EXPLANATORY MEMORANDUM TO

THE AUTHORISED COURT STAFF (LEGAL ADVICE FUNCTIONS) QUALIFICATIONS REGULATIONS 2020

2020 No. 98

1. Introduction

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

2. Purpose of the instrument

2.1 These Regulations set out the qualifications which court staff must have before they can be authorised by the Lord Chief Justice (under section 28(1) of the Courts Act 2003 as substituted by the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018) to perform functions (presently performed by justices' clerks and assistants to justices' clerks) of providing legal advice to judges in the family court and/or justices of the peace.

3. Matters of special interest to Parliament

Matters of special interest to the Committees on the UK's exit from the European Union

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The territorial extent and application of this instrument is England and Wales.

5. European Convention on Human Rights

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

6. Legislative Context

6.1 The Courts and Tribunals (Judiciary and Functions of Staff) Act 2018 ("the 2018 Act") abolishes the offices of justices' clerk and assistant to a justices' clerk, and replaces them with provision under which court staff who hold the necessary qualifications, as prescribed by the Lord Chancellor with the agreement of the Lord Chief Justice, may be authorised by the Lord Chief Justice to perform the functions, presently performed by justices' clerks and assistants to justices' clerks, of providing legal advice to judges in the family court and justices of the peace.

6.2 The qualifications required to be a justices' clerk are presently prescribed in section 27(2) of the Courts Act 2003, and those for assistant justices' clerks in regulations

(the Assistants to Justices' Clerks Regulations 2006, S.I. 2006/3405) made under section 27(6) of the Courts Act 2003. Section 27 is repealed by the 2018 Act, and provision made (in a new substituted section 28 and, for the family court, a new substituted section 31O of the Matrimonial and Family Proceedings Act 1984) for the performance of the advisory functions of justices' clerks and assistants to justices' clerks by staff who are authorised by the Lord Chief Justice, having met the qualifications prescribed for this purpose. Subsection (3)(b) of the new section 28, and subsection (2)(b) of the new section 31O, provide that the Lord Chief Justice may only authorise a person who has such qualifications as may be prescribed by the Lord Chancellor in regulations. This instrument prescribes the necessary qualifications.

6.3 This instrument is not concerned with the performance by justices' clerks and assistant justices' clerks of certain *judicial functions* in the family court and magistrates' courts. In relation to the ability of authorised staff to exercise relevant *judicial* functions, but not functions involving giving legal advice, the 2018 Act enables provision to be made in rules of court to determine which judicial functions may be exercised by authorised staff and the qualifications and/or experience required to be authorised. Such provision will accordingly appear in the relevant rules of court and is not covered by this instrument.

7. Policy background

What is being done and why?

7.1 Legal advice to the lay justices is currently provided in magistrates' courts and the family court by justices' clerks or assistant justices' clerks. A justice's clerk must have a five-year magistrates' court qualification, i.e. have been a barrister or solicitor for at least five years, or be a barrister or solicitor who has served no less than five years as an assistant justices' clerk. The qualifications required by assistant justices' clerks are that they have qualified as a barrister or solicitor, or passed the necessary examinations for either of those professions.

7.2 There are very few justices' clerks (currently 7) and in practice, most legal advice functions are carried out by assistant justices' clerks (often referred to as 'legal advisers') by virtue of rules made under section 28(2) of the Courts Act 2003. In order to broaden the role of these lawyers to provide leadership across all jurisdictions, the 2018 Act abolishes these statutory offices, but not the functions performed by those who hold them. Justices' clerks are currently not subject to direction by the judiciary, and assistant clerks are only subject to direction by a justices' clerk. The new section 28 of the Courts Act 2003 and section 31O of the Matrimonial and Family Proceedings Act 1984 which are substituted by the 2018 Act provide that the Lord Chief Justice may give directions to a person authorised to exercise functions under those sections – which is to say, functions of providing legal advice (similar provision for direction by the Lord Chief Justice or, for tribunal staff, the Senior President of Tribunals, is made for staff authorised to perform relevant judicial functions, although that is not the subject of this instrument, and provision enabling such authorised persons to perform particular functions will be contained in rules of court or tribunal procedure rules).

7.3 The policy aim of these Regulations is, by setting out the necessary/minimum qualifications for staff, to enable court staff to be authorised by the Lord Chief Justice (or his nominee) to *give legal advice* to justices of the peace (magistrates' courts) and judges of the family court. These qualifications will be very similar to those set out in

the current regulations providing for the qualifications needed to be an assistant justices' clerk, but with the addition to the appropriate qualifications of being a CILEx Fellow (Fellow of the Chartered Institute of Legal Executives) or having passed the examinations to be a CILEx Fellow.

7.4 This approach will maintain continuity with the current Assistant to Justices' Clerks Regulations 2006 qualification requirements for legal advisers. Eligibility will be limited to those who have passed the necessary examinations to become barristers in England and Wales, or solicitors of the Senior Courts of England and Wales, plus Fellows of the Chartered Institute of Legal Executives (CILEx). CILEx Fellows are eligible to be appointed to some judicial posts (such as Deputy District Judge, or Employment Judges in the tribunal system), but cannot presently apply to be justices' clerks or legal advisers, which is an anomalous situation. This instrument addresses that anomaly.

7.5 This will ensure that the qualifications required for authorised court officers giving legal advice to magistrates and/or judges of the Family Court are clear. Prescribing qualifications in this way maintains continuity with the existing body of legal advisers and ensures that justices and lay judges in the family court continue to receive competent legal advice. Adding the qualification of CILEX Fellowship means that qualifications for legal advisers are again aligned with qualifications for the judiciary.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union/trigger the statement requirements under the European Union (Withdrawal) Act 2018.

9. Consolidation

9.1 In England and Wales none is required. This instrument replaces existing instruments with a single instrument, governing qualifications, and is in itself a form of consolidation.

10. Consultation outcome

10.1 There has been no formal public consultation on this instrument. There has however been informal technical consultation with stakeholders such as HMCTS and the courts which has informed the drafting of these Regulations. The Lord Chief Justice has concurred in the making of the Regulations.

11. Guidance

11.1 HMCTS has undertaken training and provided guidance to reflect the changes before any new staff are in place and will ensure that court officers are authorised as appropriate before performing the relevant functions to which authorisation relates.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 These Regulations have no impact of themselves on the public sector, beyond the changes made by the 2018 Act.

12.3 An Impact Assessment has not been prepared for this instrument. An Impact Assessment was prepared for the 2018 Act covering 'legal advice and judicial

functions' and nothing has changed since then to require revisiting that assessment. The Impact Assessment can be viewed at the link below— https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/767589/catjafs-act-authorised-staff-ia.pdf

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 Any changes to proposed routes to qualifications to the Bar Council or route to training required by the Solicitors Regulation Authority for which the regulations make provision, will be monitored by the Heads of Legal Operations in HMCTS. If needed the regulations will be revised to take into account these changes for court officers providing legal advice in their jurisdictions.

15. Contact

15.1 Olga Kostiw at the Ministry of Justice, Criminal Courts Policy, Telephone: 07892 724990 or email: olga.kostiw@justice.gov.uk can be contacted with any queries regarding this instrument.

15.2 Matthew Gould, Deputy Director of Criminal Courts and Criminal Law Policy at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.

15.3 Chris Philp MP, the Parliamentary Under-Secretary of State for Justice can confirm that this Explanatory Memorandum meets the required standard.