EXPLANATORY MEMORANDUM TO

THE JUSTICES' CLERKS AND ASSISTANTS RULES 2014

2014 No. [DRAFT]

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 This instrument authorises justices' clerks and assistants to justices' clerks (hereafter abbreviated to 'justices' clerks' except where specified) to perform certain functions of the single family court. It sets out who may be a justices' clerk or an assistant justices' clerk, the functions of the court which they may perform, and the duty of justices' clerks to refer matters back to the court where it would be inappropriate for them to act.

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

3.1 The Committee's attention is drawn to the three matters set out below.

3.2 The first matter relates to the coming into force provision in the Justices' Clerks and Assistants Rules 2014. These Rules are stated to come into force on the date on which section 17(3) of the Crime and Courts Act 2013 is brought fully into force. This drafting device has been used as at the time of laying these Rules in draft a final decision as to the commencement date has yet to be made, so it would not have been appropriate to include a calendar date in the coming into force provision of these Rules.

3.3 The second matter is that in making these Rules, reliance will be placed on section 13 of the Interpretation Act 1978. The reason is that it is considered that the provision made by these Rules will be necessary for the purpose both of bringing fully into force, and of giving full effect to, sections 31A and 31O of the Matrimonial and Family Proceedings Act 1984, as inserted by section 17(3) and Schedule 10 of the Crime and Courts Act 2013 respectively when that section and that Schedule come fully into force. In essence, without the provision made by these Rules, the family court will not be able to be brought practically into operation because the authorisation of functions to be carried out by justices' clerks and assistants to justices' clerks is essential to the operation and resourcing of the new single family court. The anticipatory exercise of the section 31O powers is therefore expedient for the purposes of bringing section 31A of the 1984 Act into force.

3.4 The third matter drawn to the attention of the Committee is that these Rules form only part of a package of statutory instruments which will be needed for the purposes of the family court. For example, provision for numerous statutory instruments is made in new sections 31B – 31O of the Matrimonial and Family Proceedings Act 1984 as inserted by Schedule 10 of the Crime and Courts Act 2013. The intention is that all of these associated statutory instruments will come into force on the same date. There are also consequential and other related amendments to the Family Procedure Rules, which have been or will be laid and made by negative statutory instrument in December 2013 and March 2014, also coming into force on the date as the statutory instruments under the new family court sections of the 1984 Act cited above.

3.5 Despite the links outlined above, there is no intention to lay any negative statutory instrument which includes any provision which is dependent on the approval by Parliament of an affirmative statutory instrument, until that approval has been given.

4. Legislative Context

4.1 These Rules and this Explanatory Memorandum should be read in conjunction with section 17 and Schedules 10 and 11 of the Crime and Courts Act 2013, including section 31O in particular. The Act can be found online at - http://www.legislation.gov.uk/ukpga/2013/22/contents

4.2 Section 27 of the Courts Act 2003 provides for the appointment by the Lord Chancellor of justices' clerks and assistants to justices' clerks, and section 28 currently provides for the Lord Chancellor to make rules enabling things authorised to be done by, to or before a single justice of the peace to be done instead by, to or before a justices' clerk or assistant to a justices' clerk. Accordingly, it is currently the Justices' Clerks Rules 2005, made under that power, which enable justices' clerks and assistants to justices' clerks to carry out certain functions of a single justice of the peace, including in family proceedings in magistrates' courts.

4.3 Section 17 and Schedules 10 and 11 of the Crime and Courts Act 2013 establish a single family court for England and Wales and transfer jurisdiction for what were family proceedings in magistrates' courts to the new family court. As part of this, they remove the power for rules under section 28 of the Courts Act 2003 to authorise justices' clerks or assistant justices' clerks to carry out functions of the new family court, and insert a new section 31O into the Matrimonial and Family Proceedings Act 1984, which allows the Lord Chancellor (with the agreement of the Lord Chief Justice or his nominated judicial office holder, and after consulting the Family Procedure Rule Committee) to make Rules enabling functions of the family court or of a judge of the court to be carried out by justices' clerks or assistants to justices' clerks.

4.4 This instrument is one of a group of instruments required to implement the single family court for England and Wales. The instruments will be made and laid at various dates in 2014 with the intention that they will all come into force on the same date. A separate Explanatory Memorandum will be published for each instrument.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 The Minister of State, Simon Hughes has made the following statement regarding Human Rights:

"In my view the provisions of the Justices' Clerks and Assistants Rules 2014 are compatible with the Convention rights."

7. Policy background

The family court

7.1 In its response to the Family Justice Review, published in February 2012, the Government accepted the recommendations that a single family court should be created to deal with family proceedings, replacing the current three tiers of court structure. The High Court should retain exclusive jurisdiction in a limited number of areas, such as the exercise of its inherent jurisdiction. In order to achieve this, primary legislation was required and provision for the establishment of a family court for England and Wales was enacted by Parliament in the Crime and Courts Act 2013.

