The draft *Civil Law Reform Bill*

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Section Home Affairs Section

On 15 December 2009, the Government published the draft *Civil Law Reform Bill*, together with Explanatory Notes, and a consultation paper. The draft Bill is intended to introduce reforms in four separate and independent areas:

- the law of damages, particularly in relation to bereavement and dependency damages under the *Fatal Accidents Act 1976*
- pre- and post-judgment interest: the Government's stated intention is to replace the existing statutory provisions, which are set out in various statutes and pieces of secondary legislation, with a single set of modern provisions setting out the courts' general powers in relation to interest (which are broadly unchanged)
- distribution of estates on death: the draft Bill would, in certain circumstances, protect the inheritance rights of the descendants of someone whose own inheritance under a will or intestacy is forfeited or disclaimed and
- appeals in barristers' disciplinary proceedings: jurisdiction would be transferred to the High Court.

The consultation period ends on 9 February 2010.

The Justice Committee is conducting pre-legislative scrutiny of the draft Bill and have held two evidence sessions.

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1 Introduction and background

On 15 December 2009, the Government published the draft *Civil Law Reform Bill*, together with Explanatory Notes. The draft Bill is intended to introduce reforms in four separate and independent areas:

- the law of damages
- pre- and post-judgment interest
- distribution of estates on death and
- appeals in barristers' disciplinary proceedings.

A consultation paper ("the Consultation Paper") was published at the same time as the draft Bill.[1] The consultation period ends on 9 February 2010.

1.1 Territorial extent

The introduction to the draft Bill includes the following information about territorial extent:

> The majority of the provisions in the draft Bill relate only to the law of England and Wales, but none affect the functions of the National Assembly for Wales. However, the Bill amends provisions of three statutes that affect the law of damages in England and Wales, Scotland and Northern Ireland: namely, section 13(2) of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951; paragraph 12(4) of Schedule A1 to the Patents Act 1977 and section 97(2) of the Copyright, Designs and Patents Act 1988 (see clause 9 of the draft Bill). In these respects the provisions in the Bill have the same scope as the legislation being amended and therefore apply to the whole of the United Kingdom. These proposed amendments will as a result make minor changes to the law of Northern Ireland on non-reserved matters, and to Scots law. As regards Scots law, the proposed amendments are treated as relating to reserved matters on the basis that they make modifications of Scots private law as it applies to reserved matters. Whilst civil remedies are generally devolved in Scotland, it would not be within the competence of the Scottish Parliament to make the proposed amendments to the specified enactments (all of which relate to reserved matters). A similar analysis applies to the law of Northern Ireland. No legislative consent motions are, therefore, expected to be required. The Patents Act 1977 also extends to the Isle of Man. Whether the new provision should extend to the Isle of Man will be the subject of consultation with the Isle of Man authorities. No decision has been taken at this stage.[2]

1.2 Pre-legislative scrutiny

The Justice Committee is conducting pre-legislative scrutiny of the draft Bill. Two evidence sessions have been held. The first, on 19 January 2010, heard evidence from Andrew Ritchie QC, Timothy Petts and Tim Evans, (Bar Council), Des Hudson, Chief Executive, Law Society, and Stephen Mason, Chair, Law Society Civil Justice Committee. The second evidence session was held on 25 January 2009, when the Committee heard evidence from Professor Hugh Beale, University of Warwick, and Professor Andrew Burrows, University of Oxford.

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1 Civil Law Reform Bill Consultation, CP53/09, 15 December 2009

2 *Ibid*, Pp4-5

2 The law of damages

The Ministry of Justice has indicated that one of the main aims of the draft Bill is to reform the law of damages to "provide a fairer and more modern system, particularly in relation to bereavement and dependency damages under the *Fatal Accidents Act 1976*" ("the 1976 Act)" Clauses 1-9 of the Bill would make these changes.

2.1 Background

The provisions in Part 1 originate from a series of Law Commission reports published in the late 1990s: "*Claims for Wrongful Death*"[3]; "*Liability for Psychiatric Illness*"[4]; "*Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits*"[5]; and "*Aggravated, Exemplary and Restitutionary Damages*"[6] The Consultation Paper states that:

> The majority of the provisions in this Bill relate to the Fatal Accidents Act 1976. The main function of the 1976 Act is to govern the payment of compensation in the event of a death caused as a result of another person's wrongful act, neglect or default.

