a civil partnership.

This distinction in the conferral of legal parent status by operation of Law reflects the policy position that, in the case of a married or civil partnered couple, the fact of a legal relationship existing between the mother and the birth partner at the time of the conception of the child. The existence of a legal relationship, and the child born to a couple in a legal relationship, is regarded as confirmation of the intention of the parties to that relationship to conceive and raise the child together, and that the mother's spouse or civil partner should be the legal parent of the child.

Where the couple are not married or in a civil partnership, the law is unable to rely on the inherent certainty as to intention that is established by the existence of a legal relationship between the couple. As such, the Law, in Circumstance C and D, and by means of the agreed fatherhood conditions and the female parenthood conditions, as the case may be, establishes a process and several steps which enable the certainty of intention between the birth couple to be determined. This process is administered by and through a licensed clinic to ensure that the relevant checks, which are essential to establishing the intentions of the parties, are undertaken by professional clinicians in a regulated manner.

It can be noted that the HFEA 2008 contains provisions which make this distinction in requiring clinician services for the conferral of legal parent status in Circumstance B and D cases (see Part 2 of that Act). The explanatory note to the HFEA 2008 provides (at paragraph 172), in explaining the distinction, "*The new provisions [i.e. sections 36 and 37 of the HFEA 2008, ie the HFEA equivalent of the Law's Circumstance B case] require the couple to be treated in a United Kingdom licensed clinic, as before, to ensure there is clear evidence of the parents' intentions about fatherhood.*" The explanatory note explains (at paragraph 180) that the policy intent for sections 43 and 44 of the HFEA 2008 (ie the HFEA equivalent of the Law's Circumstance D case) is similar to that stated for sections 36 and 37, ie the need for clear evidence as to the parents' intentions about female parenthood.

(a) Please could you provide some details about how a clinician will record and formalise the decision?

Forms will be drafted to record these decisions; they will be based on simplified versions of forms required and used by clinics licensed by the Human Fertilisation and Embryology Authority in the United Kingdom.

(b) How will the Government, or relevant services, make the distinction of "relevant fertility treatment" clear to prospective parents, or Islanders who might be impacted by this distinction?

This activity will form part of the information provided to prospective parents by legal professionals and the Assisted Reproduction Unit, it will also form part of the dialogue the clinician will have with any prospective parents as part of any treatment. This is the same as the approach that clinics licenced by the Human Fertilisation and Embryology Authority undertake.

13. In November 2023 the United Kingdom’s Human Fertilisation and Embryology Authority (HFEA) made [recommendations](#) for changes to the Human Fertilisation and Embryology Act 1990 (as amended) (the ‘UK Act’). One of these areas was noted to be “*an overhaul of the consent regime in the Act*”. The Panel notes that there are sections of the draft Law relating to consent, for example the agreed parenthood conditions in schedule 1A of the Children Law, which have been drafted based on the current UK Act.

(a) What are the similarities of the draft Law’s consent regime to that which is outlined in the UK Act?

The consent regime outlined in the UK Act is quite different to the consent regime in the draft Law insofar as it has to also deal with consent to storage and consent for research. Storage does not take place in Jersey as there are no facilities for long term storage. Research also does not take place in Jersey. Therefore, if a person living in Jersey wishes to store their sperm or eggs, they must do so at a clinic in the United Kingdom that is regulated by the Human Fertilisation and Embryology Authority. Bearing this in mind, the consent regime in the draft Law is immediately simplified. Furthermore, the report only makes proposals that the consent regime should be overhauled, there are no recommendations as to *how* the consent regime should be amended.

The policy for the draft Law has been settled for over a year to allow law drafting to take place. Therefore, whilst the recommendations are noted they are a long way from being implemented via legislation amendment, to begin to revisit how the draft Law stands up its consent regime now would delay this project significantly.

(b) Once adopted, would you consider making further updates to the draft Law if there are changes subsequently made to the UK Act around consent and agreed parenthood conditions?

