STATES OF JERSEY

DRAFT SOCIAL SECURITY HYPOTHECS (JERSEY) LAW 201-

Lodged au Greffe on 29th October 2013
by the Minister for Social Security

STATES GREFFE

Jersey

DRAFT SOCIAL SECURITY HYPOTHECS (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 Social Security has made the following statement –

In the view of the Minister for Social Security the provisions of the Draft Social Security (Hypothecs) (Jersey) Law 201- are compatible with the Convention Rights.

Signed: **Senator F. du H. Le Gresley**

Minister for Social Security

Dated: 28th October 2013

REPORT

The Island faces a substantial increase in both the number and proportion of older residents over the next 30 years, with care costs predicted to more than double by 2044. In response to this issue, in July 2011 the States approved the Long-Term Care (Jersey) Law 2012. Details of the operation of the proposed scheme have now been set out in Proposition P.99/2013, which will be debated before this new Law is considered.

The introduction of a long-term care (LTC) scheme is designed to share long-term care costs more fairly across the community, and the scheme will establish a clear and simple process to help individuals and their families understand the choices available and plan for the cost of long-term care. The proposed new scheme will provide financial support to Jersey residents who have significant long-term care needs and who are being cared for either in their own home or in a care home.

As set out in section 15 of the report accompanying P.99/2013, an important aspect of the new LTC scheme is to acknowledge the difficult position of many elderly homeowners facing substantial care bills. The LTC scheme includes a generous disregard in respect of property and non-property assets. An individual or couple who have total assets below the asset disregard level of £419,000[1] will not need to use up their assets and will be able to apply for means-tested assistance with their care costs under the new scheme.

For those who have property assets above this level, a new form of legal hypothec is being proposed. This will enable a loan to build up and be secured against the value of the family home (minus the value of the disregard). Repayment of the loan will generally be sought when the property next changes hands (although it should be noted that repayment may be required sooner if, for example, the Department became aware that the debtor had come into a significant sum of money). Repayment resulting in a sale of property would not be sought in any circumstances where to do so would be inconsistent with a person's rights under the European Convention on Human Rights.

This type of hypothec does not currently exist under Jersey legislation and a new Law, the Social Security Hypothecs (Jersey) Law 201-, has been drafted as part of the development of the long-term care scheme.

Background

Under the new Long-Term Care (Jersey) Law 2012, it is intended that where a household is 'cash-poor' but 'property-rich', the Social Security Department may make long-term care payments on a person's behalf for the time being, but with such payments to be treated as a loan. This has the effect that those who are 'cash-poor' but 'property-rich' do not have to sell their family home to meet their care costs. The Draft Social Security Hypothecs (Jersey) Law 201- will allow the Department to take adequate security in these circumstances with repayment of such sums generally being sought by the Department when the property next changes hands. An asset disregard of £419,000 will provide a separate protection to the owners of smaller properties, and these homeowners will be able to apply directly for means-tested assistance from the long-term care fund.

[1]The figures quoted in P.99/2013 are based on 2013 prices, and these will be adjusted as necessary in advance of the proposed 2014 start date.

The Income Support (Jersey) Law 2007 (“the Income Support Law”) also provides for certain circumstances in which debts due by a claimant may be secured by a charge being taken against the claimant’s property and, again, the Draft Social Security Hypothecs (Jersey) Law 201- will allow the Department to take adequate security in these circumstances with repayment of such sums generally being sought by the Department when the property next changes hands.

Security against Jersey property

Under current Jersey property law, a debt can be secured against property using a hypothec. Three types of hypothec – judicial, contractual and legal – are described under the Loi (1880) sur la propriété foncière (“the 1880 Law”). However, none of these could easily be used in respect of loans under the Long-Term Care Law, where the value of the debt builds up over time. In particular –

<u>Judicial hypothec:</u> Article 13 of the 1880 Law requires that, in order to take a judicial hypothec, a sum of money must be recognised as being due pursuant to a judgment of the Court, whether contingently or otherwise (“le montant …” “en cas d’une … obligation contingente, … une ou plusieurs sommes”). In relation to benefit, there is an uncertain sum of money which will fall due on a future date and this makes for difficulties in providing for a judicial hypothec to be taken.

<u>Contractual hypothec:</u> The creation, and passing before Court, of a contractual hypothec (hypothèque conventionelle) on each and every occasion where monies are due to the Department would be unwieldy and would depend upon the consent of the recipient.

