EXPLANATORY MEMORANDUM TO

THE JUSTICES OF THE PEACE RULES 2016

2016 No. 709

1. Introduction

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

2. Purpose of the instrument

2.1 The purpose of this instrument is to simplify and consolidate existing rules relating to lay magistrates ("justices"). It revokes the Justices of the Peace (Size and Chairmanship of Bench) Rules 2005, the Justices of the Peace (Training and Development Committee) Rules 2007, the Youth Courts (Constitution of Committees and Right to Preside) Rules 2007 and the Family Court (Constitution of Committees: Family Panels) Rules 2014.

2.2 The Rules simplify the provisions relating to the procedure for elections of chairmen and deputy chairmen, and remove the requirements for postal ballots and election meetings.

The Rules provide for the establishment of a Justices' Training, Approvals, Authorisations and Appraisals Committee (JTAAAC) and a Family Training, Approvals, Authorisations and Appraisals Committee (FTAAAC). These committees replace Bench Training and Development Committees, Family Training and Development Committees, and Magistrates' Area Training Committees.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

4.1 Section 17 of the Courts Act 2003 requires justices to choose a chairman and one or more deputy chairmen for each local justice area. Where there is a contested election, this is to be done by a secret ballot. The Justices of the Peace (Size and Chairmanship of Bench) Rules 2005 currently set out in detail the terms of office and procedure for holding the ballot, as well as dealing with the composition of youth and adult magistrates' courts.

4.2 Section 10(4) Courts Act 2003 provides that rules may make provision about training courses to be completed before any person may exercise functions as a magistrate. Section 18 Courts Act 2003 also permits rules to be made relating to the approval of

magistrates to preside in court. Section 19 Courts Act permits rules to be made in relation to training, development and appraisals of magistrates.

4.3 The above rules are currently contained in Justices of the Peace (Training and Development Committee) Rules 2007. These rules also provide for the establishment of two types of committee to oversee this process: Training and Development Committees and Magistrates' Area Training Committees.

4.4 The Youth Courts (Constitution of Committees and Right to Preside) Rules 2007 and the Family Court (Constitution of Committees: Family Panels) Rules 2014 require the formation of panels of justices authorised to deal with the respective types of work. When the predecessors of the rules were first made, membership of the panel provided the authorisation to deal with that type of work, but this is no longer the case.

5. Extent and Territorial Application

5.1 The extent of this instrument is England and Wales.

5.2 This territorial application of this instrument is 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

7.1 In recent years, there have been many mergers of local justice areas, some of which have taken place during the calendar year (that is, not on the 1st January). Although these mid-year mergers are not excluded by the existing rules, the rules do not facilitate them. Furthermore, the existing rules are very prescriptive in relation to elections to bench offices, both in terms of timetable and procedure - requiring for example all election notices to be sent by first class post. A group (including representatives from the Magistrates' Association, National Bench Chairmen's Forum, Justices' Clerks' Society, Judicial College and Her Majesty's Courts & Tribunals Service) reviewed the existing rules and recommended the changes included in this instrument following a national consultation and discussions with the Senior Presiding Judge and President of the Family Division.

7.2 Part 2 of this instrument largely restates the existing law relating to the composition of a magistrates' court. Although justices also sit in the family court, the rules relating to the composition of this court are separate (these are the Family Court (Composition and Distribution of Business) Rules 2014), and Part 2 does not therefore apply to justices sitting in the family court.

7.3 The rules remove the distinction between the youth and the adult courts, meaning that the same principles apply to both jurisdictions. In particular, the requirement for a youth court to consist of a man and a woman (subject to exceptions) has not been maintained. The rule also confirms that the rules relating to approvals to preside in court do not apply to justices dealing with cases in accordance with section 16A of the Magistrates' Courts Act 1980 (the single justice procedure).

7.4 Part 3, Chapter 1 of this instrument deals with the procedure for elections. It applies to the elections required by the provisions under the Courts Act 2003 for chairmen and deputy chairmen of the justices for each local justice area, and to elections

required by these rules for the selection panels responsible for appointing JTAAAC and FTAAAC members. It provides that the number of deputy chairmen should be determined by the chairman for the relevant period; and that, consequently, the election for deputy chairmen follows that for the chairman. This allows the chairman to decide the number of deputies to fit in with his or her preferred ways of working.