The Consultation Paper notes the legislative history of changes to the 1976 Act and provides some background information as to the Government's reasons for further change. In brief, a civil law award of damages is normally intended to compensate a claimant for the damage, loss or injury sustained as a result of the acts or omissions of another. The award is designed to put the claimant, as far as is possible, in the same position that he or she would have been but for the injury, loss or damage. Damages payable under the 1976 Act are paid by the individual or organisation that caused a death, to the specified dependants of the person who died. The damages awarded are not the same as the damages that would have been awarded to the claimant, had he or she not died.[7] They generally comprise the 'non-business' benefits that the dependants had a reasonable expectation of receiving from the deceased, including financial contributions and gratuitous services, such as personal care.

Section 1(3) of the 1976 Act sets out a list of the potential dependants of the deceased who would be entitled to bring an action for damages. In its 1999 report, *Claims for Wrongful Death*, the Law Commission (amongst other things) proposed the extension of the right to claim damages to potential claimants beyond the specified dependents already provided for by the Act. In 2007 the, then, Department for Constitutional Affairs launched a public consultation entitled *The Law on Damages.*[8] The responses were published by the Ministry of Justice in 2009.

2.2 Commentary

Clause 1 would extend the statutory list of dependants who are eligible to claim damages under section 1 of the 1976 Act. The provision includes any person who does not fall within the other categories of dependant but who was being maintained by the deceased immediately before the death.

Clause 2 would replaces the current subsection (3) of section 3 of the 1976 Act with a new subsection which would provides that the court, when making an assessment of damages to be awarded to a dependant of the deceased, would be obliged to take into account the fact

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3 Law Com No 263
4 Law Com No 249
5 Law Com No 262
6 Law Com No 247
7 See for example *Gray v Barr* [1971] 2 QB 554, at 569, per Lord Denning
8 Department for Constitutional Affairs, *The Law on Damages*, CP 9/07

that since the death the dependant has married or remarried; entered into a civil partnership; or entered into a relevant relationship. Clause 2 would also have the effect of inserting two new subsections to Section 3 of the 1976 Act. These would provide that the court, when assessing the damages to be awarded to a child of the deceased, would be able to take into account the fact that since the death the surviving parent of the child has married or remarried; entered into a civil partnership; or entered into a relevant relationship. A person would be in a "relevant relationship" where, at the time when the action is brought, he or she lived with another person as husband, wife or civil partner; had been doing so for at least two years; and was being maintained by the other person. Clause 3 would allow the court, in some circumstances, to take account of the possibility of a relationship breakdown when assessing damages under s 3 of the 1976 Act.

Clause 4 would repeal subsection (4) of section 3 of the 1976 Act. This required the court, when assessing damages to be awarded to a cohabitant of the deceased of at least two years duration, to take into account that the cohabitant had no enforceable right to financial support by the deceased as a result of their living together. The Explanatory Notes to the draft Bill indicate that this provision "has been criticised for its lack of clarity and its intrusive nature."

Bereavement damages

Following the enactment of the *Administration of Justice Act 1982*, provision was made for certain relatives to claims damages for bereavement. Damages for bereavement are fixed (currently at £11,800 in respect of causes of action arising on or after 1 January 2008, although the Government has announced its intention to adjust this amount to the nearest £100 in line with inflation every three years). In its 1999 Report, the Law Commission considered a number of criticisms of the award of such damages, but recommended that they continue to be available under the 1976 Act.[9] Clause 5 would extend the statutory list of persons able to claim bereavement damages, by amending section 1A of the 1976 Act. Subsections (4), (5) and (6) make provision in relation to the amount of bereavement damages to be awarded. Subsection 5 would enable awards of half of the full amount of bereavement damages to be made to each eligible child of the deceased under the age of 18.