<u>Legal hypothec:</u> The only provision in the 1880 Law for an automatic (i.e. legal) hypothec is –

- in Article 7 for a widow or surviving civil partner upon the death of the husband or other civil partner; and
- in Article 11 for unsecured creditors on the death of the debtor,

neither of which is relevant to the Minister for Social Security.

Social Security Hypothecs (Jersey) Law 201-

Rather than make changes to the 1880 Law, a new Law has been drafted to deal specifically with security in respect of loans provided under the Long-Term Care scheme (and debts under the Income Support Law). The proposed Social Security Hypothecs (Jersey) Law 201- creates a new type of legal hypothec. This has several advantages –

- The registration process is very simple. The claimant will provide details of their property ownership to the Social Security Department and will confirm that they wish to claim LTC benefit on the basis of a loan against the value of their property (minus the value of the disregard). Debts may also have accrued or may arise in due course pursuant to the Income Support Law.
- The Department will check the details and submit them to the Judicial Greffe. The hypothec will be registered in the Public Registry, and the claimant will receive a written notification from the Department that this has been completed.
- A fee of £80 will be levied on the registration.
- Once the hypothec has been registered, the value of the outstanding debt can increase as the claimant continues to receive long-term care or payments which are due to be repaid under the Income Support Law.

- The Department will not generally require the loan/debt to be repaid until the property next changes hands. In particular, if an individual is in care, and their partner remains living in the property, the loan will not be due for repayment until the partner moves out of the property or the property is sold.
- When the loan/debt is repaid, the Department will notify the Judicial Greffier who will cancel the hypothec.

The hypothec will take the date of its being registered in the Public Registry and rank in priority to other hypothecs from that date. The amount secured by the hypothec at the time of a dégrèvement (or désastre) would be the amount of the accrued indebtedness at the time of such bankruptcy proceedings.

The hypothec covers property that is owned individually or jointly by a claimant and their partner. In unusual circumstances, this could include a property owned jointly with a third party. In the event of a désastre or dégrèvement in this situation, the property would be deemed to be owned in common and only the property of the claimant or their partner would be subject to the proceedings. There is no question of the hypothec operating to deprive a third party of their assets.

The one difference from the existing legal hypothecs (under Articles 7 and 11 of the 1880 Law) is that this new form of legal hypothec will be registered in the Public Registry and notice of such registration given to the debtor. This is necessary so that, for example, anyone looking to purchase the property would be able to discover that such security was in place on the property.

Financial and manpower implications

The development costs of the LTC scheme are being met through existing departmental budgets. The ongoing costs of the scheme will be met directly from the LTC Fund.

It is estimated that an additional 9.5 FTE will be required to administer the new LTC scheme.

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. <u>They are not, and should not be taken as, legal advice.</u>

Human Rights Note on the Social Security Hypothecs (Jersey) Law 201-

These Notes have been prepared in respect of the draft Social Security Hypothecs (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.

Articles 2 and 3 of the draft Law, engages Article 1 of the First Protocol of the ECHR (“A1P1”) which guarantees the right to property.

A1P1 provides –

> “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

Immoveable property is a ‘possession’ for the purposes of A1P1 and Articles 2 and 3 of the draft Law, by creating a hypothec over such property, provide for the control of use of, and, were the hypothec to be enforced, potentially the deprivation of, such a possession. This is an interference with property which, in order to be permissible, must – (i) serve a legitimate objective in the public or general interest; (ii) be proportionate to realising that objective; and (iii) comply with the principle of legal certainty.

The objective behind the measure can be identified as ensuring that people who have sufficient assets as to be required by Social Security to make certain payments are not required to sell their family homes in order to be able do so. This can be said to be a legitimate objective in the public interest and, indeed, is consistent with the objective of respect for private and family life (Article 8 of the ECHR). Given the importance of this objective, the fact that people have entered and will enter into such arrangements with Social Security, on the understanding that security may be taken over their property and the fact that any security granted over the property prior to the Law coming into force or the hypothec being registered will rank in priority to the security created by the Law, the interference with the A1P1 right can be regarded as proportionate to meeting this legitimate objective. It should also be noted that, in enforcing his rights under the draft Law, the Minister will be required to act in such a way as to ensure compliance with the rights of individuals under the ECHR. Finally, the scope of the interference provided for in Articles 2 and 3, as amended by the draft Law, constitutes a clear and precise legislative statement, with no obvious room for ambiguity. Accordingly, the interference instigated by Articles 2 and 3 to which the draft Law contributes is ‘in accordance with the law’. Therefore Articles 2 and 3 of the draft Law – (i) serve a legitimate objective in the public or general interest; (ii) are proportionate; and (iii) comply with the principle of legal certainty.

