EXPLANATORY MEMORANDUM TO

THE JUSTICES' CLERKS (AMENDMENT) RULES 2011

2011 No. 633 (L.5)

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 Rules amend the Justices' Clerk's Rules 2005 (S.I. 2005/545) (L.10) ("the 2005 Rules"), which list the functions of a single justice in a magistrates' court that can be performed by, to or before a justices' clerk or assistant clerk. The amendments make provision for certain functions of a single justice in relation to family proceedings to be authorised to be done by, to or before a justices' clerk or an assistant clerk, supporting the implementation of the new procedural code for family proceedings contained in the Family Procedure Rules 2010 (SI 2010/2955) ("the 2010 Rules"). These Rules also amend the 2005 Rules to include a safety mechanism, whereby any justices' clerk performing delegated functions may refer any matter of delegation to the court if the clerk considers that the delegation is inappropriate.

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

3.1 None.

4. Legislative Context

4.1 Section 28 of the Courts Act 2003 (c.39) permits rules to be made which make provision enabling functions 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. They may also make provision enabling functions authorised to be done, by or before a justices' clerk to be done instead by, to or before an assistant clerk. The 2005 Rules were made under that power, and provide for specified functions relating to family and non-family proceedings to be able to be performed by a justices' clerk.

4.2 The functions relating to family proceedings are largely contained in rules which will cease to have effect in proceedings to which the 2010 Rules will apply when the 2010 Rules come into force on 6th April 2011. The 2005 Rules accordingly require amendment so that they cover the corresponding functions in the 2010 Rules.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

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

7. Policy background

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

7.1 In order to facilitate the conduct of family proceedings in the magistrates' court, the 2010 Rules provide that certain functions of the court can be carried out by a single justice of the peace. The functions generally involve making directions to assist with the management of the proceedings before the final hearing at which the full court will make a substantive order. The 2005 Rules, which make provision for a justices' clerk or assistant clerk to carry out certain functions of a single justice, are being amended in consequence. The 2005 Rules as amended by these Rules provide that a justices' clerk can exercise all the powers of a magistrates' court which can be exercised by a single justice of the peace as provided by the Family Procedure Rules 2010, with the exception of those powers included in the Table in Schedule 2 to the 2005 Rules, which is inserted by the Schedule to these Rules. The excepted powers are those which the Family Procedure Rule Committee, advised by a working group of experts on practice and procedure in family proceedings in magistrates' courts, considered not to be appropriate for further delegation to a justices' clerk.

7.2 For example, the 2005 Rules as amended by these Rules will mean that under rule 8.20(4) of the Family Procedure Rules 2010 a justices' clerk cannot make a direction that any person should be made a respondent to an application for a declaration of parentage under section 55A of the Family Law Act 1996, unless the parties consent to that person being made a respondent and the person concerned is not a child. If the parties do not consent the matter would have to be referred either to a single justice (if the person is not a child or if the parties agree to the child being made a respondent to the application) or to a full court.

- ***Consolidation***

7.3 The Rules add provisions to those already contained in the 2005 Rules. It is not proposed to consolidate these amendments into the 2005 Rules at this time, as the 2005 Rules are quite recent and the majority of the amendments inserted are contained in a separate new Schedule to the 2005 Rules.

8. Consultation outcome

8.1 The Government consulted practitioners and representative organisations, including representatives of magistrates and justices' clerks, on the functions of the court to be exercised by a single justice of the peace and by a justices' clerk and on these draft Rules. These Rules were also considered by the members of the Family Procedure Rule Committee. Views of the consultees were taken into account when finalising the Rules. Those consulted generally supported the proposals for powers to be exercised by justices' clerks. A number of suggestions were made about the exercise of individual powers which resulted in amendments being made to the draft Rules. For example it was agreed that the power to direct that a person should be made a respondent to an application under section 55A of the Family Law Act 1986 under Rule 8.20(4) of the Family Procedure Rules 2010 could be exercised by a justices' clerk provided the person involved was not a child and the parties agree to the person being made a respondent.

8.2 As required by section 28(9) of the Courts Act 2003, the Criminal Procedure Rule Committee, the Family Procedure Rule Committee and the Magistrates' Courts Rule Committee were consulted in relation to the draft of the Rules. No amendments to the Rules were required as a result of this consultation.

9. Guidance

9.1 The Family Procedure Rules 2010 will be published on the Ministry of Justice website prior to implementation with supporting Practice Directions. All forms required by applicants will be published with the Rules and will be available to be downloaded from the same website.

9.2 Training for court staff, the judiciary, magistrates and justices' clerks will be provided in the run up to implementation including, where necessary, training in relation to the powers of the court which can be exercised by a single justice of the peace or by a justices' clerk in the magistrates' court.

10. Impact

10.1 The impact on business, charities or voluntary bodies is likely to be very small as the Rules deal with the way the magistrates' courts deal with family proceedings and do not themselves increase the volume of proceedings. There may be some savings in that proceedings can be facilitated and more issues resolved earlier in the proceedings because directions do not require the proceedings to be listed before a full court.

10.2 The impact on the public sector is likely to be small, as the work arising from the exercise of these functions can be met from existing resources. There may be some savings in that proceedings can be facilitated and issues resolved before the final hearing without the proceedings to be listed before a full court.

10.3 An Impact Assessment has not been prepared for this instrument, as this instrument does not in itself create new powers and does not have any impact in addition to that of the Family Procedure Rules 2010. It is considered that any additional duties for justices' clerks can be met from within existing resource allocations.

11. Regulating small business

11.1 The legislation does not apply small business.

12. Monitoring & review

12.1 The Family Procedure Rule Committee will take forward an ongoing programme of amendments to the Family Procedure Rules 2010 and will consider the operation of those Rules and the need to amend the provisions both in the light of their own experience as practitioners and in the light of representations from court users, legal and other professionals and major stakeholders. This programme will cover both the provisions of the Family Procedure Rules 2010 and the exercise of the powers of the court in the magistrates' court, including the provisions for functions to be exercised by a justices' clerk.

13. Contact

Philip Dear at the Ministry of Justice Tel: 202 3334 3125 or email: philip.dear@justice.gsi.gov.uk can answer any queries regarding the instrument.