EXPLANATORY MEMORANDUM TO

THE COMMUNITY LEGAL SERVICE (FUNDING) (AMENDMENT NO.2) ORDER 2010 (REVOCATION) ORDER 2010

2010 No. 2478

1. This explanatory memorandum has been prepared by the Ministry of Justice (MoJ) and is laid before Parliament by Command of Her Majesty. It contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1. This Order revokes the Community Legal Service (Funding) (Amendment No.2) Order 2010 (SI 2010 No.1109) which amends the Community Legal Service (Funding) Order 2007 (SI 2007/2441).

2.2. The Community Legal Service (Funding) (Amendment No.2) Order 2010 sets out revised remuneration rates and fees which were due to be payable for funded legal services and requires the Legal Services Commission to pay remuneration for advocacy in certain family proceedings under the rates and fees in Schedule 2 to the Order. The Order was laid on 31 March 2010 and was due to come into force on 14 October 2010 with the original date for the commencement of the new civil legal aid contracts.

2.3. On 27 August 2010, the Law Society commenced judicial review proceedings of the Legal Services Commission's family tender exercise, challenging its lawfulness. As a result, the Legal Services Commission agreed to a one month extension of the current Unified Civil Contract until midnight on 14 November 2010. The judicial review application was listed for an expedited rolled-up hearing on 21 and 22 September 2010. The hearing commenced on 21 September but was then unexpectedly adjourned. The full hearing took place on 23, 24 and 27 September 2010. On 30 September, the court gave its oral judgment. The judicial review claim succeeded for the detailed reasons given in that oral judgment.

2.4. The court granted the Legal Services Commission permission to appeal within 14 days of receipt of the written judgment which, as at 11 October 2010, has yet to be received. The Legal Services Commission is currently considering the judgment and its implications, including whether or not to appeal. Consequently, the position in respect of the new contracts and fee schemes (to which the provisions of the Community Legal Service (Funding) (Amendment No.2) Order 2010 relate), is under consideration following the court’s judgment. In the light of that current position, this Order therefore revokes the Community Legal Service (Funding) (Amendment No.2) Order 2010. This is being taken as an interim measure given the current position in respect of the contracts and fee schemes to

which that Order relates. As those schemes cannot come into force of 14 October, the Order is being revoked on an interim basis, pending determination of the way forward in the light of the court's judgment.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This Order is being laid in breach of the 21-day rule for laying Statutory Instruments before they come into force for the reasons given below.

3.2 This Order needs to come into force by 13 October 2010 at the latest as The Community Legal Service (Funding) (Amendment No.2) Order 2010 (which this Order revokes) would otherwise come into force on 14 October 2010. The reasons for revoking that Order and the timing of the revocation are fully explained at paragraphs 2.3 and 2.4 above.

4. Legislative Context

4.1. The Lord Chancellor makes this Order in exercise of the powers conferred by section 6(4) and 25(8A) of the Access to Justice Act 1999. The Lord Chancellor has consulted the General Council of the Bar and the Law Society in accordance with section 25(2) of that Act and has had regard to the matters specified in section 25(3) of that Act.

4.2. The instrument is subject to the negative resolution procedure under section 25(10) of the Access to Justice Act. It revokes the Community Legal Service (Funding) (Amendment No.2) Order 2010 (SI 2010 No.1109) which amends the Community Legal Service (Funding) Order 2007 and revokes the Community Legal Service (Funding) (Counsel in Family Proceedings) Order 2001 (S.I. 2001/1077).

5. Territorial Extent and Application

5.1. The Order extends to England and Wales.

6. European Convention on Human Rights

6.1. As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy Background

7.1 In November 2006, in *Legal Aid Reform: the Way Ahead* (Nov 2006), the Government's response to Lord Carter's report into legal aid procurement, the Government set out its intention to abolish the Family Graduated Fee Scheme (FGFS) barrister fee scheme, and to move towards a new harmonised payment system for family advocacy work by both solicitors and barristers. The FGFS,

introduced in May 2001, was developed over a number of years in close consultation with the Bar and the Family Law Bar Association (FLBA). Barristers receive fixed fees for certain activities, and these fixed fees can be increased by a variety of uplifts, depending on factors in the case. These extra payments are controlled by the judiciary – who approve the uplifts at the end of the hearing or case.

7.2 The fee schemes contained in the Community Legal Service (Funding) (Amendment No.2) Order 2010 are designed to help control inflationary growth and maximise access to legal aid for the future.

7.3 The joint MoJ and Legal Services Commission (LSC) consultation, *Family Legal Aid Funding from 2010*, focused on two payment schemes: The Private Family Law Representation Scheme (PFLRS), designed to bring private family work (excluding advocacy) within a standard fee regime, and The Family Advocacy Scheme (FAS), designed to create a single graduated fee scheme covering payments to both solicitor advocates and barristers for public and private family law cases. The proposed fee schemes would replace hourly rates with standard fees and were designed to be cost neutral against 2007/08 average case costs.

8. Consultation outcome

8.1. The Bar Council and Law Society were consulted on the draft Order pursuant to section 25(2) of the Access to Justice Act 1999. The Association of Lawyers for Children, the Family Law Bar Association, President of the Family Division, Advice Services Alliance, Resolution and Legal Aid Practitioners' Group were also consulted on the draft Order since they had been consulted on the draft of the Community Legal Service (Funding) (Amendment No.2) Order 2010.

8.2. Five responses were received to the consultation. Three of the respondents had no comments on the proposed Order. The Bar Council and FLBA (who sent a joint response) and the ALC were concerned that the Order may indicate that the fee schemes will not be implemented. However, as explained at paragraph 2.4 above, the Order is simply an interim measure flowing from the fact that the way forward and timetable are currently under consideration in the light of the judgment.

9. Guidance

9.1. Information on the *Family Legal Aid Funding from 2010* consultation process can be found on the LSC website at:
https://consult.legalservices.gov.uk/inovem/consult.ti/FamilyFees2008/consultationHome

10. Impact

10.1. An Impact Assessment of the *Family Legal Aid Funding from 2010* consultation, including an equality impact assessment, is available at: https://consult.legalservices.gov.uk/gf2.ti/f/137410/3070853.1/pdf/-/Annex_A_IA_21.10.09.pdf

11. Regulating small business

11.1. The legislation does not specifically apply to small businesses.

12. Monitoring & review

12.1. Not applicable.

13. Contact

13.1. Any enquiries about the contents of this memorandum should be addressed to: Jackie Hartley, Access to Justice Policy Strategy Directorate, Ministry of Justice, 102 Petty France, London SW1H 9AJ.
Email: Jackie.Hartley@justice.gsi.gov.uk Tel. 020 3334 4237.