

INHERITANCE AND TRUSTEES' POWERS BILL

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Inheritance and Trustees' Powers Bill as brought from the House of Lords on [date]. They have been prepared by the Ministry of Justice in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
2. The notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require any explanation or comment, none is given.

TERRITORIAL EXTENT AND APPLICATION

3. The Bill extends to England and Wales only. The Bill deals with one provision, relating to the adoption of children, which is within the legislative competence of the National Assembly for Wales. The consent of the National Assembly will be sought for this provision and any future amendments which fall within their competence.

BACKGROUND AND SUMMARY

4. The Inheritance and Trustees' Powers Bill implements the recommendations made by the Law Commission in Parts 2 to 7 of its Report, *Intestacy and Family Provision Claims on Death* (2011) Law Com No 331 published in December 2011.

The Law Commission's work was concerned with two areas of the law: the intestacy rules and the family provision legislation. In October 2009, the Law Commission published a consultation paper, *Intestacy and Family Provision Claims on Death* (2009) Law Commission Consultation Paper No 191. Following responses to this consultation, the Law Commission considered some aspects of trustees' powers more widely and a Supplementary Consultation Paper was published in May 2011.

Intestacy

5. The intestacy rules determine the distribution on a person's death of any of his or her property that is not governed by a valid will. They are largely contained in the Administration of Estates Act 1925 and the Intestates' Estates Act 1952. Priority is given to any surviving spouse or civil partner of the deceased, followed by blood relatives (children and other descendants, parents, siblings and their descendants, grandparents, aunts and uncles and their descendants).
6. The Law Commission's review considered all aspects of the intestacy rules, including the circumstances in which a surviving spouse or civil partner is required to share the deceased's property with other relatives, the order of priority between the different classes of relative and the way in which property is divided between the different generations within each class.

Family provision

7. The Inheritance (Provision for Family and Dependants) Act 1975 permits certain family members and dependants to apply to the court to vary the distribution of a deceased person's property, whether that is under the intestacy rules or the terms of a valid will. An application under the 1975 Act is often referred to as a claim for family provision.
8. The Law Commission's review considered the whole of the 1975 Act, including the categories of persons who are entitled to apply for an order under the Act, the factors the court must take into account when considering the application, the powers of the court to make orders and property that the court is able to take into account when making orders.

Trustees' powers

9. The intestacy rules require the creation of statutory trusts where beneficiaries are under 18 or property is to be shared between beneficiaries. The trustees of assets held under these trusts are usually (but not always) the personal representatives responsible for administering the estate.
10. The general law gives certain powers to trustees and imposes on them certain obligations. The Law Commission's project considered the powers and obligations under sections 31 and 32 of the Trustee Act 1925, which give trustees powers to distribute capital or income from the trust fund to a beneficiary who is under the age of 18, subject to certain restrictions.

The Inheritance and Trustees' Powers Bill

11. The Inheritance and Trustees' Powers Bill implements the Law Commission's recommendations by amending existing legislation, principally the Administration of Estates Act 1925, the Trustee Act 1925 and the Inheritance (Provision for Family and Dependants) Act 1975.

COMMENTARY ON CLAUSES

Clause 1: intestacy: surviving spouse or civil partner

12. Clause 1 amends the entitlement of a surviving spouse or civil partner of a person who has died intestate in two situations. First, where the deceased was also survived by “issue”, meaning a direct descendant (a child, grandchild, great-grandchild and so on). Secondly, where the deceased was not survived by any issue but was survived by at least one parent or at least one full sibling (or the issue of a full sibling).
13. The property of a person who has died, after payment of all debts and administrative expenses, is known as the residuary estate. The distribution of the residuary estate of a person who has died intestate is governed by section 46 of the Administration of Estates Act 1925. Section 46(1)(i) sets out in a table what is to happen if the intestate leaves a spouse or civil partner who survives for more than 28 days after the intestate’s death (see section 46(2A)).
14. In all cases, the surviving spouse or civil partner is entitled to all of the deceased’s “personal chattels” that are not disposed of by will. The Bill does not change that position but clause 3 changes the statutory definition of personal chattels. That is explained in more detail in the commentary on clause 3, below.
15. Clause 1(2) substitutes a new table at section 46(1)(i) of the Administration of Estates Act 1925 in place of the current table.
16. Paragraph (1) of the new table provides that, where the intestate leaves no issue, the residuary estate shall be held in trust for the surviving spouse or civil partner absolutely. This means that, in all cases where the deceased died intestate and was survived by a spouse or civil partner, that spouse or civil partner is the only beneficiary except where the deceased was also survived by issue. This changes the current law, under which a surviving parent or full sibling (or the issue of a full sibling) is entitled to share the estate after the surviving spouse or civil partner has received the deceased’s personal chattels and the first £450,000 of the residuary estate (this is referred to in section 46 as the “fixed net sum” and commonly known as a “statutory legacy”).
17. Paragraph (2) of the new table provides that, where the intestate leaves issue, the surviving spouse or civil partner is entitled to the deceased’s personal chattels and a statutory legacy (currently £250,000). Under current law, a surviving spouse or civil partner would be entitled to a life interest in half of anything that is left in the estate. This means that he or she may use the property and is entitled to the income from it until his or her own death, at which point the property itself passes to the deceased’s issue (who share it under the “statutory trusts” set out in section 47 of the Administration of

Estates Act 1925). Paragraph (2) changes this: instead of a life interest in half of the rest of the estate, the surviving spouse or civil partner will take that half of the rest of the estate absolutely, as his or her own. The other half of the balance of the estate will be held on the statutory trusts for the issue of the deceased, as under the current law.