Explanatory Note

This Law would create a new form of legal hypothec for the purpose of securing debts arising under the Long-Term Care (Jersey) Law 2012 ("2012 Law") and the Income Support (Jersey) Law 2007 ("2007 Law").

Debts may arise under the 2012 Law by reason of a loan made to an individual under Article 4(1) of that Law in order to enable the individual to meet all or part of the payments that an individual is required to make towards the costs of long-term care. (This is referred to in the draft Law as a "long-term care loan".)

Debts may arise under the 2007 Law by reason of any of the following –

(a) special payments to an individual (such as for goods and services or clinical costs) that take the form of a loan;

(b) awards to an individual under the 2007 Law which have been wrongly made and which the Minister is seeking to recover; or

(c) amounts of capital or income that have been disregarded by an officer exercising his or her discretion under the 2007 Law in calculating a household's income, that is, a household where one or more adults are eligible for income support.

Such debts under the 2007 Law are referred to in the draft Law as an "income support debt".

Article 1 is an interpretation provision. In particular, it defines a "debtor" as a person who is liable to pay one or more amounts as accrue from time to time by reason of an income support debt or a long-term care loan. It also defines a "partner" to mean the debtor's spouse or civil partner or any individual living in a similar relationship with the debtor (whether or not of different sexes).

The reference to a debtor's partner is consistent with Article 3 of the 2012 Law under which the means (including assets) of a debtor's partner may be taken into account in determining the amount of any payment that an individual must make towards the cost of long-term care services. In the case of an income support debt, under Article 14 of the 2007 Law, the debt can be secured by a hypothec on all immovable property owned by a claimant for income support or a member of the claimant's household. Persons who are married, civil partners or who are living in similar relationships, are treated as being members of the same household under the Income Support (General Provisions) (Jersey) Order 2008. Article 1 also defines a "third party" to mean someone who is not a debtor or a partner.

Article 2 creates a legal hypothec on all the immovable property of a debtor and the debtor's partner if, following an application by the Minister, the hypothec is registered in the Public Registry. Such a hypothec is referred to in the draft Law as a "social security hypothec". A social security hypothec can be registered at any time and ranks in priority to other hypothecs from the date that it is registered. Provision is also made so that where property is owned jointly (whether or not with a third party) and a court order of dégrèvement is made, the property is taken to have been converted into ownership in common in equal shares from the date of the order.

Article 3 provides that the amount secured by a social security hypothec is the amount that accrues from time to time that a debtor is liable to pay pursuant to a long-term care loan or income support debt, as the case may be. Specific provision is made with respect to an order of dégrèvement under Article 2(b) of the Loi (1904) (Amendement

No. 2) sur la Propriété Foncière or a declaration under Article 6 of the Bankruptcy (Désastre) (Jersey) Law 1990, so that it is clear that the amount secured is such amount that the debtor is liable to pay pursuant to the income support debt or long-term care loan at the time of the order or declaration, as the case may be.

Article 4 makes provision concerning the Loi (1880) sur le propriété foncière ("1880 Loi") with respect to social security hypothecs. The 1880 Loi contains provisions relating to the nature of hypothecs, including legal hypothecs. (Other types of hypothec are judicial and contractual.) The relevant provisions of the 1880 Loi relating to legal hypothecs are translated into English and set out for information in the Schedule to the draft Law. Article 4 makes specific provision in respect of cancellation of a social security hypothec in place of the provision in the 1880 Loi. It also makes provision in respect of the right to enforce a hypothec when the property passes into the hands of a third holder. Under the 1880 Loi, this right is barred in most cases after 10 years. Article 4 makes provision so that, in the case of a social security hypothec, this right in not barred by prescription (that is, the right is not extinguished by reason only of lapse of time).

Article 5 provides that Rules of Court may be made under the Royal Court (Jersey) Law 1948 to give effect to the draft Law.

Article 6 amends the Stamp Duties and Fees (Jersey) Law 1998 to provide that a fee of £80 is payable for the registration of a social security hypothec.