Yes, a number of conversations have taken place regarding proposed changes in practice in different jurisdictions such as pre-birth parental orders etc. A watching brief will be kept on developments in these areas.

14. The Panel has noted that, under the draft Law there are different routes to acquiring parental responsibility. Please could you provide a summary of the different routes.

i) Acquisition by birth registration

Article 3 of the Children (Jersey) Law 2002 currently provides that:

“Where a child’s father and mother were married to each other at the time of the child’s birth they shall each have parental responsibility for that child”. Or “Where a child’s father and mother were not married to each other at the time of the child’s birth –

a. The mother shall have parental responsibility for the child; and

b. The father shall not have parental responsibility for the child unless he acquires it in accordance with the provisions of this law.”

Article 5 of the Children (Jersey) Law 2002 goes on to state that :

“Where a child’s father and mother were not married to each other at the time of the child’s birth then the father shall only 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”

As such the Children (Jersey) Law 2002 provides that the legal parents shall acquire parental responsibility by being the registered mother and father of the child under the provisions of the Marriage and Civil Status (Jersey) Law 2001. A child’s legal parents will always have parental responsibility for their child except in very limited circumstances.

Article 8 of the draft Law will insert Article 9A into the Children (Jersey) Law 2002 that replaces the existing Article 3 of the Law, so that the Article would also apply to second parents. The draft Law would also insert a new Article 9D to enable a second parent who is not married to, nor a civil partner of the birth mother to acquire parental responsibility if they are registered as the child’s second parent in accordance with the provisions of Part 5 of the Marriage and Civil Status (Jersey) Law 2001 as amended by the draft Law.

ii) Acquisition by recognition order

A recognition order will, if the draft Law is approved, recognise the effects of a parental order granted in England or Wales, in Jersey. If granted, the court will order the sealing of the original birth record and entering of the particulars of the parental order in the Parental Order Register (also provided for by the draft Law). The granting of a recognition order by the court will reallocate legal parent status and parental responsibility in Jersey Law to those parties named in the original parental order.

iii) Acquisition by parental order

The granting of a parental order by the Royal Court for a Jersey born child will reallocate legal parent status and parental responsibility in Jersey Law to those parties named in the parental order in the same way as an adoption order made under the Adoption (Jersey) Law 1961.

iv) Acquisition by agreement (step-parents)

Where all persons with parental responsibility for a child agree, a step-parent (who is married to, or in a civil partnership with a child’s parent) may acquire parental responsibility for a child. This is provided a parental responsibility agreement is made in accordance with the Law.

The court may also order that the step-parent is to have parental responsibility for a child if an application is made. This is similar to the court granting a residence order for a child (see below).

v) *Acquisition by court order (existing provisions)*

Article 10 of the Children (Jersey) Law 2002 provides the court with the power to make certain orders with respect to children. If the court grants a residence order in favour of the applicant, then that person shall have parental responsibility for the child whilst the residence order remains in force.

15. The report accompanying the proposition details that legal parenthood governs aspects such as inheritance, financial provision for the child, and citizenship. Please can you clarify how the draft Law may change each of these aspects for a child?

The Law would not change any aspects of inheritance law, financial provision for a child or citizenship. The effect of the Law is to merely establish a wider range of family units in which individuals can be recognised in law as being legal parents, and children can be established in law as the child of these individuals. Children who are deemed to be the child in law of these persons will be treated the same way in law as a child born naturally to a male and female couple, or to any other family unit currently provided for in Jersey law. As such, in general terms, where Jersey law refers to a *child* or a *parent* the amendments made by the Law will require those terms to be interpreted as including reference to children and individuals who, by the Children Law and the Marriage Law, would now be recognised in law as legal parents, and established as children of these individuals. In the areas highlighted, therefore –

i) *Inheritance*

In general terms, the devolution of property in an intestate succession and, in certain cases, in a testate succession is dependent on the existence of a legal or biological relationship between the parties concerned. In the case of devolution of property from a parent to a child in an intestate succession, the child must be the legal child of the parent in order to participate in a succession. In the case of devolution of property in a testate succession, a testator can make any legal provision for the devolution as that person's wishes in their will. Where a devolution is provided for in a will to that person's child or issue, it will be understood (unless the contrary intention is clear) to include any legal or biological child of that person. Therefore, in these cases, in an intestate or testate succession, children who are, for example, born through assisted reproduction, through surrogacy arrangements and parental orders, or to same sex couples, are treated as *children* for the purposes of succession in the same way as children born 'naturally' to their parents.