18. Paragraph (2)(B) of the new table clarifies a point of uncertainty under the current law by providing that the statutory legacy accrues interest from the date of death calculated on a simple basis as opposed to a compound basis.
19. The text below the new table provides for the amount of the statutory legacy to be determined in future by a new Schedule 1A to the Administration of Estates Act 1925, which is explained in the commentary on clause 2 of and Schedule 1 to the Bill below.
20. Clause 1(3) substitutes a new section 46(1A) of the Administration of Estates Act 1925. This provides that the rate of interest which accrues from the date of death of the intestate on the statutory legacy (see paragraph (B) of case (2) of the new table at section 46(1)(i) of the Act) is the Bank of England rate that had effect at the end of the day on which the intestate died.
21. Clause 1(4) inserts new subsections (5) to (9) after subsection (4) of section 46 of the 1925 Act. The new subsection (5) defines the Bank of England rate as being either the rate announced by the Monetary Policy Committee of the Bank of England as the official bank rate, or any equivalent rate determined by the Treasury in the exercise of its emergency powers under section 19 of the Bank of England Act 1998 to give the Bank directions with respect to monetary policy. The new subsection (6) gives the Lord Chancellor power to amend the definition of Bank of England rate, for example if the Bank of England ceases to publish a rate using the term "official bank rate". The new subsection (8) provides that a statutory instrument containing an order made under this power is subject to annulment by either House of Parliament. This negative resolution procedure means that the new definition passes into law unless there is a resolution in either the House of Commons or House of Lords annulling it.
22. The new subsection (7) contains a broader power for the Lord Chancellor to amend section 46(1A) of the 1925 Act by substituting a different interest rate for the interest rate provided for by that subsection and to make any consequential changes to the section. The new subsection (9) provides that a statutory instrument containing any such order must be approved by a positive resolution of each House of Parliament.

Clause 2: the fixed net sum

23. Clause 2(1) inserts a new Schedule 1A into the Administration of Estates Act 1925. This new Schedule is set out at Schedule 1 to the Bill. It makes provision for determining the fixed net sum (often referred to as a "statutory legacy") to which a surviving spouse or civil partner is entitled before any

part of the estate is shared with any other beneficiary (under the amendments made by clause 1, only issue will be entitled to share the estate with the intestate's spouse under the intestacy rules). The detailed provisions are explained in the commentary on Schedule 1 below.

24. Clause 2(2) repeals section 1 of the Family Provision Act 1966. (This is done by repealing the whole of the 1966 Act; all substantive provisions apart from section 1 had already been repealed by other legislation.) Section 1 contained the Lord Chancellor's power to set the fixed net sum. On the coming into force of Schedule 1 to the Bill that power will be superseded by the powers in the new Schedule 1A to the Administration of Estates Act 1925.

Clause 3: definition of "personal chattels"

25. The table at section 46(1)(i) of the Administration of Estates Act 1925 provides that the surviving spouse or civil partner of a person who has died intestate is entitled to all of that person's "personal chattels". These are defined at section 55(1)(x).
26. Clause 3(1) substitutes for the current wording of section 55(1)(x) a new definition of personal chattels as "tangible movable property" with three defined exceptions. The first exception is money and securities for money, which is an exception that is found in the current statutory definition. The second exception is for property used at the death of the intestate solely or mainly for business purposes. The current statutory definition of personal chattels also excludes any chattels used at the death of the intestate for business purposes but the new definition adds the words "solely or mainly" to make clear that it is only where a chattel was used primarily for business purposes that it should be excluded under this exception and not pass to the surviving spouse or civil partner. The third exception, for property held at the death of the intestate solely as an investment, is wholly new. 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.
27. When the expression "personal chattels" is used in a will or codicil (a document which amends a will) it may be defined by reference to section 55(1)(x) of the 1925 Act. However, wills and codicils are executed on one date, but do not take effect until a later date - the death of the person who made the will. Clause 3(2) establishes how references in a will executed before the commencement of clause 3(1) to "personal chattels" defined by reference to section 55(1)(x), will be interpreted. This is established according to the date of execution of the will or codicil containing the

reference.

28. Where a will or codicil that defines “personal chattels” by reference to section 55(1)(x) of the 1925 Act is executed before clause 3(1) comes into force, clause 3(2) ensures that (subject to contrary intention) the will or codicil will be read as referring to the old definition of personal chattels even if the death occurs after clause 3(1) comes into force. Equally, where a will is executed before clause 3(1) comes into force, the fact that a codicil is made after that date is not in itself sufficient to oust the rule in clause 3(2). Where that later codicil itself makes, say, a gift of personal chattels defined according to section 55(1)(x) then the codicil will be read as referring to the new definition. Clause 3(2) is subject to contrary intention, so that it is open to a person making a will or codicil to make express provision for the new definition to apply.