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

Jersey

DRAFT SOCIAL SECURITY HYPOTHECS (JERSEY) LAW 201-

Arrangement

Article

Jersey

DRAFT SOCIAL SECURITY HYPOTHECS (JERSEY) LAW 201-

A LAW to make provision for debts arising under the Long-Term Care (Jersey) Law 2012[1] and the Income Support (Jersey) Law 2007[2] to be secured by hypothecs and for related purposes.

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

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

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1 Interpretation

(1) In this Law, unless the context otherwise requires –

"1880 Loi" means the Loi (1880) sur la propriété foncière[3];

"2007 Law" means the Income Support (Jersey) Law 2007[4];

"2012 Law" means the Long-Term Care (Jersey) Law 2012[5];

"Article 4(1)(b) benefit" means a benefit under Article 4(1)(b) of the 2012 Law to meet all or part of the cost of a payment by an individual towards the costs of long-term care, such payment being required by virtue of an Order under Article 3(2)(c) of the 2012 Law;

"debt" means the amount that a debtor is liable to repay the Minister by way of final settlement by reason of an income support debt or pursuant to a long-term care loan;

"debtor" means a person who is liable to pay one or more amounts to the Minister as accrue from time to time pursuant to an income support debt or a long-term care loan;

"income support debt" means an amount that a claimant is liable to pay by reason of any of the circumstances referred to in Article 14(1)(a), (b) or (c) of the 2007 Law;

"long-term care loan" means an arrangement entered into by an individual pursuant to which an Article 4(1)(b) benefit provided to the individual takes the form of a loan to the individual (however such loan is expressed and in whatever form);

"Minister" means the Minister for Social Security;

"partner" means the debtor's spouse or civil partner or any individual living in a similar relationship with the debtor (whether or not of different sexes);

"social security hypothec" means a legal hypothec arising under Article 2(1);

"third party" means a person other than the debtor and his or her partner.

(2) Words and expressions used in this Law shall, except where indicated otherwise, have the same meaning as such words and expressions have in French in the 1880 Loi.

2 Creation of social security hypothec

(1) A debt may be secured by a hypothec in accordance with the provisions of this Law.

(2) Subject to paragraph (6), the Minister shall have a legal hypothec on all the immovable property of a debtor and the debtor's partner (whether owned separately, jointly or in common) if, following an application by the Minister, the hypothec is registered in the Public Registry.

(3) In the case of a long-term care loan or income support debt, a hypothec is created under paragraph (1) whether or not the immovable property is owned jointly with a third party.

(4) Where a hypothec has been created in circumstances where the property is owned jointly (whether or not with a third party) and a *dégrèvement* is ordered under Article 2(b) of the Loi (1904) (Amendement No. 2) sur la Propriété Foncière[6], the title to the property shall, as from the date of the order, be taken to have been converted into ownership in common in equal shares ("*en indivis en parts égales*") and the hypothec shall, with the debt secured by it, be apportioned accordingly.

(5) Where paragraph (4) applies and the *dégrèvement* is discontinued, or for any other reason, the court may make such order as it thinks fit for restoring the position to what it would have been had the order for the *dégrèvement* not been made or as nearly thereto as the court thinks practicable.

(6) Immovable property which is subject to any other form of hypothec in favour of the Minister for a debt cannot be subject to a social security hypothec in respect of the same debt.

(7) A social security hypothec may be registered at any time.

(8) A social security hypothec shall date from the date it is registered in the Public Registry and shall rank in priority to other hypothecs from that date.

(9) The Minister shall give notice of the registration of a social security hypothec to the debtor as soon as reasonably practicable following its registration.

3 Amount secured by a social security hypothec

(1) A social security hypothec shall secure such amount as accrues from time to time that a debtor is liable to pay pursuant to an income support debt or a long-term care loan, as the case may be.

(2) In the case of an order of *dégrèvement* under Article 2(b) of the Loi (1904) (Amendement No. 2) sur la Propriété Foncière[7] or a declaration under Article 6 of the Bankruptcy (Désastre) (Jersey) Law 1990[8], a social security hypothec shall secure such amount that the debtor is liable to pay pursuant to the income support debt or long-term care loan at the time of the order or declaration, as the case may be.

4 Application of the 1880 Loi

(1) Instead of Article 16 of the 1880 Loi paragraphs (2) and (3) shall apply.