Gratuitous care

Clause 7 would make provisions for changes in relation to gratuitous care in personal injury cases. This includes such things as personal care provided to the injured person by family members. The Consultation Paper indicates that "currently claimants are generally entitled to recover damages for gratuitous care, but are required to hold the damages on trust for the carer. This can be cumbersome in practice." Clause 8 sets out provisions which reflect those in clause 7, as adapted for fatal accidents claims.

Awards of aggravated damages

Clause 9 relates to the power of the courts to award aggravated damages in certain circumstances.[10] Amongst other things, the draft Bill replaces the reference to exemplary damages in the *Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951* with a reference to aggravated damages.

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9 Law Com 263, para 6.7

10 These terms are fully defined in the Consultation Paper, at p 11

Impact Assessment

The Consultation Paper includes an Impact Assessment on the proposals. In summary it states that:

> An impact assessment relating to the damages provisions is at Annex C. We estimate that the proposals will result in the receipt by claimants of dependency and bereavement damages under the Fatal Accidents Act 1976 of about an additional £11.4 million per annum or thereabouts. This will largely be paid by insurers or their policyholders and, in the case of clinical negligence, the National Health Service Litigation Authority and medical defence organisations.

2.3 Consideration by the Justice Committee

During the course of the Justice Committee's first evidence session, it became apparent that the changes suggested in relation to the law of damages could be one of the more contentious issues in the draft Bill.[11] Questions were raised about whether the words "immediately before the death" (Clause 1(2)) could be interpreted in a way to exclude claims by persons who would otherwise be dependent, who were being maintained before the accident but not before the death.[12]

Other issues were raised about potential dependants. For example, it was also suggested by one witness that friends who had been supported by the deceased might come forward.[13]

The Government has rejected the Law Commission proposal that the court could consider the fact of an engagement when assessing damages. Many of the witnesses thought that this would not be a problem; as such persons might be included in other categories. Questions were raised about the position of persons engaged to be married, where there was no co-habitation and where no maintenance was occurring immediately before the death, but where there was a reasonable expectation that such maintenance might occur.[14]

It was also suggested, by both the Bar Council and the Law Society, that the term "person" ought to be defined, as otherwise it might encompass "legal persons" such as charities. The Bar Council and Law Society raised concerns about two other issues, the first being the effect of remarriage, both on the widow or widower and on any child dependants.[15] The second was the issue of gratuitous care, provided by a defendant pre-trial. The Bar Council's witness gave a practical example of the potential problem:

> Imagine there is a couple who have been married for 40 years; they are in their 70s and they are in a car together. The husband is driving and he falls asleep. As a result, there is a crash and his wife is very seriously injured. His responsibility is to care for his now injured wife and he does so. He is the tortfeasor but he cares for his now injured wife. It takes four years to get to court and at court what the court will say under this Bill is, "All the care that you have given to your wife over the last four years you cannot recover from the insurance company. All those hours that you've put in, you can't recover. Your wife will live for one further year as a result of her brain injury and we will give you damages for caring for her for the next year."[16]

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11 Justice Committee, Uncorrected Transcript, Minutes of Evidence, 19 January 2010, HC 300-i
12 *Ibid*, Q 2
13 *Ibid*, Q 8
14 *Ibid*, Q 14
15 *Ibid*, Qq 23-30
16 *Ibid*, Q 32

The Committee also gave further, detailed, consideration to the issue of Clause 9 (aggravated damages) and evidence was taken from both the Law Society and the Bar Council.[17]

3 Pre- and post-judgment interest

Part 2 of the Bill deals with the issue of pre- and post-judgment interest. Pre-judgment interest is the interest that may be awarded by the courts in an order or judgment for the payment of a debt or damages in respect of the period from the time the cause of action underlying the action arose to the date of the order or judgment. Post-judgment interest (sometimes referred to as judgment debt interest) is the interest payable on a sum awarded by the court from the date of the award to the date of payment.