Clause 4: adoption and contingent interests

29. Clause 4 concerns the rights of an adopted child to the estate of a parent who had died before the adoption. The general rule, set out in section 67(3) of the Adoption and Children Act 2002, is that after adoption the child is regarded for all purposes as the legal child of the adopter or adopters, and has no other legal parents. This can have consequences for the child's interests in property, where those interests depend on the legal relationship between the child and the former legal parent or parents.
30. Section 69(4) of the Adoption and Children Act 2002 contains exceptions to this rule. In particular, interests which are already vested in possession in the adopted child are not affected by adoption: for example, an inheritance by will which was left in such a way as to give the child an unconditional entitlement. Subsection (1) of clause 4 adds a further category of interest which is not affected by adoption, by adding a new paragraph (c) to section 69(4). It applies where that adoption occurs on or after the date on which the section comes into force (subsection (2)).
31. New paragraph (c) applies where, immediately before adoption, the child's then legal parent has already died and some or all of that parent's estate is held on trust – whether created by will or arising on intestacy – by which the child has a contingent interest which is not in remainder. Its effect is that the child's interest in that parent's estate is not affected by the change in the child's legal parentage on adoption.
32. A contingency is a condition which must be fulfilled before the beneficiary has an absolute entitlement. For example, if a child's parent died intestate with no other surviving family members, under the intestacy rules the whole estate would pass to the child contingent on reaching the age of 18. Such an interest is preserved by new paragraph (c) despite the adoption. Paragraph (c) does not apply if the contingent interest is in remainder to another beneficiary's interest. Contingent interests in remainder no longer arise under the intestacy rules, but may be created by will. For example, a parent

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makes a will leaving his or her estate in trust so that X has a right to the income for life and subject to that the child will take the estate if he or she reaches 25. The child's interest is contingent, but (if X is living at the date of the adoption) it is in remainder to X's interest and therefore not preserved by new paragraph (c).

Clause 5: presumption of prior death

33. 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. The rule does not apply to those whose parents later married or whose birth would otherwise be regarded in law as legitimate or legitimated (see Family Law Reform Act 1987, s 1; Legitimacy Act 1976, ss 2, 2A, 3, 4 and 10). In such cases, the administrators may presume that the intestate was predeceased by his or her father and also by any other person to whom the intestate was related only through his or her father. In the case of a person who has a female parent other than his or her mother by virtue of section 43 of the Human Fertilisation and Embryology Act 2008, the administrators may proceed on the basis that the deceased was not survived by the second female parent or any person related only through the second female parent (see the Family Law Reform Act 1987, s 18(2A)). The presumption operates "unless the contrary is shown".
34. Clause 5 amends section 18 of the 1987 Act by adding a new subsection (2ZA), which disapplies section 18(2) in certain circumstances. Those circumstances are that a person is recorded as the intestate's father, or as a parent (other than the mother) of the intestate in a register of births kept (or having effect as if kept) under the Births and Deaths Registration Act 1953, or in a record of births included in an index kept under section 30(1) of that Act. The reference to "a parent (other than the mother)" addresses the possibility of registration as a second female parent of a child in the circumstances set out in section 43 of the Human Fertilisation and Embryology Act 2008. The reference to indexes kept under section 30(1) of the 1953 Act is to cater for the fact that births may be recorded in registers which are not kept under the 1953 Act but are included in a searchable index kept under the Act. Examples include the marine register, the air register book of births and deaths, the hovercraft register book of births and deaths, and the service departments registers.

Clause 6: amendments of Inheritance (Provision for Family and Dependents) Act 1975

35. Clause 6 and Schedule 2 make amendments to the Inheritance (Provision for Family and Dependents) Act 1975. These are explained in the commentary on Schedule 2 below.

Clause 7: date when representation is first taken out

36. A grant of representation is a grant of probate made to executors appointed

under a will or a grant of letters of administration in other cases. Clause 7 and Schedule 3 amend section 23 of the Inheritance (Provision for Family and Dependents) Act 1975 and equivalent provisions in other statutes which require certain types of grant to be left out of account when determining the date when representation with respect to the estate of a deceased person was first taken out. These amendments are explained in the commentary on Schedule 3 below.

Clause 8: power to apply income for maintenance

37. Clause 8 amends the statutory power of trustees 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. 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 they 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.
38. Paragraph (a) concerns the assessment of the amount of income to be used under the power. Section 31(1)(i) of the Trustee Act 1925 states that the power is exercisable in respect of the trust property in which the beneficiary in question has an interest, and that it extends to "the whole or such part, if any, of the income of that property as may, in all the circumstances, be reasonable". Paragraph (a) amends that condition to 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.
39. Paragraph (b) removes the proviso to section 31(1) of the Trustee Act 1925. This proviso lists factors to which the trustees are to have regard in exercising their discretion – the beneficiary's age and requirements, and the circumstances generally – and imposes a specific restriction on the amount of income which may be paid out. That restriction applies where the trustees have notice that the income of one or more other trust funds is also applicable for the maintenance, education or benefit of the beneficiary in question, and limits the payments to a proportionate part of the income, so far as practicable (unless the whole of the income is paid out, or the court directs otherwise). 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.
40. These amendments apply in accordance with clause 10.