7.2 The general policy objective is to create a new family court which is flexible, which allows for efficient use of judicial and court resources, and which is easier for users to navigate. It should reduce delay and, where possible, enable increased judicial continuity and leadership in dealing with cases. It should be able to deal with all relevant family matters, and in practice should be the only court able to deal with the majority of family matters. As part of improvements to efficiency, there should be a reduced need to transfer cases between courts and appeals should be heard at the most appropriate level.

7.3 A package of secondary legislation is now being brought forward to implement the single family court in April 2014. These Rules form one part of that package (see 3.3 above).

The current situation

7.4 Currently, justices' clerks perform a range of functions in family proceedings in magistrates' courts (which are known as family proceedings courts when hearing family matters). These functions are concerned with practice and procedural work; they do not involve making final judicial decisions.

7.5 Assistant justices' clerks may currently perform the same functions as a justices' clerk, provided they are authorised for that purpose by a justices' clerk. In practice,

assistant justices' clerks carry out the majority of the work which is carried out by justices' clerks and their assistants, while justices' clerks themselves perform a largely managerial role.

7.6 In addition to performing certain functions of the court and judges of the court, justices' clerks currently provide advice on matters of law to lay judges in the family proceedings courts. They are employed by HMCTS but are not subject to the direction of the Lord Chancellor or any other person when performing their functions: in other words, they act independently.

The proposed legislation

7.7 In order to realise the objective of creating an efficient, flexible court to hear family matters, it is desired that justices' clerks and their assistants continue to be able to perform a similar role in the new family court as they currently perform in the family proceedings courts. The Crime and Courts Act 2013 allows for Rules to be made making provision for justices' clerks and their assistants to perform functions of the family court.

7.8 The range of functions which justices' clerks should be able to perform in the new family court has been drafted to largely replicate the current situation in the family proceedings court.

7.9 To enable the most efficient and effective deployment of judicial and HMCTS resources, it is intended that justices' clerks be able to perform the functions which are authorised to them no matter which level of judge the case has been allocated to in the new family court. In practice, this means that justices' clerks would be able to assist all judges (rather than just lay magistrates) with practice and procedural work.

7.10 These Rules will also allow justices' clerks to perform certain functions in undefended cases of divorce, judicial separation, dissolution and separation orders. These cases are relatively straightforward matters which, by virtue of the volume of applications, currently take up a significant amount of District Judges' time. Allowing justices' clerks to perform certain functions in these cases will allow judges more time to attend to more complex matters. Justices' clerks will not act in any case where the application for divorce or other order is defended or complicated. In all cases, justices' clerks will remain subject to the requirement to refer matters back to the court if it is inappropriate for them to act (see 7.12 below).

7.11 These Rules will also allow assistant justices' clerks to perform the same functions as a justices' clerk, provided they have been specifically authorised by a justices' clerk for that purpose. This is an exercise of the power granted by s.31O(2)(b) of the Matrimonial and Family Proceedings Act 1984, as inserted by the Crime and Courts Act 2013, and replicates the current provision in family proceedings courts.

7.12 These Rules impose a duty on justices' clerks to refer matters back to the court if, when considering carrying out a function authorised to them, they consider that it may be

inappropriate for them to carry out that function. In practice this will act as a fail-safe: justices' clerks will not carry out any function where they consider that it may be more appropriate for a judge to consider the matter. Again, this replicates the current provision in family proceedings courts.

Consolidation

7.13 This is the first instrument made under the new power, and so no question of consolidation arises.

8. Consultation outcome

8.1 The Family Procedure Rule Committee (FPRC) has been consulted in the course of the drafting of this instrument. As part of this consultation, a working group of the FPRC was established to scrutinise the proposals in more detail. HMCTS has also been informally consulted throughout the drafting of the instrument. The instrument as drafted reflects the outcome of these consultations.

9. Guidance

9.1 Training for justices' clerks, assistant justices' clerks, the judiciary, magistracy and court staff will be provided prior to the implementation of the new family court.

10. Impact

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

10.2 The impact on the public sector is that it is expected that there will be some costs to HMCTS, including training costs, as a result of this measure. It is also expected that there will be efficiency savings to HMCTS as a result of this measure.

10.3 The Impact Assessment covering this instrument is attached to this memorandum and has already been published at www.legislation.gov.uk.

11. Regulating small business

11.1 The legislation does not apply to small businesses.

12. Monitoring & review

12.1 The day-to-day role played by justices' clerks and assistant justices' clerks will be reviewed on an ongoing basis by HMCTS in order to ensure the most efficient and effective deployment of resources within the provision of these Rules, and that the functions being carried out by justices' clerks and their assistants are appropriate.

12.2 The functioning of the new family court, including the role played by justices' clerks and assistant justices' clerks in performing functions of the court will be reviewed within five years of implementation.

13. Contact

Sam Hawkins at the Ministry of Justice, Tel: 020 3334 4202 or email: sam.hawkins@justice.gsi.gov.uk can answer any queries regarding this instrument.