(2) When a debt secured by a social security hypothec is extinguished by any reason whatsoever, the Minister shall cause the hypothec to be cancelled within one month of the day on which the debt was extinguished.

(3) For the purposes of paragraph (2), the Minister shall provide the Judicial Greffier with evidence of extinguishment of the debt and, upon receiving such evidence, the Judicial Greffier shall cancel the social security hypothec.

(4) Article 29 of the 1880 Loi shall apply to a social security hypothec except that the right of recourse to a third holder of the property (*le droit de suite*) shall not be barred by prescription.

(5) The relevant provisions of the 1880 Loi are set out in translation in the Schedule, however these translations are by way of information only and in the event of any conflict between a translation and the 1880 Loi, the latter shall prevail.

5 Rules of Court

Rules of Court may be made under the Royal Court (Jersey) Law 1948[9] to give effect to this Law.

6 Stamp Duties and Fees (Jersey) Law 1998 amended

In Part 1 of the Schedule to the Stamp Duties and Fees (Jersey) Law 1998[10] after item 49 there shall be added the following item and entries –

“50.	**APPLICATION FOR REGISTRATION OF SOCIAL SECURITY HYPOTHEC**			
	For an application under Article 2(2) of the Social Security Hypothecs (Jersey) Law 201-[11]	rate F	Application	Greffier”

7 Citation and commencement

This Law may be cited as the Social Security Hypothecs (Jersey) Law 201- and shall come into force 7 days after it is registered.

SCHEDULE

(Article 4)

ENGLISH TRANSLATION OF RELEVANT PROVISIONS OF THE 1880 LOI

1 Article 2

A hypothec, for the purposes of this Law, is a real right attached to a *rente* or other claim by virtue of which one or more *biens-fonds* belonging to the debtor are rendered specially subject to the payment of such *rente* or claim and which confers on the holder of the hypothec the advantages as follows.

> In the case of a *décret* or *dégrèvement* of the hypothecated property (except in the case where the property of the debtor has been declared *en désastre*): the right, according to the rank of the hypothec, of becoming *tenant* to the property thus undergoing the *décret* or *dégrèvement* or of being paid off by any *tenant* who shall have become such by virtue of a contract or hypothec subsequent in date;
>
> In the case of an insufficiency in the debtor's assets: the right to follow any part of the hypothecated property into the hands of a third holder of the property and although the third holder shall not have been directly charged with the payment of the *rente* or claim so hypothecated, to compel the third holder to pay off whatever balance remains due thereon, or to give up the property held.

The renunciation by default or otherwise in a *décret* or *dégrèvement* of a *rente* or of an hypothecated claim shall have the effect of freeing the properties undergoing these different procedures from the *rente* or claim itself as well as from the hypothec attached thereto but shall not deprive the creditor of any right of recourse with respect to any other hypothecated property, if there be any.

2 Article 6

A legal hypothec is that which results from operation of law.

3 Article 26

The holder of a legal, judicial or contractual hypothec, charged on a *bien-fonds* in the hands of a third holder shall not have the right, unless the third holder is bound expressly by his or her title to the property to discharge the liability of the principal debtor, to take any proceedings against the third holder for payment of the sum of money or the *rente* so hypothecated except after the assets of the principal debtor shall have been exhausted.

4 Article 29

Legal, judicial or contractual hypothecs constituted under the present Law shall remain in force until the debts or obligations which are the subject of them become extinct, not only as regards every part of the hypothecated property for the proportion of the *rente* or hypothecated claim with which such part is specially charged, but also as against every debtor of the property charged, for such portion of the *rente* or claim in respect of which the debtor is personally liable; but such hypothecs, except a contractual hypothec, whether landed or simple, may be barred by prescription in so far as the right of following the hypothecated property into the hands of a third holder of the property is concerned, notwithstanding that the debt or hypothecated claim may not be extinct.

As regards the right of recourse to third holders, judicial and legal hypothecs with the exception of the legal hypothec for dower shall be barred by prescription by the lapse of 10 years or more from their date.

With regard to the hypothec for dower, such right of recourse is extinguished only by the death of the widow.

[1] *L.21/2012*
[2] *chapter 26.550*
[3] *chapter 18.495*
[4] *chapter 26.550*
[5] *L.21/2012*
[6] *chapter 18.530*
[7] *chapter 18.530*
[8] *chapter 04.160*
[9] *chapter 07.770*
[10] *chapter 24.960*
[11] *P.137/2013*