Clause 9: power of advancement

41. Clause 9 amends 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. This is known as the statutory power of advancement. For instance, the trustees of the trust described at paragraph 38 above could use this power to make payments of capital for the benefit of X, Y and Z. Each of those beneficiaries is contingently entitled to one-third of the capital of the trust fund on reaching the age of 18 (see paragraph 33 above). The trustees could sell some of the shares which represent the capital of the trust fund and use this statutory power to make payments from the proceeds for the benefit of X, Y and Z; for example, to pay for an educational trip.
42. The terms of section 32 limit this power of advancement to a maximum of one half of the beneficiary's prospective share. Subsection (3)(b) of clause 9 removes that one half limit, so that the power enables trustees in the exercise of 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.
43. Subsection (2) amends the statutory power of advancement to make it clear that the trustees are able not only to pay out cash in the exercise of the statutory power of advancement but also to transfer or apply property. For example, the trustees might wish to create another trust in favour of one of the beneficiaries and his or her family; they could transfer the shares direct to the trustees of the new trust. This clarifies and extends the effect of existing case law (*Re Collard's Will Trusts* [1961] Ch 293).
44. Subsection (3)(a) amends section 32(1)(a) of the Trustee Act 1925 to make it clear that advancements under the power, whether in money or other property, may not exceed the beneficiary's prospective share of the capital of the trust fund.
45. Subsection (4) carries this reform through to section 32(1)(b) of the Trustee Act 1925 to require that any non-cash assets advanced under the power are brought into account, in the same way as a cash payment, as part of the beneficiary's share if and when he or she becomes absolutely entitled to it. Paragraph (c), which makes the exercise of the power of advancement subject to the consent of other trust beneficiaries in certain circumstances, is also amended to apply equally to cash and non-cash advancements: subsection (5).
46. These amendments apply in accordance with clause 10.
47. Subsection (6) makes it clear that if trustees have exercised their power of advancement under section 32(1) of the Trustee Act 1925, the money or other property advanced to a beneficiary may be treated as a percentage of the overall value of the trust (as opposed to strictly according to their monetary value) when it is brought into account. Trustees may exercise their

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choice to treat advancements in this way either expressly, for example in writing in the trust deed itself or in an implied way, for example through the act of dividing up the trust fund amongst the beneficiaries.

Clause 10: applications of sections 8 and 9

48. Clause 10 sets out the circumstances in which clauses 8 and 9 apply to trusts.
49. Subsection (2) concerns the amendments made by clause 9 to include within the statutory power of advancement under section 32 of the Trustee Act 1925 the ability to transfer or apply property other than money. These amendments apply to all trusts whenever established. For example, these reforms to the power would apply in relation to a trust which arose on the intestacy of a person who died before clause 9 came into force.
50. Under subsections (1) and (3), the removal of the one-half restriction on the statutory power of advancement pursuant to subsection (3)(b) of clause 9, and the reforms to the power in section 31 of the Trustee Act 1925 made by clause 8, apply as set out in subsections (4) and (5).
51. Under subsection (4), those reforms apply in relation to all interests under trusts established after the coming into force of these provisions. For example, if a trust arises under the intestacy rules on a death which occurs after the provisions have come into force, these statutory powers will apply as reformed to all interests under the trust. The same applies if the trust is created by will in these circumstances (regardless of when the will was executed), subject to amendment or exclusion of the power by the terms of the will (section 69(2) of the Trustee Act 1925). Similarly, and again subject to contrary intention expressed in the trust instrument, all interests under a trust created in lifetime after the provisions come into force will have the benefit of the powers as reformed.

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52. Subsection (5) extends the application of the reforms to trust interests established by the exercise, after the reforms come into force, of any power held in relation to a trust, whether that power was conferred by the terms of the trust or by statute. This is relevant where the trust in question is already in existence before the reforms. For example, the trustees of such an existing trust may hold a power of appointment, enabling them to create new interests in favour of one or more of a class of beneficiaries. If that power is exercised after these provisions come into force to create new trust interests (without establishing a separate settlement, in which case subsection (4) would apply), the interests so created have the benefit of the statutory powers as amended. For example, suppose that the trustees exercised the power of appointment so as to give A an entitlement to a tenth of the trust fund contingent on reaching 25. They would then be able to use the statutory power of advancement in section 32 of the Trustee Act 1925 as amended by clause 9(3)(b) to apply anything up to the whole of that one-tenth share for A's advancement or benefit, by virtue of that contingent interest.

Clause 11: minor and consequential amendments

53. Clause 11 and Schedule 4 make minor and consequential amendments. These are explained in the commentary on Schedule 4 below.

Schedule 1: determination of the fixed net sum

54. Clause 2 of and Schedule 1 to the Bill make provision for determining the fixed net sum (often referred to as a "statutory legacy") to which a surviving spouse or civil partner is entitled under section 46 of the Administration of Estates Act 1925. 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 (see section 1 of the Family Provision Act 1966). Clause 2 inserts a new Schedule 1A into the Administration of Estates Act 1925. The text of that new Schedule is set out at Schedule 1 to the Bill. References to paragraph numbers below are to the paragraph numbers of the new Schedule 1A.
55. Paragraph 2 provides that the amount of the fixed net sum after the coming into force of the Schedule is to be the same as it was immediately before.
56. Paragraph 3(1) retains the Lord Chancellor's power to set the level of the fixed net sum by order. Paragraph 3(2) provides that any such order relates only to deaths occurring after the coming into force of the order. Paragraph 3(3) provides that the current level of the fixed net sum (see paragraph 2) will be superseded once the first order is made under the power in paragraph 3(1).
57. Paragraph 3(4) provides that a statutory instrument containing an order made under paragraph 3(1) is subject to annulment by either House of Parliament. This means that the new amount of the fixed net sum passes into

law unless there is a resolution in either the House of Commons or House of Lords annulling it. Paragraph 3(5) disapplies this negative resolution procedure in the case where the Lord Chancellor determines the amount of the fixed net sum without using the index-linking mechanism set out in paragraph 7 of the new Schedule, or amends paragraph 7 under the powers set out in paragraph 8. In those cases, each House of Parliament must positively approve the statutory instrument containing the order (see paragraph 6(3)).