The Consultation Paper indicates that the "intention is to replace the existing statutory provisions, which are set out in various statutes and pieces of secondary legislation, with a single set of modern provisions setting out the courts' general powers in relation to interest (which are broadly unchanged)." Detailed information about the current position can be found in the Consultation Paper.[18] In particular, it indicates that:

> The Bill would replace the present statutory provisions governing the award of pre- and post-judgment interest in the High Court, the country courts and other courts or record with new provisions retaining the majority of the courts' powers but giving the Lord Chancellor a wide power to prescribe the rate of pre-judgment interest payable as well as the rate applicable to post judgment interest. A significant change in the powers of the court would be that the rate specified by the Lord Chancellor for the types of cases in question would be the only rate that the court could award if it chose to award pre-judgment interest. The Lord Chancellor's power will be very flexible and will be exercised by statutory instrument.[19]

In evidence to the Justice Committee, the Bar Council described the proposal as "a sensible tidying-up provision"; however, the Law Society noted that the proposals could have been more ambitious and one of their witnesses argued that:

> It seems to me implicit in what we have here we are still left with the need for a specific act to be taken to review the rate of interest. It has to be done annually rather than the unspecified period, but what about the opportunity to adopt a self-correcting mechanism? What if we were to say that the rate of interest will be a fixed premium over base rate? It would then be, if you like, self-correcting.[20]

4 Distribution of estates on death

The draft Bill would reform the law relating to the distribution of estates in certain specified circumstances. It would protect the inheritance rights of the descendants of someone whose own inheritance under a will or intestacy is forfeited or disclaimed. The draft Bill would give effect, with minor modifications, to the recommendations of the Law Commission in its 2005 report, *The Forfeiture Rule and the Law of Succession*[21] which was accepted by the Government in 2006.[22]

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17 *Ibid*, Qa 34-42
18 Civil Law Reform Bill Consultation, CP53/09, 15 December 2009, pp15-17
19 *Ibid*, p17
20 Justice Committee, Minutes of Evidence, 19 January 2010, HC 300-i, Qq 44-47
21 Law Com No 295
22 HL Deb 18 December 2006 c221WS

4.1 Devolution of property on death

When a person dies, generally his or her property passes in accordance with any valid will or, if the deceased did not leave a valid will, in accordance with the intestacy rules. Sections 46 and 47 of the *Administration of Estates Act 1925* (as amended) set out the intestacy rules and much depends on which relatives survive the deceased. A Community Legal Advice publication, *Wills and Probate,* sets out what this means in some of the more common situations.[23] A more detailed summary of the intestacy rules is included in the Consultation Paper.[24]

4.2 The forfeiture rule

The forfeiture rule is defined in the *Forfeiture Act 1982* as meaning "the rule of public policy which in certain circumstances precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing." The forfeiture rule is an instance of a wider principle that a person should not be allowed to profit from his or her crime and prevents a person from inheriting property from someone (under a will or intestacy) whom he has unlawfully killed. Under provisions contained in the *Forfeiture Act* 1982, the court has discretion to waive the forfeiture rule in some circumstances, but not where the killer has been convicted of murder.

Where the forfeiture rule operates to preclude a person from acquiring a benefit under a will or intestacy, the rights of inheritance of the killer's descendants may also be affected. The Consultation Paper sets out examples of how this might occur:

> The forfeiture rule not only affects the inheritance rights of the killer, it also affects the inheritance rights of the killer's descendants who purely as a consequence of the killer's actions are also excluded from inheriting, so that for example, a grandchild is unable to inherit from his or her deceased grandparent. This is because section 47 of the Administration of Estates Act 1925 and section 33 of the Wills Act 1837 have the effect that for a grandchild, for example, to inherit from his or her deceased grandparent his or her parent must have died before the deceased. In cases of forfeiture the killer is still alive and so the grandchild could not inherit in place of his or her parent. This is contrary to the general policy intention of succession law, which is to prefer descendants over other relatives.
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> This effect of the forfeiture rule also extends to cases where a person leaves a will containing a default gift. For example, a person (the testator) may provide by will that 'A' shall take the estate but if 'A' predeceases the testator, or does not survive the testator by a given number of days, then 'B' shall take the estate. If 'A' kills the testator, 'B' will not take in 'A's' stead because the condition, that 'A' predeceased the testator, has not been met. However, although the result is the same as for a grandchild, because the testator has freedom of testamentary disposition, the default beneficiary may not be a descendant of the deceased or the primary beneficiary: he or she might be the sibling or someone totally unrelated, because the testator has freedom of testamentary disposition.[25]

