EXPLANATORY MEMORANDUM TO

THE FAMILY PROVISION (INTESTATE SUCCESSION) ORDER 2008

2008 No.

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 The purpose of the instrument is to increase the statutory legacy. This is the fixed net sum payable to a surviving spouse or civil partner from the estate of a person dying intestate, that is without leaving a valid will. The statutory legacy levels were last increased in 1993. The increase will apply in relation to the estate of a person dying on or after 1st February 2009.

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

3.1 The instrument is subject to a negative draft resolution procedure, which requires the statutory instrument to be laid in draft before both Houses of Parliament for 40 days before it can be made.

4. Legislative Context

4.1 Section 1 of the Family Provision Act 1966 enables the Lord Chancellor to set from time to time, by way of a statutory instrument, the statutory legacy. The current statutory legacy levels are considered to be too low.

4.2 The statutory instrument currently in force is the Family Provision (Intestate Succession) Order 1993 (SI 1993/2906) which will be superseded by the new instrument from 1st February 2009 by virtue of section 1(3) of the Family Provision Act 1966.

5. Territorial Extent and Application

5.1 The instrument applies to England and Wales only. Scotland and Northern Ireland each have their own jurisdiction on succession matters.

6. European Convention on Human Rights

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

7. Policy background

- ***What is being done and why***

7.1 Section 46 of the Administration of Estates Act 1925 (as amended) sets out rules for the distribution of a deceased person's estate on intestacy. Specifically,

these rules set out who among the deceased person's family will receive what from the estate. If a person dies leaving a surviving spouse or civil partner and children or other close relatives, and the estate is of sufficient value, the surviving spouse or civil partner will receive a fixed net sum, referred to as the statutory legacy.

7.2 Since the Administration of Estates Act 1925 came into force, the statutory legacy has been reviewed seven times, either on its own or as part of a wider review of intestacy law. Of these reviews the most wide ranging were the reports by the Committee on the Law of Intestate Succession, chaired by Lord Morton of Henryton, which reported in 1951[1], and the Law Commission, which delivered its report "Distribution on Intestacy" in 1989.[2] The report by the Committee on the Law of Intestate Succession resulted in the Intestates' Estates Act 1952. The Act introduced for the first time different levels of the statutory legacy depending on which relatives of the deceased, in addition to the spouse, were surviving. In its 1989 report, the Law Commission recommended that in all cases the surviving spouse should take the intestate's whole estate. The Government rejected this proposal on the ground that the deceased's children should not end up with nothing.

7.3 The statutory legacy was increased in 1993 when it was set at £125,000 where the deceased leaves a spouse (and from 2005 a civil partner) and children, and £200,000 where the deceased leaves a spouse (and from 2005 a civil partner) and parents or siblings, but no children.

7.4 In 2005, the Department for Constitutional Affairs (whose functions in this regard subsequently passed to the Ministry of Justice) carried out a full public consultation on the statutory legacy. The review was prompted by letters received from Members of Parliament, lawyers and members of the public complaining about the effect of the current levels of the statutory legacy. The issue was also raised in Parliament. The principal complaint made about the statutory legacy was that it was too low and that bereaved persons, particularly widows, were being forced to sell the family home to meet the claims on intestacy of other family members. However, there was also a converse complaint that the statutory legacy was so large that children of the deceased would receive nothing. This was of particular concern where the children of the deceased were from an earlier relationship. The consultation paper invited comments on whether the current levels of statutory legacy should be changed and, if so, to what amounts.