58. Paragraph 4 requires the Lord Chancellor to make an order setting the fixed net sum if the consumer prices index has risen by more than 15%.
59. Paragraph 4(1) provides that the requirement applies when a figure for the consumer prices index for a month has become available, and is more than 15% higher than the consumer prices index for the base month (that is the month in which Schedule 1A came into force, or if one or more orders under paragraph 3(1) have been made before the publication date, the most recent month for which a figure for the consumer prices index was available when the Lord Chancellor made the most recent of those orders: see paragraph 4(4)). The consumer prices index for any given month is made available by being published on the Office for National Statistics website. The future monthly publication dates are available on this website up to a year in advance.
60. Paragraph 4(2) requires such an order to be made within 21 days of the relevant consumer prices index figure becoming available. Paragraph 4(3) provides that if, on making such an order the Lord Chancellor determines the amount of the fixed net sum without using the index-linking mechanism set out in paragraphs 6 and 7, the requirement to make the order within 21 days will have been met as soon as the statutory instrument containing the order is laid before Parliament.
61. Paragraph 4(4) defines the “base month” against which a potential rise in the consumer prices index is to be measured and the “consumer prices index” for the purposes of this paragraph. “Consumer prices index” means the all items consumer prices index published by the Statistics Board or any substitute index published by the Statistics Board.
62. Paragraph 5 requires the Lord Chancellor to make an order setting the fixed net sum at least every five years. The first such order must be made within five years of the date on which the new Schedule comes into force. Subsequent orders must be made within five years of the previous order.
63. Paragraph 6 provides that, unless the Lord Chancellor otherwise determines, the fixed net sum specified in each order should be the amount given by following the procedure set out in paragraph 7. That procedure “index-links” the fixed net sum by increasing it by an amount that reflects any increase in the consumer prices index measure of economic inflation. The

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procedure operates on an “upwards only” basis; if there has been no inflation or there has been deflation in the economy, the amount of the fixed net sum does not change under the paragraph 7 procedure.

64. Paragraphs 6(2) to 6(4) apply where the Lord Chancellor does decide to set the fixed net sum without using the index-linking mechanism at paragraph 7.
65. Paragraph 6(2)(a) provides that the Lord Chancellor may set the fixed net sum at any amount, including an amount equal to or lower than the pre-existing figure.
66. Paragraph 6(2)(b) requires the Lord Chancellor to prepare a report stating the reason why it has been decided to set the fixed net sum without using the index-linking mechanism at paragraph 7. This report must be laid before Parliament before or at the same time as the instrument containing the draft order is laid before Parliament (paragraph 6(4)).
67. Paragraph 6(3) requires any order setting the fixed net sum at a level other than that obtained by the index-linking procedure to be positively approved by a resolution in each House of Parliament.
68. Paragraph 7 sets out the procedure to be used to determine the amount of the fixed net sum in any case covered by paragraph 6(1) (that is, in every case except where the Lord Chancellor has decided otherwise). This involves ascertaining the level of the consumer prices index for the current month (that is, the most recent month for which a figure is available when the Lord Chancellor makes the statutory instrument setting the new level of the fixed net sum: see paragraph 7(4)). This figure is compared with the equivalent figure for the base month (that is, the month that was the “current month” for the previous order or, in the case of the first order made under the Schedule, the month in which the Schedule came into force: see paragraph 7(4)).
69. If the level of the consumer prices index for the current month is higher than that for the base month, then the new amount of the fixed net sum is calculated by increasing the existing figure by the same percentage as the percentage increase in the two consumer prices index figures (paragraph 7(1)), and then rounding the resulting figure up to the next multiple of £1,000 (paragraph 7(2)).
70. If the level of the consumer prices index for the current month is the same or lower than that for the base month, then the amount specified in the order is the same as the existing amount (unless the Lord Chancellor otherwise determines). The fixed net sum therefore remains the same (paragraph 7(3)).
71. Paragraph 7(4) defines the terms “base month”, “current month” and “consumer prices index” for the purposes of paragraph 7.

72. Paragraph 8 gives the Lord Chancellor power to amend paragraphs 4 and 7 by specifying an index other than the consumer prices index and to make any other amendments to paragraphs 4 and 7 that are required as a result of that change. This power is intended to recognise that the consumer prices index may cease to be the most appropriate index to use (for example, it may no longer be published, or the Government may decide that the retail prices index or some other index is a more appropriate measure of inflation for these purposes). Paragraph 8 enables paragraphs 4 and 7 to be amended by order without the need for further primary legislation. A statutory instrument containing any such order must be approved by a positive resolution of each House of Parliament.