This problem came to light as a result of a Court of Appeal case, *Re DWS (deceased).*[26] In this case, two grandparents were murdered by their only son. The grandparents had not left wills and so their property had to be distributed in accordance with the intestacy rules. The

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[23] January 2009
[24] Pp 99-100
[25] Pp19-20
[26] [2001] Ch 568 (CA)

forfeiture rule prevented the son from inheriting because he had murdered his parents. If the son had died before his parents, the grandparents' property would have passed to their only grandchild, who was the son's only child. However, the son was not dead, but disqualified from inheriting. The relevant provision of the intestacy rules provides that the grandchild will only inherit if the son or daughter has already died. In this case, the Court of Appeal accordingly decided that the law did not allow the grandson to take the property. Instead, the property would have to go to the dead grandfather's sister (or her estate). It was as a consequence of the decision in this case that the Law Commission was asked to review the relationship between the forfeiture rule and the law of succession.

The Law Commission criticised the current law for a number of reasons:

- the grandchildren should not be punished for the sins of their parent
- it is more likely that the deceased would have wished to benefit the grandchildren than the other relatives
- the general policy of intestacy law is to prefer descendants to siblings and other relatives; the Law Commission considered that to make an exception in the forfeiture case is inconsistent with that policy.[27]

The Law Commission recommended that where a child of a deceased person is disqualified from inheriting through having killed the deceased, the property should be distributed as if the child had died immediately before the deceased (the "deemed predecease" rule). That would mean that the killer's children would be allowed to inherit. A similar rule would also apply when the deceased had been killed by a spouse or other relative.

The Law Commission also recommended that where a person forfeits their inheritance through having killed the deceased, but as a result of the reforms property devolves on or is held for a minor descendant of the killer, the court should have the power to order that the property be held by the Public Trustee, who should administer it so as to avoid benefit to the killer.

4.3 Disclaimer and death under the age of 18

Disclaimer

Disclaimer is where a person rejects his or her inheritance under a will or intestacy. As with the forfeiture rule and for similar reasons, disclaimer may affect the inheritance rights of the descendants of the person disclaiming.

Death under the age of 18

Furthermore, the intestacy rules specify what happens to the estate of a deceased person who dies intestate leaving minor children. These children attain a vested interest (that is they become fully entitled to inherit) when they:

- reach the age of majority; or
- marry or form a civil partnership before that age.

Accordingly, if a child in this situation dies after the deceased but while still a minor, and without having married or formed a civil partnership, leaving one or more children

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[27] *The Forfeiture Rule and the Law of Succession*, p2

(grandchildren of the deceased), the property does not pass to the grandchildren because their parent never attained a vested interest. The grandchildren cannot claim under the original intestacy because their parent was at that time alive. The property would pass instead to the deceased's other relatives. The same problem could also arise where the person who dies under the age of 18 is some other relative of the deceased but would otherwise have been entitled to inherit under the intestacy rules.

The Law Commission recommended that the same solution (ie the "deemed predecease" rule) should also apply both in cases of disclaimer and in cases of death under the age of 18. Effectively this would mean that property should be distributed as if the person disclaiming, or the child dying under the age of 18, had died immediately before the deceased.

4.4 The draft Bill

Part 3, Clauses 15 to 17, of the draft Bill would give effect to the Law Commission's recommendations subject to a minor modification which is explained in the Consultation Paper:

> Briefly, this modification provides that the Court must consult the Public Trustee before exercising its discretion to appoint him or her. This additional step will give the court and the Public Trustee the opportunity to consider whether the Public Trustee is the most appropriate person to appoint in the particular circumstances of the case. This allows a trustee from the private sector to be appointed if that is more appropriate. This reflects the policy that the Public Trustee should be a trustee of last resort.[28]

A will could still make specific provision as to the devolution of any property in the event of disclaimer or the forfeiture rule applying. In this event, the provisions of the will would apply rather than the "deemed predecease" rule.

A detailed explanation of the relevant clauses is included in the Government's Explanatory Notes published with the draft Bill.