7.5 The rules require a two stage process: (a) a requirement for candidates to submit a "notice of candidacy" and (b) where necessary, a secret ballot. A secret ballot is not necessary where the number of candidates submitting a valid notice of candidacy equals or is less than the number of vacancies - in this case, the candidates are automatically elected without the need for a ballot. This is broadly in line with the existing procedure, although the notice of candidacy replaces the need for nominations by others.

7.6 The rules are not prescriptive as to the timescale for the election procedure, the form of notices or papers, or the method of undertaking the ballot. Rather, these will be determined by the justices' clerk at the outset. This will allow, where available, up-to-date methods of communications, or indeed potentially the contracting out of the balloting. The justices' clerk's responsibility to determine the procedure is wide enough to allow him or her to determine that people other than the justices' clerk undertake roles in the election procedure.

7.7 The procedure for determining the result of an election is replicated - the ballot procedure allows the justices' clerk, where necessary, to decide between two or more candidates with an equality of votes, by way of lot.

7.8 Once the result of an election is known, the rules provide for openness, as the justices' clerk is required to notify the outcome (including, where there was a ballot, the number of votes cast for each candidate) to the candidates, and then the justices. There is no requirement for this to be done at a meeting of the justices.

7.9 The rules also deal with the withdrawal of a candidate (rule 14), the absence or insufficiency of candidates (rule 15) and provide consideration of a re-run of an election in the event of a material irregularity (rule 16). The rules on withdrawal and insufficiency expand on the previous provisions, to clarify the position. The rule relating to material irregularity is new and is designed to avoid the need for judicial review as the only way to correct significant irregularities in the election process.

7.10 Chapter 2 of Part 3 makes specific provision in respect of chairmen and deputy chairmen of the justices. Rule 17 prescribes the terms of office. The normal term is one of 12 months from 1 April each year, but exceptions are provided for in the event that the person ceases for whatever reason to remain in office for the normal term. The rule also explicitly deals with the creation of a new local justice area part-way through a term. The effect of paragraph 7 of rule 17 is to allow a term of office of over 12 months (up to 15 months) where the term commences between 1st January and 31st March inclusive. Overall, these provisions provide flexibility and avoid elections for short periods.

7.11 Rule 18 broadly replicates the current rules relating to the total time a person may be a chairman or deputy chairman, save that it describes the periods in relation to the terms of office, rather than in years, in order to support the description of terms of office in Rule 17.

7.12 Part 4 deals with justices' training, approvals to preside in court, authorisations to sit in family and youth courts, and appraisals.

7.13 The rules replicate the existing rule by specifying the compulsory training courses that a justice must complete before undertaking certain functions and create Justices' Training, Approvals, Authorisations, and Appraisal Committees and Family Training, Approvals, Authorisations and Appraisal Committees. These replace the current Training and Development Committees and Magistrates Area Training Committees ("MATC"), which had overlapping roles and membership. The areas covered by the JTAAACs/FTAAACS are to be specified by the Lord Chief Justices.

7.14 Between 6 and 24 of the members of these committees must be justices appointed from the local justice areas concerned. These members are chosen by a selection panel, which is elected by the justices (or in respect of FTAAACs, the family justices). The selection panel is required to confirm the number of members of the JTAAAC/FTAAAC as well as appoint its members. On the JTAAAC there must be sufficient number of youth justices on the committee to consider competence for positions in the youth court. These rules maintain the link with benches through the selection panel, but there is no requirement for members of the JTAAAC/FTAAAC to represent individual benches - the intention is that the best candidates should be selected, irrespective of the bench to which they are assigned.

7.15 Justices' clerks are also members, but, recognising their role in respect of the bench as a whole and in order to preserve their impartiality, they are not permitted to take part (except in an advisory capacity) in decisions relating to individual magistrates. HMCTS designated officers may attend meetings (but not as members). Under current arrangements, the designated officers are the Delivery Directors, whose approval is necessary in order to agree the budget for justices' training. Bench Chairmen may also attend meetings, and the Committee may invite other people if appropriate. However, attendees who are not members may not be present when there are discussions concerning individual magistrates.