Schedule 2: amendments of Inheritance (Provision for Family and Dependants) Act 1975

73. Clause 6 and Schedule 2 make amendments to the Inheritance (Provision for Family and Dependants) Act 1975.
74. Paragraph 2 of Schedule 2 amends section 1(1) of the 1975 Act, which sets out the categories of relatives and dependants who can apply under the Act. These categories include, at section 1(1)(d), any person who was treated by the deceased as a “child of the family” in relation to a marriage or civil partnership to which the deceased was at any time a party. Paragraph 2 extends that category of applicant by amending section 1(1)(d) to include any person who was treated by the deceased as a child of the family, not in relation to a marriage or civil partnership, but in relation to any other family in which the deceased had a parental role. The requirement that the deceased stood in a parental role in that family clarifies that the relationship between the deceased and the applicant needs to have been akin to that between a parent and a child. Other family members who form part of the deceased’s family, but in relation to whom the deceased did not stand in a parental role, are not brought within the scope of the category.
75. Paragraph 2(3) inserts new subsection (2A) in section 1 of the 1975 Act. This provision establishes that an applicant can be treated as a child of the family (otherwise than in relation to the deceased’s marriage or civil partnership) even if that family only existed in the relationship between the deceased and the applicant. Thus, a “single parent family” is included within the scope of section 1(1)(d) as amended.
76. Paragraph 3 of Schedule 2 amends section 1(3) of the 1975 Act. That subsection qualifies the interpretation of section 1(1)(e), which permits a person to make an application under the Act if immediately before the death of the deceased he or she was being maintained, either wholly or partly, by the deceased. Such applicants are usually described as “dependants” and section 1(3) as currently worded provides that a person shall be treated as being maintained by the deceased if the deceased was, otherwise than for full valuable consideration, making a substantial contribution towards that

person's reasonable needs.

77. The words "otherwise than for full valuable consideration" have been interpreted as requiring the court to balance the contribution made by the deceased towards the needs of the applicant against any benefits flowing the other way (from the applicant to the deceased). This is the case even if the applicant and the deceased were living in an interdependent domestic relationship with no commercial aspect. If the "balance sheet" shows that the applicant contributed more to the deceased than vice versa, then the applicant cannot be said to have been maintained by the deceased and cannot apply under section 1(1)(e).
78. The new wording of section 1(3) still requires the deceased to have been making a substantial contribution towards the reasonable needs of the applicant but the words "otherwise than for full valuable consideration" are omitted. Instead, there is a narrower exception for any contribution that was made for full valuable consideration pursuant to an arrangement of a commercial nature. This will mean that contributions made between people in a domestic context should not be weighed against one another for these purposes.
79. Paragraph 4 of Schedule 2 amends section 2 of the 1975 Act, which governs the court's powers to make orders if it is satisfied that the deceased's will or the intestacy rules (or a combination of both) did not make reasonable provision for the applicant.
80. Paragraph 4(2) inserts a new section 2(1)(h) into the 1975 Act, giving the court an express power to vary, for the applicant's benefit, the trusts on which the deceased's estate is held (whether these are trusts arising on intestacy or under a will or both). This provides a more direct way of achieving a result that under the current law may require the creation of a new trust or trusts to replace the existing trust or trusts under which the estate is held.
81. Paragraph 4(3) concerns the assessment of the net estate of the deceased. Under section 2 of the 1975 Act, the court may make various orders in relation to the net estate, such as the payment of a lump sum to the applicant. The net estate is defined at section 25(1) of the 1975 Act, which specifies the assets which are included and provides for the deduction of funeral, testamentary and administration expenses, debts and liabilities, including inheritance tax payable out of the estate. It is possible, under section 19(1) of the 1975 Act, for the calculation of such liabilities to be affected by the making of an order under section 2; for example, because changes in the way in which the estate is distributed affect the calculation of tax.
82. Paragraph 4(3) adds a new subsection (3A) to section 2 of the 1975 Act, confirming that in making an order under section 2 the court may assess the

net estate on the assumption that the order has already been made. The court may therefore make an order which extends to the whole of the net estate after the liabilities have been recalculated in accordance with that order.

83. Paragraph 5 of Schedule 2 amends section 3 of the 1975 Act, which sets out matters to which the court is to have regard when exercising its order-making powers under section 2 of the Act. Where the applicant was the spouse or civil partner of the deceased, one of the matters to which the court is to have regard is the award that a court would have made in proceedings for “ancillary relief” had the marriage or civil partnership ended in divorce or dissolution: section 3(2) of the 1975 Act. The words added by paragraph 5(2) make clear, so as to avoid any uncertainty, that this exercise is not to be regarded as setting either a lower limit or an upper limit on the level of any award under the 1975 Act.
84. Paragraph 5(3) of Schedule 2 concerns matters to which the court is to have regard where the application is made by virtue of section 1(1)(d) of the 1975 Act, on the basis that the deceased treated the applicant as a child of the family. It amends paragraphs (a) and (b) of section 3(3) of the 1975 Act to clarify the matters which are there set out, in order to avoid any uncertainty consequent on the amendments also made to section 3(4) of the 1975 Act, discussed immediately below.
85. Paragraph (a) of section 3(3), as amended, directs the court to have regard to whether the deceased maintained the applicant; and if so, to the duration of that maintenance, the basis on which it was provided, and how much maintenance the deceased contributed. New paragraph (aa) of section 3(3) requires the court also to have regard to whether the deceased assumed responsibility for the applicant’s maintenance, and if so, to what extent. A necessary consequential amendment is made to paragraph (b) of section 3(3), which concerns the requirement for the court to have regard to whether – if the deceased maintained or assumed responsibility for maintaining the applicant – the deceased did so in the knowledge that the applicant was not his or her own child.
86. Paragraph 5(4) of Schedule 2 amends section 3(4) of the 1975 Act, which sets out matters to which the court is to have regard in relation to an application brought by a dependant: that is, on the basis that the applicant was maintained by the deceased, under section 1(1)(e) of the 1975 Act. The amendments separate two issues to which the court is to have regard. Under section 3(4)(a), the court must consider the duration of the maintenance provided, the basis on which it was provided, and the extent of the contribution thereby made by the deceased. Under section 3(4)(b), the court must also have regard to whether the deceased assumed responsibility for the applicant’s maintenance (beyond the actual provision of maintenance) and if so, the extent of that assumption of responsibility. The requirement in the case law as it currently stands that such an assumption of responsibility must be present in order for an applicant to qualify to apply for family