4.5 Consideration by the Justice Committee

Evidence to the Justice Committee queried elements of the drafting and the necessity for safeguards which had been included. Concern was also expressed that the Bill should not affect the validity of all existing wills. [29]

5 Appeals in barristers' disciplinary proceedings

The draft Bill would transfer the jurisdiction for appeals in barristers' disciplinary hearings to the High Court. It would bring the appeal process for barristers into line with the appeal process for solicitors in disciplinary hearings. The Consultation Paper states that the aim of the reforms is "to make the system simpler and more transparent".[30]

5.1 Current position

Any barrister who has been found guilty of charges of professional misconduct, whether at a summary hearing or before a disciplinary tribunal of the Council of the Inns of Court, has the right to appeal against the finding and/or the sentence imposed. Appeals are made to the Visitors to the Inns of Court who are independent of the Bar Standards Board (which

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[28] P22
[29] Uncorrected transcript of oral evidence,19 January 2010 Qs67-9
[30] P23

regulates barristers called to the Bar in England and Wales). Visitors also hear appeals which arise from decisions of the Qualifications Committee of the Bar Standards Board. Jurisdiction is conferred by virtue of Section 44 of the *Senior Courts Act 1981.*

Visitors to the Inns of Court are senior judges but, when exercising their jurisdiction in relation to the conduct of barristers or aspiring barristers, they do not act as judges of the High Court or Court of Appeal but rather act specifically in their capacity as Visitors to the Inns of Court in accordance with the *Hearings Before The Visitors Rules 2005*. These are judge-made rules and are not subject to any legislation applicable to the High Court.

This appeals procedure differs from the procedure relating to solicitors found guilty of professional misconduct: decisions made by the Solicitors' Disciplinary Tribunal can be the subject of appeal to the High Court. The *Impact Assessment on Appeals,* which is included in the Consultation Paper, sets out what the difference means in practice:

> These appeals are currently heard at the Royal Courts of Justice by High Court or Court of Appeal Judges sitting in the capacity of Visitors to (or senior benchers of) the Inns of Court. Depending upon the type of appeal, judges either sit alone to hear these appeals or they sit with a barrister and a lay person who are specially nominated for this purpose. Appeals arising from the decisions of Solicitor Disciplinary Tribunals on the other hand are heard by two or more High Court Judges sitting as a Divisional Court. (The majority of appeals are heard by two-judge courts but it is occasionally necessary to arrange a three-judge court if the complexity or seriousness of a case demands this.)
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> The legal reforms brought in under the Legal Services Act 2007 created a requirement for amendments made by a professional regulatory body to be subject a statutory approval procedure. This is at odds with the fact that the Visitors Rules are made by the judiciary and do not, therefore, require similar approval.[31]

5.2 The draft Bill

Part 4, Clause 18, of the draft Bill would replace the current arrangements with a right of appeal to the High Court in respect of the following decisions:

- decisions made in barristers' disciplinary cases
- decisions not to allow waivers from the standard requirements for qualification and/or practising
- decisions to refuse a barrister permission to act as a pupil master.

The Consultation Paper states that this proposal is supported by both the General Council of the Bar and the Inns of Court and is intended to render the disciplinary arrangements for barristers more transparent and, at the same time, to make their appeal arrangements consistent with those for solicitors appealing against decisions of Solicitor Disciplinary Tribunals.[32]

The decision of the High Court on an appeal would be final except where it relates to a decision to disbar a barrister.

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[31] P104
[32] P23

The right of appeal to the High Court would not extend to decisions relating to the disciplining of student members of the Inns of Court, or from the refusal of applications for admission to an Inn. The Consultation Paper states that it is intended that in future these matters will be dealt with at first instance by an Inns Conduct Committee with a right of appeal lying to the Qualifications Committee of the Bar Standards Board.[33]

The Impact Assessment indicates that this reform has already been considered on previous occasions:

> Enquiries were made in 2007 about the possibility of the Legal Services Bill being amended to include such a provision but this was not acceded to because of the potential danger to the overall timetable for the bill. In 2008 a request for an amendment to the Constitutional Renewal Bill was turned down because of the difficulty of categorising the proposal as a constitutional reform.[34]

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33 *Ibid*

34 Civil Law Reform Bill Consultation, CP53/09, 15 December 2009, p104