Draft *Inheritance and Trustees' Powers Bill*

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Section Home Affairs Section

When a person dies "intestate" (that is without leaving a valid will disposing of the whole of his or her property) their estate is distributed in accordance with legal rules known as the intestacy rules. According to the Law Commission, "studies suggest that between a half and two thirds of the adult population do not have a will and that those who need one most are the least likely to have made one".

The *Inheritance (Provision for Family and Dependants) Act 1975* ("the 1975 Act") enables certain family members and dependants to apply to court for reasonable financial provision from a deceased person's estate. (This is often referred to as a claim for family provision.) The 1975 Act provides a means for someone to challenge the distribution of an estate, under a will or under the intestacy rules, by applying to court for a share, or an increased share, in the estate. If the claim is successful, then the way in which the estate is distributed will be changed.

In October 2008, the Law Commission began work on a project dealing with intestacy and family provision claims on death. In December 2011, the Law Commission published a final report and two draft bills. The Law Commission found "many instances where the current law is outdated, confusing or places unnecessary obstacles in the way of those with a valid claim to share in a deceased person's assets". It recommended a package of reforms "that would modify the current legal rules to reflect modern social expectations and to remove arbitrary or unduly technical aspects, while leaving intact the fundamental structure of the English law of "succession" to property on death".

On 21 March 2013, Lord McNally, Minister of State for Justice, announced that the Government had accepted the Law Commission's recommendations, with minor amendments, in all areas except for the recommendations relating to rights for cohabitants on intestacy. On the same day, the Government published for consultation the *Draft Inheritance and Trustees' Powers Bill* which was produced by the Law Commission with its report. The consultation ends on 3 May 2013.

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1 Who inherits the property of a person who dies without a valid will?

When a person dies "intestate" (that is, without leaving a valid will disposing of the whole of his or her property) their estate is distributed in accordance with legal rules known as the intestacy rules. These rules, which are set out in section 46 of the *Administration of Estates Act 1925*, are amended from time to time. The intestacy rules determine the distribution of the deceased's estate after any debts and liabilities, funeral expenses and costs of the administration of the estate have been paid. In addition, some assets pass without reference to the intestacy rules (for example, some property owned jointly which passes by right of survivorship).

In distributing the estate, much depends on which relatives survive the deceased and the size of the estate. The deceased's spouse or civil partner will not necessarily inherit the whole of the estate. A surviving cohabitant has no automatic right to inherit any part of his or her partner's estate, regardless of how long they lived together and even if they had children together. The intestacy rules are complex and anyone wishing to determine how a particular estate might be distributed should consider seeking specific legal advice.

The Law Commission has recently summarised how the intestacy rules operate in practice:

> ***If the deceased is survived by a spouse and children***
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> 2.20 If the deceased is survived by a spouse and children or other descendants, the spouse is entitled to:
>
> (1) all of the deceased's personal chattels;
> (2) a statutory legacy of £250,000; and
> (3) a life interest in half of the remainder of the estate.
>
> 2.21 "Personal chattels" encompass the deceased's personal belongings, such as cars, jewellery, china, clothes, furniture, pictures, and so on, but do not include anything used for business purposes.
>
> 2.22 The spouse may use the property that is subject to the life interest and may retain or spend any income it generates (such as rent or interest) during his or her life, but may not sell the assets or diminish their capital value. The spouse also has the right to "capitalise" the life interest within 12 months of a grant of representation. This means that the fund is divided so that the spouse receives the capital value of the life interest and the remainder passes to the deceased's children and other descendants.
>
> 2.23 The surviving children or other descendants are entitled to:
>
> (1) half of what is left after payment of the statutory legacy; and
> (2) eventually, the other half of the estate when the surviving spouse's life interest comes to an end.
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> These interests are held on the "statutory trusts", which we discuss below.
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> ***If the deceased is survived by a spouse but no children***
>
> 2.24 If the deceased is survived by a spouse but no children or other descendants, the entitlement of the surviving spouse depends on the existence of other relatives.
>
> 2.25 If the deceased was not survived by any parents or full siblings (or children or other descendants of a full sibling) the spouse takes the whole estate absolutely.
>
> Otherwise, the surviving spouse is entitled to:

(1) all of the deceased's personal chattels;
(2) a statutory legacy of £450,000; and
(3) half of the rest of the estate absolutely.