It can be noted that new Article 9M to the Children Law makes certain clarificatory provision in the context of intestacy and the position of a child who is the subject of a parental order. In sum, the effect of these provisions is to ensure that a child who is the subject of a parental order is treated in law as if they were a natural child of the persons named in the parental order. As such, there is no distinction in their rights to participate in an intestate succession on account of their being the subject of a parental order, and they will participate and rank in a succession just as if they were the 'natural' child of the persons named in the parental order. The counter position is true also: a child named in a parental order is treated, under Article 9G and 9M as not being the child of any other person except the persons named in a parental order. As such, the child is unable to participate in the succession of the surrogate parents, i.e. the child's 'natural' parents.

These provisions are similar in effect to those which exist in Jersey law currently in the case of adoption (see Article 23).

ii) Financial provision for a child

The Children Law (Article 15) provides that the Court may make orders for financial relief with respect to any child in accordance with Schedule 1 to the Children Law. 'Child' in the Children Law is defined as, in general terms, any person who has not yet attained the age of majority, and is applied in practice to mean a child who is recognised as the legal or biological child of a person. The Law would have no substantial effect on these provisions, other than the minor amendments set out in Article 17 of the Law which include provision that financial orders may be made against the child's second parent, just as they could be made against the child's father or mother. As explained further above, a child who is born to individuals through, for example, assisted reproduction or surrogacy is treated in law as the child of the couple who entered into that treatment or arrangement, and those individuals are treated in law as the parents of the child. As such, the references in the Children Law to father or second parent will include individuals who are treated in law, by the amendments made in the Law, as the parents of children in respect of whom the Court makes an order for financial provision.

iii) Citizenship

In general terms, the rules governing eligibility for British citizenship apply equally to Jersey as they do to the United Kingdom and are the responsibility of the United Kingdom Government. This means that with a few exceptions people who were born in Jersey or whose parents were born in Jersey or the United Kingdom are automatically British citizens. A child who is treated in law as the child of an individual or couple will, in most cases, acquire their citizenship by dint of the citizenship of those persons as the child's parent or parents. The Law would not impact on these rules, only permitting a greater range of legal parent/child relationships to be established in law and, as such, all benefits stemming from these relationships to be determined, including nationality or citizenship.

16. The draft Law will provide for surrogacy arrangements but does not allow for any nonexpense payments to the surrogate mother. How would this aspect be monitored by the court?

The answer to this question will be provided at a later date as previously notified.

17. Please could you outline how the declarations of the father / second parent (per articles 55, 55A, 55B and 55C) will work in practice?

These Articles are based on current legislation and practice, except that they are expanded so that, if the draft Law is approved, the Marriage and Civil Status (Jersey) Law 2001 would provide for the registration of:

- married fathers;
- same-sex female couples who are not married or in a civil partnership; and
- same-sex female couples who are married or in a civil partnership.

In all of these Articles the birth mother is automatically deemed to be the mother of the child and, as her particulars must be entered in the birth register. Therefore, the birth mother will always acquire legal parent status and parental responsibility.

Articles 55, 55A, 55B & 55C all deal with providing for another person's name to be entered into the Register of Births in addition to those of the birth mother. Making a false declaration for any statutory declaration under the Marriage and Civil Status (Jersey) Law 2001 is an offence under Article 76(1).

Someone who makes a declaration that they are the father of a child, or a second parent of a child, when they are not, would be committing an offence under the Law.