7.5 It is not readily possible to determine exactly how many surviving spouses or civil partners are affected by the statutory legacy. Figures are not collected for the actual number of people who die leaving a spouse or civil partner and other relatives. However, using statistics obtained from a variety of Government sources, it was possible to estimate the number of estates potentially adversely affected by the current levels of the statutory legacy. On this basis it was estimated that, each year, there could be up to 9,000 estates where the lower level of the statutory legacy prevents the surviving spouse or civil partner from obtaining the whole estate and that, of these estates, there could be 3,600 where the surviving spouse or civil partner might be at risk of losing the family home. It was also estimated that, where the upper limit operates, up to 1,600 spouses or

[1] Report of the Committee of Intestate Succession (Cmd.8310).
[2] Family Law: Distribution on Intestacy (Law Com No 187).

civil partners each year would not receive the whole of the estate and, of these, 640 might be at risk of losing the family home. Against this background we provisionally recommended increasing the statutory legacy levels from £125,000 to £350,000 where the deceased leaves children and from £200,000 to £650,000 in other cases.

7.6 It became clear to the Department, during the preparation of the consultation paper, that the issues, in particular the level of priority to be accorded to the retention of the family home by the surviving spouse or civil partner, might be too complicated to be adequately resolved simply by adjusting the levels of the statutory legacy. Comments were therefore also invited on whether a wider review of the intestacy rules should be undertaken and, if so, what it should consider.

8. Consultation outcome

8.1 The consultation on the review of the statutory legacy took place between June and September 2005, with around 150 copies of the consultation paper being sent out during the consultation period. Copies were sent, among others, to legal professional bodies including the Law Society, the Society for Estate and Trust Practitioners and the Bar Council. The paper was also sent to Government departments. 33 responses to the consultation were received. Respondents generally supported an increase in the levels of the statutory legacy, but there was less consensus as to the amount.

Lower level of the statutory legacy

8.2 There was general support for an increase in the lower level of the statutory legacy. However, concerns were expressed about the effect of the provisionally proposed increase on the children of the deceased, especially those from an earlier relationship in view of the exclusion of step-children from those entitled to inherit on intestacy. This potential problem is compounded by the less favourable treatment children receive under the Inheritance (Provision for Family and Dependants) Act 1975. There was also a concern that too much emphasis was being placed on the possibility that a surviving spouse or civil partner might have to sell the family home to meet the demands on the estate of the deceased's children. The fact that most married couples or civil partners own their homes jointly nowadays was a key factor cited in support of this view because in these cases the property would pass directly to the surviving spouse or civil partner rather than as part of the estate.

Upper level of the statutory legacy

8.3 There was a greater degree of support for an increase in the upper level of the statutory legacy. Respondents generally considered that the surviving spouse or civil partner should receive the whole of the estate where the deceased did not leave children. The provisional proposal for the upper level was thought likely to achieve this in the majority of cases.

Wider review of the law of intestacy

8.4 A small minority of respondents argued that a wider review of the intestacy rules should be undertaken before making any changes to the levels of the statutory legacy. They criticised the statutory legacy for being inflexible and an unsubtle device to do justice to the increasingly complex family structures of modern times. However, overall, the majority of respondents urged for both an

increase in the statutory legacy and for a wider review of the intestacy rules to be undertaken.

8.5 The comments and suggestions on the consultation paper caused the provisional proposal to be re-examined, and revised downwards to £250,000 and £450,000 respectively. The new increases aim to strike a fair balance between the surviving spouse or civil partner and the deceased's blood relatives. The Law Commission has agreed to carry out a review of the intestacy rules as part of its Tenth Programme of Law Reform, which was published in June 2008. It expects to report in 2011.

9.1 The response to the consultation was published on 28 August 2008. The response paper is available on the Ministry of Justice website at: http://www.justice.gov.uk/publications/cp1105.htm.

9. Guidance

9.1 No guidance will be issued. The changes apply to the levels of the statutory legacy only. The law of intestacy has not changed as a result.

10. Impact

10.1 An initial impact assessment was undertaken, which indicated that no groups were likely to be particularly affected.

10.2 The impact on business, charities or voluntary bodies is unlikely to lead to additional costs or savings.

10.2 The public sector is not likely to be particularly affected.

11. Regulating small business

11.1 The legislation does not apply to small business.

13. Contact

The points of contact are:

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