2.26 The other half of the estate passes to the deceased's parents in equal shares, or to one parent if only one is still alive. If neither parent survives, then the full siblings take the remaining half, in equal shares if there are more than one of them. The children of a full sibling who has already died stand in their parent's place and share in the amount which that sibling would have received.

If the deceased is not survived by a spouse

2.27 If the deceased is not survived by a spouse then the whole estate will be inherited by other relatives, in the following order of priority:

(1) children and other descendants;
(2) parents;
(3) full siblings (or their descendants);
(4) half siblings (or their descendants);
(5) grandparents;
(6) full siblings of parents of the deceased – uncles and aunts (or their descendants);
(7) half siblings of parents of the deceased – half uncles and half aunts (or their descendants).

If there is more than one member of any of these categories, they share equally.

2.28 The list is a hierarchy; only if there are no members of a particular category does the next category become relevant. The estate will, therefore, not be split between two different categories of relatives. It can, however, be divided between different generations within a class which includes descendants, by the operation of the "statutory trusts".

The Law Commission also explains the working of statutory trusts and bona vacantia:

The statutory trusts

2.29 The statutory trusts take effect in all cases except where the estate passes only to the deceased's spouse, parents or grandparents. So, where the effect of the intestacy rules is that the estate passes, for example, to two children and two grandchildren of the deceased (the grandchildren being entitled because their parent has died), the estate will be held for them on the statutory trusts.

2.30 Under the statutory trusts, the beneficiaries in any given class (the deceased's children, siblings or parents' siblings) are entitled to the estate in equal shares on reaching the age of 18 (or marrying or forming a civil partnership under that age). However, if any of them have already died leaving surviving children or other descendants, then the share which the deceased beneficiary would have received will pass instead to those descendants in equal shares. This means that no one can benefit if his or her parent is still alive. …

Bona vacantia

2.31 If the deceased leaves none of the above relatives then the estate passes as bona vacantia (a Latin term roughly translated as "ownerless goods"). This usually means that the Crown becomes entitled to the estate, though these assets are now collected by the Treasury Solicitor and are used for general public spending. However, if the deceased died resident within the County Palatine of Lancaster, or within the

> county of Cornwall, the estate passes to the Duchy of Lancaster or the Duke of Cornwall.[1]

Further information about the intestacy rules, together with a flowchart intended to help explain the process, is available on the Government's Justice website.[2]

According to the Law Commission, "studies suggest that between a half and two thirds of the adult population do not have a will and that those who need one most are the least likely to have made one".[3]

2 What is a family provision claim?

The *Inheritance (Provision for Family and Dependants) Act 1975* ("the 1975 Act") enables certain family members and dependants to apply to court for reasonable financial provision from a deceased person's estate. This is often referred to as a claim for family provision.[4] The 1975 Act provides a means for someone to challenge the distribution of an estate, under a will or under the intestacy rules, by applying to court for a share, or an increased share, in the estate. If the claim is successful, then the way in which the estate is distributed will be changed. The 1975 Act also sets out factors to be considered by the court in relation to particular categories of applicant.

A claim can be made only if the deceased died domiciled in England and Wales. According to the Law Commission, "domicile is a difficult legal concept that can often become a significant preliminary issue in litigation".[5] It must be made within six months of the grant of representation, although the court may extend this time period. (Representation means a grant of probate made to executors appointed under a will or a grant of letters of administration in other cases).