Article 55, as inserted by the draft Law, deals with the registration of a father if the mother and the father of the child were neither married to, nor civil partners of each other at the time of the child's birth. It is a restatement of the current provision with some slight amendments to accord with the new Articles in terms of drafting and style.

Article 55 requires that the relevant registrar must not enter the name of the father in the register except:

“(a) at the joint request of the mother and the person stating himself to be the child's father (“F”);

(b) at the request of the mother, on production of –

- (i) a declaration by the mother that that person is the child's father, and*
- (ii) a declaration by that person that he is the child's father;*

(c) at the request of F on production of –

- (i) a declaration by him that he is the child's father, and*
- (ii) a declaration by the mother that he is the child's father;*

(d) at the request of the mother or F on production of –

- (i) a copy of a parental responsibility agreement made between them in relation to the child, and*
- (ii) a declaration by the person making the request that the agreement was made in compliance with Article 9F of the Children Law and has not ceased to have effect by an order of the Royal Court;*

(e) at the request of the mother or F on production of –

- (i) a certified copy of an order under Article 9C of the Children Law giving F parental responsibility for the child, and*
- (ii) a declaration by the person making the request that the order has not ceased to have effect by an order of the Royal Court; or*

(f) at the request of the mother or F on production of –

- (i) a certified copy of an order under paragraph 1 of Schedule 1 to the Children Law (and which is not an order under Draft Children and Civil Status (Amendments) (Jersey) Law 202- Article 26 paragraph 4(3) of that Schedule) requiring F to make financial provision for the child, and*
- (ii) a declaration by the person making the request that the order has not been discharged.”*

Article 55A, as inserted by the draft Law, deals with the registration of a father if the parents of the child are married or civil partners of each other.

The Article requires that the relevant registrar must not enter the name of a person in the register of births as the child's father except:

“(a) at the joint request of the mother and her husband or civil partner;

(b) at the request of the mother, on production of –

- (i) a declaration by her that her husband or civil partner is the child's father, and*
- (ii) a declaration by that person that he is the child's father;*

(c) at the request of the mother's husband or civil partner on production of –

- (i) a declaration by him that he is the child's father, and*
- (ii) a declaration by the mother that that person is the child's father; or*

(d) at the request of a person on production of a declaration by him that he is –

- (i) the child's father, and*
- (ii) married to, or the civil partner of, the child's mother.”*

Article 55B as inserted by the draft Law, deals with the registration of a second parent where the parents of that child are neither married nor civil partners of each other. A woman would acquire the status of second parent by operation of paragraph 7(2) of Schedule A1 that is inserted into the Children (Jersey) Law 2002 by the draft Law. A woman who satisfies the conditions set out in Circumstance D of Schedule A1 acquires the status of second parent by the operation of that Schedule. She is then able to make the required declaration to the relevant registrar as per Article 55B which the draft Law will insert into the Marriage and Civil Status (Jersey) Law 2001.

Article 55B requires that the relevant registrar must not enter the name of a person in the register of births as the child's father except:

“(a) at the joint request of the mother and the woman stating herself to be the second parent of the child (“W”);

(b) at the request of the mother, on production of –

- (i) a declaration by the mother that that woman is the second parent of the child, and*
- (ii) a declaration by that woman that she is the second parent of the child;*

(c) at the request of W on production of –

- (i) a declaration by W that she is the second parent of the child, and*
- (ii) a declaration by the mother that W is the second parent of the child;*

(d) at the request of the mother or W on production of –

- (i) a copy of a parental responsibility agreement between them in relation to the child, and*
- (ii) a declaration by the person making the request that the agreement was made in compliance with Article 9F of the Children Law and has not ceased to have effect by an order of the Royal Court;*

(e) at the request of the mother or W on production of –

(i) a certified copy of an order under Article 9D of the Children Law giving W parental responsibility for the child, and
(ii) a declaration, by the person making the request, that the order has not ceased to Have effect by order of the Royal Court; or

(f) at the request of the mother or W on production of –

(i) a certified copy of an order under paragraph 1 of Schedule 1 to the Children Law (and which is not an order under paragraph 4(3) of that Schedule) requiring W to make financial provision for the child, and
(ii) a declaration, by the person making the request, that the order has not been discharged by an order of the Royal Court.”