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provision as a dependant is thereby removed. An applicant qualifies to apply under the 1975 Act as a dependant if he or she satisfies the terms of section 1(1)(e), read with section 1(3); see paragraphs 77 to 79 above.

87. Paragraph 6 of Schedule 2 amends section 4 of the 1975 Act to expressly permit an application to be made under the Act before a grant of representation has been made in respect of the estate. A grant of representation is a grant of probate made to executors appointed under a will or a grant of letters of administration in other cases.
88. Paragraph 7 of Schedule 2 amends section 9 of the 1975 Act, which governs the way in which the court treats property which the deceased co-owned with others as a beneficial joint tenant immediately before his or her death. Under this form of co-ownership, the death of any one co-owner causes that co-owner's undivided share of the property to pass automatically to the other co-owners. It does not therefore form part of the deceased co-owner's estate. Section 9 permits the court to treat the deceased's severable share of any such property as part of the deceased's net estate to such extent as appears to the court to be just in all the circumstances of the case. Once included in the net estate for these purposes, the property can be the subject of an order under section 2 of the Act.
89. Paragraph 7 amends section 9 of the 1975 Act in two ways. First, it omits the words "before the end of the period of six months from the date on which representation with respect to the estate of the deceased was first taken out". This permits the court to exercise the section 9 power even where the application had been made more than six months after a grant of representation was first taken out (if the court has given permission for the application to be made; see section 4 of the 1975 Act).
90. The second amendment removes the words "at the value thereof immediately before his death" and inserts a new subsection (1A). The current wording was considered by the Court of Appeal in *Dingmar v Dingmar* [2006] EWCA Civ 92 and its meaning was found to be unclear. The amendment is intended to make clear that when considering how to value the deceased's severable share in a property, the court will, as a general rule, have regard to the value of the property at the date the claim is heard, but that the court retains the discretion to choose a different date if appropriate. The default position described here reflects the approach throughout the 1975 Act; but, for example, the property may have been sold, or other circumstances may make another valuation date more appropriate.

Schedule 3: determination of date when representation is first taken out

91. Clause 7 and Schedule 3 amend section 23 of the Inheritance (Provision for Family and Dependents) Act 1975 and equivalent provisions in other statutes which require certain types of grant to be left out of account when determining the date when representation with respect to the estate of a

deceased person was first taken out. These are section 31(9) of the Matrimonial Causes Act 1973, section 20(4) of the Administration of Justice Act 1982, paragraphs 7 and 11 of Schedule 1 to the Children Act 1989, and paragraph 60 of Schedule 5 to the Civil Partnership Act 2004.

92. The significance of the determination of this date depends on the particular statutory context. An application for an order under section 2 of the 1975 Act, for example, must be made within six months of this date unless the court gives permission for a late application (see section 4 of the 1975 Act).
93. Under section 23 (and the other statutory provisions amended by Schedule 3) grants limited to settled land and to trust property are left out of account as are grants limited to either real estate or to personal estate, unless a grant limited to the remainder of the estate has previously been made or is made at the same time. There are a number of other types of grant which give the personal representatives certain powers (for example, to collect in the assets of the estate and protect them or to represent the estate in litigation) but do not permit any property in the estate to be distributed. There is uncertainty under the current law over whether the making of such a grant counts as the first taking out of representation for the purposes of section 23 (and by analogy for the various purposes in the other statutes which use the same wording). There is also uncertainty over the status for these purposes of a grant made outside the United Kingdom.
94. Clause 7 and Schedule 3 clarify this uncertainty by substituting in each case new provisions in place of the existing provisions. These maintain the current position by leaving out of account grants limited to settled land and to trust property as well as grants limited to either real estate or to personal estate, unless a grant limited to the remainder of the estate has previously been made or is made at the same time. A grant limited to trust property is issued where the deceased held legal title to property as trustee for others and there is no other estate for which a grant is required. A limited grant is needed to permit the personal representatives to deal with the trust property but it does not permit the distribution of any of the deceased's own property. Similarly, succession to settled land is governed by special rules and is not available for distribution by the personal representatives as part of the deceased's estate. The new provisions expressly exclude from consideration any other grant which also does not permit any of the estate to be distributed. The new provisions also require grants made outside the United Kingdom to be left out of account. For these purposes, a grant which is "resealed" in the United Kingdom under the Colonial Probates Act 1892 is treated as a grant made in the United Kingdom. Any such grant is taken to have been made on the date it was sealed and not the date on which the original grant was taken out.