3 The Law Commission project

In October 2008, the Law Commission began work on a project dealing with intestacy and family provision claims on death, against the following background:

> The intestacy rules must strive to reflect the needs and expectations of modern families. Where the rules (or the deceased's will) fail to make adequate provision for close family members or dependants, it is important that the law does not place unnecessary obstacles in the way of a valid family provision claim.
>
> The intestacy rules date back to 1925 and have not been comprehensively reviewed for more than 20 years (when the Law Commission last considered this area of the law). The 1975 Act has not been the subject of a full review since it was enacted.[6]

In October 2009, the Law Commission published a consultation paper, *Intestacy and Family Provision Claims on Death,* which reviewed the current law, discussed options for reform and put forward questions for consultation, including provisional proposals for reform.[7] This was followed, in May 2011, by a supplementary consultation paper*, Intestacy and Family*

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1 Law Commission Consultation Paper No 191, *Intestacy and Family Provision Claims on Death,* October 2009, pp19-21, footnotes omitted
2 Justice, *Why make a will?* [accessed 26 March 2013]
3 Law Commission, *Intestacy and Family Provision Claims on Death* [accessed 26 March 2013]
4 Ministry of Justice CP6/2013, *Draft Inheritance and Trustees' Powers Bill,* 21 March 2013, p4
5 Law Commission Report Law Com No 331 (Summary, *Intestacy and Family Provision Claims on Death Executive Summary*, December 2011, p4
6 Law Commission, *Intestacy and Family Provision Claims on Death* [accessed 26 March 2013]
7 Law Commission Consultation Paper No 191, *Intestacy and Family Provision Claims on Death,* October 2009

Provision Claims on Death: Sections 31 and 32 of the Trustee Act 1925 which set out options for reform of statutory provisions which enable trustees to distribute income or capital from the trust fund to or for the benefit of beneficiaries who are not yet entitled to take such funds outright.[8] The Law Commission website also includes focus group research commissioned for the project.[9]

In December 2011, the Law Commission published its final report,[10] together with an analysis of consultation responses.[11]

The Law Commission found "many instances where the current law is outdated, confusing or places unnecessary obstacles in the way of those with a valid claim to share in a deceased person's assets". It recommended a package of reforms "that would modify the current legal rules to reflect modern social expectations and to remove arbitrary or unduly technical aspects, while leaving intact the fundamental structure of the English law of "succession" to property on death".[12]

The Law Commission recommended reforms in a number of areas including:

- Where the deceased leaves a spouse or civil partner **but no** children or other descendants, the spouse or civil partner should take the whole estate and not share it with the deceased's parents or siblings, which is the current requirement for high value intestate estates. The Law Commission stated that this "would bring the law into line with public expectations in those cases".[13]

- Where the deceased is survived by a spouse or civil partner **and** children or other descendants, the surviving spouse or civil partner should take the deceased's personal chattels and a statutory legacy (as under the current law) but then receive half of any balance of the estate outright (and not only a life interest as at present). The Law Commission said that this would "simplify the law and eliminate the expense and complication of the life interest structure".[14]

- The statutory legacy should be updated regularly and there should be provisions determining the rate of interest payable on.

- The definition of "personal chattels" should be updated.

- Children who are adopted after the death of a parent should not lose their entitlement to share in that parent's estate because of the adoption: "this avoids a legal trap which we have found can be easily overlooked by those involved in the adoption process".[15]

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8 Law Commission Consultation Paper No 191 (Supplementary), *Intestacy and Family Provision Claims on Death: Sections 31 and 32 of the Trustee Act 1925 A Supplementary Consultation Paper,* 26 May 2011

9 Gareth Morrell, Matt Barnard and Robin Legard, National Centre for Social Research, *The Law of Intestate Succession: Exploring Attitudes Among Non-Traditional Families Final Report,* 31 March 2009

10 Law Commission (LAW COM No 331), *Intestacy and Family Provision Claims on Death*, December 2011

11 Law Commission Consultation Paper No 191 (Responses), *Intestacy and Family Provision Claims on Death Analysis of Consultation Responses*, 14 December 2011

12 Law Commission Report Law Com No 331 (Summary, *Intestacy and Family Provision Claims on Death Executive Summary*, December 2011, p2

13 *Ibid* p2

14 *Ibid* p3

15 *Ibid* p3

- Where a person whose mother and father were not married to each other dies intestate, the presumption that the deceased's father has also died should not apply where the father was named on the deceased's birth certificate or equivalent official birth record.

- A person who was treated by the deceased as a child of his or her family should be permitted to claim family provision, whether or not the deceased was married or in a civil partnership; the definition of a "child of the family" should no longer be limited to situations where the deceased was married or in a civil partnership.