To make a declaration that is false, for example if a woman declared she is the second parent of a child, when she is in fact is not, would constitute an offence under Article 76(1) of the current Marriage and Civil Status (Jersey) Law 2001.

Article 55C as inserted by the draft Law, deals with the registration of a second parent where the parents of that child are married to or civil partners with each other. It operates in the same way as Article 55A that provides for the registration of a father who is married to or in a civil partnership with the mother.

18. Please could you outline how the draft Law impacts a Child’s right to know their biological parents, or doners?

The draft Law, if approved, would further the implementation of a child’s right to know their biological parents. It facilitates the acquisition of legal parent status and parental responsibility for a whole class of biological parents who have not been able to access this status before. Previously, a biological parent, such as a female who has donated an egg to be carried by her partner, would not be able to acquire legal parent status unless they adopted the child, or sought an Article 10 order through the court. Both often require significant expense and legal advice.

In respect of donors, where a child is conceived using sperm from an anonymous donor, that child cannot know who their biological father is. It is currently the case that Jersey Law does not prohibit the use of sperm from anonymous donors, unlike United Kingdom Law. There are a number of methods where sperm can be used to bring about a pregnancy:

- Home insemination: Jersey residents may directly import anonymous donor sperm from a sperm bank located in another jurisdiction for the purposes of home insemination. Whilst it is not known how many Jersey residents directly import anonymous donor sperm for the purposes of home insemination, it is anticipated that it would be a small number due to the costs of imported sperm and failure rates associated with home insemination.
- Intrauterine insemination (IUI): IUI is provided in Department for Health and Community Services’ Assisted Reproduction Unit. As a matter of practice, the Assisted Reproduction Unit will not use anonymous sperm, although it is not prohibited from doing so in law.
- In vitro fertilisation (IVF): IVF is not currently available in Jersey, so the sperm used by Jersey residents will be subject to the legislation of the jurisdiction in which they are having IVF (if this is in the United Kingdom then the Human Fertilisation and Embryology Act 1990 prohibits the use of anonymous sperm.

In the event that the States Assembly determines that IVF and/or IUI should be provided to more residents at subsidised cost, the States Assembly will also be asked to consider restrictions on the use of anonymous donor sperm in Jersey.

19. Whilst the definition of “parent” under the draft Law is widened, there appear to be differences in the choice of language used to describe parents based on gender, for example:

- (i) “fatherhood conditions” (as per proposed Schedule A1 of the Children Law);**
- (ii) “female parenthood conditions” (as per proposed Schedule A1 of the Children Law);**
- (iii) “biological father” (per Article 3, paragraph (2) (c) of the draft Law);**
- (iv) “mother” (per Article 3, paragraph (2) (g) of the draft Law).**

Please could you advise why these are considered to be the most appropriate classifications?

The choice of language in the provisions highlighted by the Panel was not based on gender, rather it was based on a reflection of the legal status to which the terminology relates, or in order to ensure functionality of the legislation.

i) Agreed fatherhood conditions

These are the conditions on which a man, in a Circumstance B case under Schedule A1 to the Children Law, is determined to be the legal parent of a child. Where, among other things, the agreed fatherhood conditions are satisfied, the Children Law would operate to treat the man in law as the child’s father (see Schedule A1, paragraph 3(2)). The man, on acquiring this legal status, is recognised as the ‘father’, hence the conditions are referred to as the ‘fatherhood’ conditions. There is no difficulty in referring to a man in this situation as the ‘father’ of the child, as it does not conflict with recognition of, and reference to, the birth parent as the ‘mother’ of the child. Note also that the HFEA 2008, which informed the development of the policy for the Law, contains similar provisions to Schedule A1 which refer to ‘agreed fatherhood conditions’.