Schedule 4: minor and consequential amendments

95. Paragraph 1 of Schedule 4 makes minor and consequential amendments to the Administration of Estates Act 1925.
96. Paragraph 1(2) omits section 46(3) of the 1925 Act, which operates in limited circumstances where an intestate and his or her younger spouse or civil partner died in circumstances rendering it uncertain which one survived the other. Ordinarily, section 184 of the Law of Property Act 1925 would deem the younger spouse or civil partner to have survived the intestate but section 46(3) provides that section 46 is to have effect as if the younger spouse or civil partner had not survived the intestate. In other words, for these limited purposes only, section 46(3) disapplies the deemed survival under section 184 of the Law of Property Act 1925. But section 46(2A) of the Administration of Estates Act 1925 (inserted by the Law Reform (Succession) Act 1995) has rendered section 46(3) redundant. Section 46(2A) operates where the intestate's spouse or civil partner survives the intestate but dies within 28 days of the intestate's death. In those circumstances, the spouse or civil partner is deemed not to have survived. Therefore, in the circumstances contemplated by section 46(3), the younger spouse or civil partner is deemed by section 46(2A) not to have survived for the purposes of the intestacy rules. Section 46(3) therefore no longer serves a purpose and can be repealed.
97. Paragraph 1(3) omits section 47A of the Administration of Estates Act 1925, which gives a surviving spouse or civil partner a right to redeem a life interest arising on intestacy. The reforms enacted under clause 1 of the Bill mean that no further life interests will be created under the intestacy rules. Section 47A will therefore become redundant for deaths after the coming into force of clause 1 and can be repealed.
98. Paragraph 1(4) omits section 48(2)(b) of the Administration of Estates Act 1925, which gives personal representatives power to raise capital to enable the purchase or redemption of the surviving spouse or civil partner's life interest by borrowing against the security of the rest of the estate. The reforms enacted under clause 1 of the Bill mean that no further life interests will arise under the intestacy rules. Section 48(2)(b) will therefore become redundant for deaths after the coming into force of clause 1. Paragraph 1(4) therefore omits section 48(2)(b) and amends the rest of section 48 accordingly.
99. Paragraph 1(5) omits section 49(4) of the Administration of Estates Act 1925, which clarifies the way in which the word "property" is used in section 47A and is rendered unnecessary by the repeal of section 47A.
100. Paragraph 2 of Schedule 4 makes minor and consequential amendments to the Intestates' Estates Act 1952, Schedule 2 of which governs the operation of a surviving spouse or civil partner's right to appropriate his or her former matrimonial or civil partnership home.

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101. Paragraph 2(2) omits paragraph 1(4) of Schedule 2 to the 1952 Act. That paragraph deals with the treatment of a spouse or civil partner's life interest created under the intestacy rules and is rendered redundant by clause 1 of the Bill, which has the effect that no such interests will be created in future.
102. Paragraph 2(3) substitutes new wording for paragraph 3(3) of Schedule 2 to the 1952 Act to take account of the repeal of section 47A of the Administration of Estates Act 1925.
103. Paragraph 3 of Schedule 4 amends the Administration of Justice Act 1977 by omitting section 28(1), which inserted subsection (1A) into section 46 of the Administration of Estates Act 1925 (giving the Lord Chancellor power to set the interest rate that accrues on the fixed net sum to which a surviving spouse or civil partner is entitled). Clause 1(3) of the Bill substitutes a new subsection (1A) into section 46 of the 1925 Act, rendering section 28(1) of the 1977 Act redundant.
104. Paragraph 4 of Schedule 4 amends the Inheritance Tax Act 1984 to take account of the repeal of section 47A of the Administration of Estates Act 1925.
105. Paragraph 5 of Schedule 4 amends the Law Reform (Succession) Act 1995 to take account of the amendment of section 1(1) of the Inheritance (Provision for Family and Dependants) Act 1975, and the restatement of the list of categories of person eligible to make an application for family provision in new section 1(1ZA) of that Act.
106. Paragraph 6 of Schedule 4 amends the Civil Partnership Act 2004 to take account of the amendment of section 1(1) of the Inheritance (Provision for Family and Dependants) Act 1975, and the restatement of the list of categories of person eligible to make an application for family provision in new section 1(1ZA) of that Act.

FINANCIAL EFFECTS AND PUBLIC SECTOR MANPOWER

107. The Bill is not expected to have any significant effect on public expenditure and is not expected to have any effect on public service manpower.

SUMMARY OF THE IMPACT ASSESSMENT

108. An impact assessment has been prepared. It has not been possible to quantify the costs or benefits of the Bill because there is limited information on case volumes and the value of estates. A number of qualitative benefits for beneficiaries, the Ministry of Justice and legal service providers have been identified. The Bill is not judged to have a direct impact on business. The impact assessment is available from the Ministry of Justice, Criminal Law and Legal Policy Unit, 6.20, 102 Petty France, London SW1A 9AJ.

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as brought from the House of Lords on 10 February 2014 [Bill 172].*

COMPATIBILITY WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS

109. A statement has been made pursuant to section 19 of the Human Rights Act 1998 that the Bill is compatible with the European Convention on Human Rights.

COMMENCEMENT

110. Other than clause 12, which will come into force on the date the Bill is passed, the provisions of the Bill will be brought into force on such day as is specified by order made by the Lord Chancellor (clause 12(2)).

INHERITANCE AND TRUSTEES' POWERS BILL [HL]

EXPLANATORY NOTES

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