- Obstacles to claims for family provision by dependants, defined as those who were being maintained by the deceased immediately before the death, should be removed. The courts have held that an applicant must show that the deceased assumed responsibility for the maintenance, and also that he or she contributed more to the relationship, in terms of financial value, than did the applicant. The Law Commission recommended reforms to remove both of these hurdles: "the court would still take these matters into account but they would not be sufficient to prevent a deserving applicant from making a successful claim".[16]

- It should be possible to claim family provision if the deceased died "domiciled" in England and Wales (as at present) and alternatively where the deceased left assets governed by English succession law.

- The management powers of all trustees under sections 31 and 32 of the *Trustee Act 1925* (powers to distribute income or capital from the trust fund to or for the benefit of beneficiaries who are not yet entitled to take such funds outright) should be reformed. This would include, for example, extending the trustees' power contained in section 32 to pay or apply capital to or for the benefit of a trust beneficiary to the whole, rather than one-half, of the beneficiary's share in the trust fund.

The Law Commission's final report contained a draft Bill, the *Inheritance and Trustees' Powers Bill*, to give effect to these and other more technical recommendations.

The Law Commission also produced the draft *Inheritance (Cohabitants) Bill* which included provisions that would give some unmarried partners, who had lived together for five years, the right to inherit on each other's death under the intestacy rules. Where the couple had a child together, this entitlement would accrue after two years' cohabitation, provided the child was living with the couple when the deceased died. At present, a surviving cohabitant has no automatic right to inherit any part of his or her partner's estate, regardless of how long they lived together and even if they had children together, although a survivor who had lived with the deceased for a qualifying period could go to court to claim family provision from his or her partner's estate under the 1975 Act.

4 The Government response

On 21 March 2013, Lord McNally, Minister of State for Justice, announced that the Government had accepted the Law Commission's recommendations, with minor amendments, in all areas except for the recommendations relating to rights for cohabitants on intestacy.[17] Lord McNally said that "after careful consideration", the Government had

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16 *Ibid* p4

17 HL Deb 21 March 2013 cc59-60WS

decided that the Law Commission's recommendations regarding rights for cohabitants upon intestacy would not be implemented during this Parliament.[18]

On the same day, the Government published for consultation the *Draft Inheritance and Trustees' Powers Bill* which was produced by the Law Commission with its report.[19] The consultation ends on 3 May 2013. The consultation asks for:

- comments on either the draft bill or its accompanying Explanatory Notes, in particular the drafting;
- views on which of four different options is the most appropriate approach for determining the basis of jurisdiction for family provision claims (in addition to the domicile of the deceased); and
- comments on the Impact Assessment.[20]

5 The draft Bill

The *draft Inheritance and Trustees' Powers Bill* has 12 clauses and 4 schedules; this section of this note sets out a brief summary of these provisions. Further detail is provided in the Law Commission's Explanatory Notes which accompany the Bill.

In brief, the provisions in the Bill are:

Clause 1 would amend section 46 of the *Administration of Estates Act 1925* to change the entitlement of an intestate person's surviving spouse or civil partner, who would only have to share the deceased's estate if the deceased was also survived by "issue" (children, grandchildren and so on). If the deceased was not survived by issue, the surviving spouse or civil partner would inherit the deceased's estate outright without having to share any of the estate with any surviving parent or full sibling (or issue of a full sibling) of the deceased.

If the deceased was also survived by issue, the surviving spouse or civil partner would continue to inherit the deceased's personal chattels (the definition of which would be amended by Clause 3) and the statutory legacy (currently £250,000, but in future to be determined in accordance with the provisions of a new Schedule 1A of the 1925 Act, as inserted by the Bill). In addition, they would inherit half of the rest of the estate outright (instead of having a life interest[21] in that half, as at present). The other half of the balance of the estate would be held on the statutory trusts[22] for the issue of the deceased, as under the current law.

Clause 1 would also make provision about the payment of interest on the statutory legacy and how the rate of interest was calculated.