ii) Agreed Female parenthood conditions

These are the conditions on which a woman, in a Circumstance D case under Schedule A1 to the Children Law, is determined to be the legal parent of a child. Where, among other things, the agreed female parenthood conditions are satisfied, the Children Law would operate to treat the woman in law as the child’s second parent (see Schedule A1, paragraph 7(2)). The woman, on acquiring this legal status, is recognised as the child’s second parent, hence the conditions are referred to as the ‘parenthood’ conditions. A child is capable, in law, of having one mother, but may have two parents. A woman who is partnered with the birth mother cannot be regarded as the ‘mother’ of the child in strict terms. As such there would be an inherent difficulty in the Law recognising these women, in legal terms, as the child’s ‘mother’. The Law uses, therefore, the concept of ‘second parent’ to describe these women who have legal parent status, hence the use of ‘parenthood’ conditions in their case.

Note also that the HFEA 2008, which informed the development of the policy for the Law, contains similar provisions to Schedule A1 which refer to ‘agreed female parenthood conditions’.

iii) *Biological father*

The Children Law, as amended, would not define the term 'biological father' as it should be given its ordinary meaning, i.e. the man who genetically fathers the child. The Children Law, as amended, would recognise in Jersey law the legal status of men who genetically father a child, for example through intercourse, and those who do not, for example those who are treated in law as the father of a child (e.g. a Circumstance A or C man under Schedule A1).

As such, it is important that the Law distinguishes between these concepts of a biological father and a man who is otherwise treated in law as the father of a child so that legal parent status can be properly ascribed in the many situations in which legal parenthood would be recognised in Jersey law.

It can be noted too that the distinction between the biological father of a child and the man who is recognised in law as being the father of the child is relevant in cases in which the biological father would seek to establish parental responsibility for a child who is recognised in law as being the child of another man. The Legitimacy Law (Article 2(2)) provides that the fact that a child is born or conceived during the subsistence of a lawful marriage raises a presumption that the husband is the father of the child. New Article 9C(3) of the Children Law, which would re-enact current Article 5(2) of the Children Law, would apply in cases in which a child is treated in law as legitimate and would permit the court to order that a man is to have parental responsibility if he makes an application stating that he is the child's biological father, and the court is satisfied that the man is the child's biological father. It is necessary for the Children Law to refer to both a *father* and a *biological father* in order to ensure the functionality of these provisions.

iv) *Mother*

As stated above, a child is recognised in law as having one mother, ie the birth mother. A child cannot have two mothers, though may be legally recognised as having two parents. In the case of a same sex female parenthood situation, the female partner of the mother is referred to as the 'second parent', this is similar to provisions in New Zealand that refer to 'other parent'.

Marriage and Civil Status (Jersey) Law 2001 ('Civil Status Law')

20. The legal concept of 'legitimate' and 'illegitimate' would be retained in new articles proposed for the Civil Status Law, for example, we understand that only the child of a married couple where there is a father can be legally registered or re-registered as 'legitimate', therefore providing inconsistency with children of same sex married couples. Why is the law drafted in this way?

(a) Is this compatible with Children's Rights?

(b) Will any of the proposed consequential amendments to the Legitimacy law address the definitions of 'legitimate' and 'illegitimate'?

Legitimacy and illegitimacy are a feature of Jersey law. The question of legitimacy is governed, in the main, by the Legitimacy (Jersey) Law 1973 which provides, among other things, that a child who is legitimate by birth is a child born or conceived during the subsistence of a lawful marriage of whom the father is the husband of the mother (Article 2(1)). The Legitimacy (Jersey) Law 1973 also provides for the legitimation of a child *per subsequens matrimonium* on the marriage of his or her mother and father (Article 4(1)).

