EXPLANATORY MEMORANDUM TO

THE JUSTICES' CLERKS AND ASSISTANTS (AMENDMENT) RULES 2014

2014 No. 841 (L. 14)

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 amends the Justices' Clerks and Assistants Rules 2014 (S.I. 2014/603) which authorises justices' clerks and assistants to justices' clerks to perform certain functions of the family court. Amendments are required as functions of the court have been created or amended in secondary legislation to set up the family court or in other primary and secondary legislation concerning family justice.

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

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

3.2 The first matter is that in making these Rules, reliance is placed on section 13 of the Interpretation Act 1978, as it was for the Justices' Clerks and Assistant Rules 2014 ("the 2014 Rules").

3.3 The reason is that it is considered that the provision made by these amending Rules will, like the 2014 Rules, 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(6) and Schedule 10 of the 2013 Act when that section and Schedule come fully into force. In essence, without the provision made by these amending Rules, the family court will not be able to be brought practically into operation, because the amendments to these Rules materially amend and complete the authorisation of functions to be carried out by justices' clerks in the new family court. For example, these amending Rules authorise justices' clerks to allocate cases to the appropriate level of judge that is being established in Rules under section 31D of the Matrimonial and Family Proceedings Act 1984 as inserted by Schedule 10 of the 2013 Act and which will come into force on the same day. This function is important to reduce delay and improve the efficiency and effectiveness of the family court. These amending Rules also ensure that justices' clerks can perform some new functions established in the Children and Families Act 2014 (c.6), but ensure that previous authorisations do not allow them to perform others by virtue of the consequential amendments that have been made, for example, by the Family Procedure (Amendment No. 3) Rules 2014 (S.I. 2014/843).

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 second matter drawn to the attention of the Committee is that these amending Rules form only part of a package of statutory instruments which will be needed for the purposes of the family court. The intention is that all of these associated statutory instruments will come into force on the same date. More detail about this package of statutory instruments in provided in the next section.

4. Legislative Context

4.1 These amending 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.

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. Currently the Justices' Clerks Rules 2005 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 family court for England and Wales and transfer jurisdiction, amongst other things, 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. They 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 The 2014 Rules received approval resolutions of both Houses of Parliament and were then made on 12 March. This instrument makes amendments to those rules. The family court is established by section 17(3) of the Crime and Courts Act 2013. Although neither that provision nor the 2014 Rules have come into force yet, these amendments to the 2014 Rules are needed as a consequence of the new statutory provision in the Children and Families Act 2014 (the "2014 Act") and secondary legislation related to that act or to the family court which has been made since the draft 2014 Rules were laid before Parliament under the affirmative resolution procedure. The secondary legislation includes the Family Procedure (Amendment No. 2) Rules 2014, which were laid before Parliament in March; the Family Court (Composition and Distribution of Business) Rules 2014 which establish the allocation function referred to in the Schedule to these amending rules, the Family Procedure (Amendment No. 3) Rules 2014 which amend the Family Procedure

Rules under or in consequence of sections 9, 10, 12, 13 and 17 of the 2014 Act; and amended practice directions which have been made under section 81 of the Courts Act 2003 related to the new single family court or the 2014 Act provisions.

4.5 The intention is that all the legislation to create the family court and the amendments to the Family Procedure Rules 2010 will come into force on 22 April. A separate Explanatory Memorandum has been 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 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

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 on 22 April 2014. These Rules form a part of that package (see 4.4 above).

The current situation

7.4 Justices' clerks perform a range of functions in family proceedings in magistrates' courts. These functions are generally concerned with practice and procedural work; they do not involve making final judicial decisions.

7.5 Assistant justices' clerks may 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 perform a largely managerial role.

7.6 In addition to performing certain functions of the court and judges of the court, justices' clerks provide advice on matters of law to lay judges in the family proceedings courts. They are employed by Her Majesty's Courts and Tribunals Service 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 Justices' Clerks and Assistants Rules 2014 and the amending Rules

7.7 The 2014 Rules set out a range of functions that justices' clerks will be able to perform in the new family court and were made in March. However, amendments to these rules are needed so that they can perform some new functions in the family court that had not been created when the 2014 Rules were made or that have been amended since that time, because the new or amended functions are contained in the 2014 Act or in secondary legislation related to that Act or to create the family court.

7.8 For instance, these amending Rules authorise justices' clerks to carry out an allocation function set out in the Family Court (Composition and Distribution of Business) Rules 2014. That function is intended to ensure that cases are allocated to the most appropriate level of judge as soon as possible so as to reduce delay and enable the most efficient and effective use of judicial resources and of court use staff and buildings, which is a key policy objective of the creation of the family court.

7.9 These amending rules also authorise certain new functions found in the 2014 Act. For example, the Act contains a new requirement for a timetable to be drawn up for disposal of applications under Part 4 of the Children Act 1989 within 26 weeks of the application. That Act also creates a function of extending the timetable, which these Rules do not authorise, so that consequential amendments were required to other functions in the Schedule to the 2014 Rules to ensure that justices' clerks could not perform other functions in a way that would indirectly or directly, extend the timetable beyond the 26-week limit.

7.10 These amending rules also authorise new functions created in the Family Procedure (Amendment No. 3) Rules 2014 related to the new requirement in the 2014 Act for a prospective applicant to attend a family mediation information and assessment meeting ("MIAM"). Those new functions are determinations as to whether a MIAM exemption has been validly claimed and directions for attendance at a MIAM and to adjourn proceedings if necessary.

7.11 It should be noted that in addition to the Family Procedure (Amendment No. 3) Rules 2014, the Family Procedure Rules 2010 referred to in the Schedule have also been recently amended by the Family Procedure (Amendment No.3) Rules 2013, the Family

Procedure (Amendment) Rules 2014 and the Family Procedure (Amendment No.2) Rules 2014.

Consolidation

7.12 This is the second instrument made under the new power, and the instrument is formulated so that a new table simply replaces the table in the Schedule to the 2014 Rules for ease of reference.

8. Consultation outcome

8.1 The Family Procedure Rule Committee has been consulted in the course of the drafting of this instrument. Her Majesty's Courts and Tribunals Service has also been informally consulted throughout the drafting of the instrument. The instrument as drafted reflects the outcome of these consultations and the President of the Family Division has agreed this instrument.

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

Michael Lillis at the Ministry of Justice, Tel: 020 545 8984 or email: michael.lillis@justice.gsi.gov.uk can answer any queries regarding this instrument.