Clause 2 would insert a new Schedule 1A into the *Administration of Estates Act 1925*. The new schedule is set out at **Schedule 1** to the draft Bill and would make provision for determining the fixed net sum (often referred to as a "statutory legacy") to which a surviving spouse or civil partner would be entitled before the estate was shared with the deceased's issue.

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18 HL Deb 21 March 2013 cc59-60WS
19 Ministry of Justice CP6/2013, *Draft Inheritance and Trustees' Powers Bill,* 21 March 2013
20 *Intestacy and Family Provision Claims on Death Impact Assessment,* 22 February 2012
21 See p3 of this note, above, for information about what "life interest" means
22 See p4 of this note, above, for information about the "statutory trusts"

Under current law, the Lord Chancellor has power to set the level of the statutory legacy but is under no obligation to do so or to keep the level under review. The new Schedule 1A would retain the Lord Chancellor's power to set the level of the fixed net sum by order and the statutory instrument would be subject to the negative resolution procedure. However, the affirmative resolution procedure would apply in certain circumstances (for example, if the Lord Chancellor determined the amount of the fixed net sum without using the index-linking mechanism set out in the new schedule, and set the fixed net sum at an amount lower than the pre-existing figure). In those circumstances, the Lord Chancellor would be required to prepare and lay before Parliament a report stating the reason why it had been decided to set the fixed net sum without using the index-linking mechanism.

The Lord Chancellor would be required to make an order setting the fixed net sum at least every five years.

Clause 3 would amend the definition of "personal chattels" (which the surviving spouse or civil partner is entitled to inherit). Personal chattels would be defined as "tangible movable property" other than:

- money and securities for money (as in the current statutory definition);
- property used at the death of the intestate person solely or mainly for business purposes (the current definition excludes any chattels used at the death of the intestate person for business purposes but the new clause adds the words "solely or mainly");
- property held at the death of the intestate person solely as an investment – this is a new exception. The Law Commission has explained the intention of this provision:

> This is intended as a narrow exception for property held solely as an investment which had no personal use at the date of the deceased's death. Property which had some personal use but which the deceased also hoped might maintain or increase its value, for example precious jewellery worn only occasionally, will not fall within this exception (and so will pass to the surviving spouse) even if it is held outside the home, for example in a bank for security reasons.[23]

Clause 4 deals with the inheritance rights of an adopted child in certain circumstances. Section 67(3) of the *Adoption and Children Act 2002*, provides that, generally, after adoption the child is regarded for all purposes as the legal child of the adopter or adopters, and has no other legal parents, although section 69(4) of that Act contains exceptions to this rule. Clause 4 would add another exception, the effect of which would be that where, immediately before adoption, the child's then legal parent had already died, the child's interest in that parent's estate would not be affected by the change in the child's legal parentage on adoption.[24] Certain interests created by will would not be preserved by the new provisions. The Explanatory Notes provide further detailed information.

Clause 5 deals with the presumption of prior death. At present section 18(2) of the *Family Law Reform Act 1987* operates where a person dies intestate and his or her parents were not married to each other at the time of his or her birth or subsequently. The effect of this provision is that it is presumed that the father and any other person to whom the intestate was related only through his or her father, died before the intestate person. There is a similar presumption that the intestate person was predeceased by a female parent other than

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[23] Ministry of Justice CP6/2013, *Draft Inheritance and Trustees' Powers Bill,* 21 March 2013, p37

[24] Ministry of Justice CP6/2013, *Draft Inheritance and Trustees' Powers Bill,* 21 March 2013, p38

the mother. (A person may have a female parent other than his or her mother by virtue of section 43 of the *Human Fertilisation and Embryology Act 2008*.) The presumption operates "unless the contrary is shown".

Clause 5 provides that the presumption would not apply where the father (or second female parent) is named on the deceased's birth certificate or equivalent official birth record.

Clause 6 introduces **Schedule 2** which would amend the *Inheritance (Provision for Family and Dependants) Act 1975.*

Schedule 2 would provide that a family provision claim could be made if the deceased died domiciled in England and Wales (as at present) and alternatively if the deceased's estate included, or was treated as including, certain property to which the domestic succession law of England and Wales applied (for example, if the deceased was not domiciled in this jurisdiction but owned land here, the applicable law condition would be satisfied). The court's power to make an order would not be limited to the money or other property which satisfied the applicable law condition.