As reflected by the Legitimacy (Jersey) Law 1973, the concept of legitimacy does not extend to children who are born to a relationship that is not an opposite sex marriage. In other words, the concept of legitimacy in Jersey law does not recognise civil partnership or same sex relationships. A child born to any of these relationships, just as a child born to an unmarried opposite sex couple, is treated in Jersey law as illegitimate by birth (see Article 3 of the Legitimacy (Jersey) Law 1973).

a) Is this compatible with Children’s Rights?

The question has been understood to mean is this compatible with the rights of the child under the United Nations Convention on the Rights of the Child (UNCRC). Advice as to the compatibility of these matters with the European Convention on Human Rights is provided in the human rights notes appended to the report to the proposition (see page 46-47).

Article 2 of the UNCRC provides for the right of non-discrimination. In sum, Article 2(1) requires that States Parties shall respect and ensure the rights set forth in the UNCRC to each child with discrimination of any kind, irrespective of, among other things, the child’s or his or her parent’s birth or other status. Article 2(2) requires State Parties to take all appropriate measures to ensure that the child is protected against all forms of discrimination. The bar on discrimination of any kind does not outlaw legitimate differentiation between children in the implementation of UNCRC rights – for example to respect the “evolving capacities” of children and to give priority, “special considerations” or affirmative action to children living in exceptionally difficult conditions.

Legitimacy in Jersey law is, in real terms, of limited relevance today. A classification of illegitimacy presents no bar to the registration of the birth of a child, does not prevent the establishment of legal relations between the child and the child’s parents, and does not prevent that child or the child’s family accessing benefits or services. Importantly, the distinction between legitimate and illegitimate children in matters of succession was removed in Jersey law in 2010 by an amendment to the Wills and Successions (Jersey) Law 1993 (see Part 3A of that Law). As such, in inheritance matters, Jersey law provides that an illegitimate child has the same rights of succession as if he or she were the legitimate issue of his or her parents (see Article 8C(1) of the Wills and Successions Law).

Nevertheless, as evidenced by the general comments of the UN Committee on the Rights of the Child (the treaty body responsible for the UNCRC) the right to non-discrimination under Article 2 of the UNCRC is to be given a broad interpretation. While Article 2(1) concerns discrimination only in relation to the enjoyment of rights in the UNCRC, Article 2(2) requires action against “all forms of discrimination”, and is not confined to the issues raised by the UNCRC. As such, though an illegitimate child in Jersey may not experience discrimination in the enjoyment of his or her rights under the UNCRC, for example birth registration, nationality and the right to know and be cared for by parents (Article 7), the UNCRC requires Jersey to protect its children against *all forms* of unjustifiable discrimination.

As mentioned at the outset, the concept of legitimacy is a feature of Jersey law and, as such, those amendments to the Marriage and Civil Status (Jersey) Law 2001 which include provisions referring to the legitimacy status of children are necessary in order for the Marriage and Civil Status (Jersey) Law 2001 to accord with the Jersey law on legitimacy. It was not within the policy scope of the Law to address the concept of legitimacy in Jersey law at its root. As such, the Law, in of itself, is not incompatible in principle in this respect with the rights of the child.

It is accepted, however, that steps should be taken to review the wider Jersey law position on legitimacy to consider, among other things, how the Jersey law in relation to legitimacy is compatible with the UNCRC and the position of children in modern society. As and when policy work toward consideration of the concept of legitimacy in Jersey law gets underway, I will work with other ministers and officers to this end.

21. Changes to the Civil Status Law will see the abolition of wife's domicile of dependence (per Article 75A). Please could you summarise the reason for this course of action and the impact that it may have?

A wife's domicile of dependence was abolished by the insertion of Article 77A into the Marriage and Civil Status (Jersey) Law 2001 by the Marriage and Civil Status (Amendment No.5) (Jersey) Law 2023. The draft Law merely adjusts the numbering of the provision, but its effect remains unaltered.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Richard Vibert', written over a horizontal line.

Connétable Richard Vibert
Minister for Children and Education