Someone who was treated as "a child of the family" by the intestate person would be eligible to bring a claim for family provision regardless of whether that treatment was in relation to a marriage or civil partnership or was by a cohabiting couple or an individual.

A person who was being maintained by the deceased immediately before the death would no longer have to show that the deceased contributed more to the relationship in financial terms than the applicant did, and that the deceased assumed responsibility for that maintenance. The revised provision would treat a person as having been maintained by the deceased if the deceased had been making "a substantial contribution in money or money's worth towards the reasonable needs of that person, other than a contribution made for full valuable consideration pursuant to an agreement of a commercial nature". The Law Commission has stated that this is a narrower exception than under the current wording of "otherwise than for full valuable consideration" and that this will mean that contributions made between people in a domestic context should not be weighed against one another for these purposes.[25]

Schedule 2 would also make further amendments to the 1975 Act relating to the powers of the court; matters to which the court is to have regard; the time limit for applications; and joint tenancies; as detailed in the Explanatory Notes.

Clause 7 introduces **Schedule 3** which would amend enactments which determine, for various purposes, the date when representation was first taken out.

Clause 8 would amend the statutory power of trustees (in section 31 of the *Trustee Act 1925)* to use the income of trust funds for the maintenance, education or benefit of a beneficiary who is under 18 and has an interest in those funds. The Law Commission has given an example of when this power might arise:

> For example, if a trust fund invested in shares is held for the benefit of such of W's young children X, Y and Z as reach the age of 18, in equal shares, the trustees may use the power under section 31 to pay a maximum of one-third of the income (the dividends on the shares) for the maintenance, education or benefit of each child.[26]

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[25] Ministry of Justice CP6/2013, *Draft Inheritance and Trustees' Powers Bill,* 21 March 2013, p46

[26] Ministry of Justice CP6/2013, *Draft Inheritance and Trustees' Powers Bill,* 21 March 2013, p39

At present, the power is exercisable in respect of the trust property in which the beneficiary in question has an interest, and it extends to the whole or such part, if any, of the income of that property "as may, in all the circumstances, be reasonable". **Clause 8** would replace the words "as may, in all the circumstances, be reasonable" with the words "as the trustees may think fit". The Law Commission has stated the intended effect of this amendment and that it would:

> make it clear that the amount of the income used is a matter for the trustees' discretion, and is not limited by an objective standard of reasonableness. The general law on trustees' decision-making applies; the decision must be taken in good faith after due consideration of the circumstances".[27]

Clause 8 would also remove from section 31(1) of the *Trustee Act 1925* the proviso which lists factors to which the trustees are to have regard in exercising their discretion and imposes a specific restriction on the amount of income which may be paid out: "The removal of this proviso leaves trustees free to pay out as much of the income as they think fit; the requirement of the general law to consider all relevant factors before exercising their discretion is unaffected".[28]

Clause 8 would apply in accordance with **Clause 10**.

Clause 9 would amend section 32 of the *Trustee Act 1925*, which confers on trustees the power to make payments of capital for the advancement or benefit of a beneficiary who has a requisite type of entitlement to the capital of the trust fund. The terms of section 32 limit this power of advancement to a maximum of one half of the beneficiary's prospective share. **Clause 9** would remove the one-half limit, so that the power would enable trustees to exercise their discretion to pay out up to the whole of the capital of a beneficiary's prospective share for his or her advancement or benefit. **Clause 9** would also make some further amendments to section 32, which are explained in detail in the Explanatory Notes.

Clause 9 would apply in accordance with **Clause 10**.

Clause 10 sets out the circumstances in which **clauses 8 and 9** would apply to trusts and are detailed in the Explanatory Notes.

Clause 11 and **Schedule 4** would make minor and consequential amendments.

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[27] Ministry of Justice CP6/2013, *Draft Inheritance and Trustees' Powers Bill,* 21 March 2013, p39

[28] Ministry of Justice CP6/2013, *Draft Inheritance and Trustees' Powers Bill,* 21 March 2013, p40