7.16 Under the previous rules, certain members of the judiciary could be members of the MATC. In practice, there was limited involvement and this is not replicated in the JTAAAC/FTAAAC membership, but the Rules maintain the involvement of the local senior judiciary by requiring the committees to consider any representations by local senior circuit judges.

7.17 The rules set out terms of office for members and require the appointment of a JTAAAC/FTAAAC chairman. They also outline how the JTAAACs and FTAAACs can make decisions. The Judicial College will issue guidance on this prior to implementation.

7.18 Rule 21 (JTAAAC) and Rule 25 (FTAAAC) outline the requisite functions of these committees. These are in two parts: (i) approvals (to preside in court), authorisations (to sit in family or youth courts) and appraisals (paragraph 1); and (ii) training (paragraph 2).

7.19 In undertaking its functions, the JTAAAC/FTAAAC are acting in many instances on behalf of the Lord Chief Justice, and must take account of guidance issued by or on behalf of the Lord Chief Justice.

7.20 The Rules (Rule 30) confirm that, in deciding whether to approve or authorise further justices, the JTAAAC must be satisfied that there is a need to do so, in that additional justices are required. The rule also requires justices, before they can be approved or authorised: (i) to meet any criteria laid down by the Lord Chief Justice; (ii) in respect

of authorisations, to be suitable for the particular function; and (iii) in respect of approvals, to have been trained and appraised as competent.

7.21 Rules 31 to 33 deal with reviews of competence and revocation of approvals and authorisations. Taken together, they simplify the process for reviewing competence and improve the flexibility in respect of outcomes, by prescribing that the authorisation or approval or finding of competence (as the case may be) must be reviewed by the JTAAAC/FTAAAC in specified circumstances and by extending the options available if an issue concerning competence is identified.

7.22 Rule 33 specifies the grounds on which the JTAAAC/FTAAAC may revoke an approval or recommend an authorisation to be revoked. These broadly follow the existing (mandatory) guidance issued by the Lord Chief Justice, save that:

(i) grounds are specified for both approvals and authorisations (previously, this was in guidance);

(ii) the grounds include a failure to undertake essential as well as compulsory training;

(iii) a failure to comply with a training requirement required by the JTAAAC/FTAAAC following a review would amount to a ground; and

(iv) a failure to demonstrate competence (as opposed to "persistent" failure in the current guidance) could justify revocation. A single act, if serious enough, should be sufficient to allow a revocation.

7.23 These changes enhance the appraisal process the powers of committees to deal with justices' competence issues, and were widely supported in the consultation.

7.24 Rule 34 provides for a justice who is dissatisfied by the decision of the JTAAAC/FTAAAC to ask for a reconsideration of the decision by the committee or, if circumstances allow, a review by the bench chairman. The Rule broadly re-states the current guidance, and so the bench chairman's authority to allow an appeal is restricted to requiring the JTAAAC/FTAAAC to reconsider (this is because only the JTAAAC/FTAAAC has the delegated authority in respect of authorisations).

7.25 Rule 35 explicitly allows the JTAAAC/FTAAAC to review authorisations where there is an excess (such that justices are unable to fulfil their minimum sitting obligations). If need be, it allows authorisations to be withdrawn by lot. This addresses one key weakness of the current regime: that it is impossible to control the number of youth or family justices in response to changes in caseload. That has led to concerns in recent years that in some areas youth justices may be unable to achieve sufficient experience to maintain competence.

7.26 Rule 36 makes consequential changes to the Family Court (Composition and Distribution of Business) Rules 2014.

8. Consultation outcome

8.1 A total of 217 responses to the consultation paper were received. All were from members of the judiciary, including the magistracy and associated bodies including from the Magistrates' Association, the National Bench Chairmen's Forum, the Criminal Procedure Rule Committee (CrimPRC), Family Justice Council (FJC) and Family Procedure Rule Committee (FPRC). The key areas of concern raised in the responses to consultation were:

Composition of courts (adult and youth – these proposals do not relate to family)

8.2 The requirement in relation to authorisation of justices to preside does not apply to the single justice procedure ("SJP"). Although a large number of respondents felt there should be a minimum requirement before a justice can deal with SJP cases, this will be dealt with by guidance.

8.3 The proposal to remove the requirement for mixed gender benches in the youth court generated much opposition based upon the perception of fairness ad impartiality. The working group however considered that such requirement is outdated, as gender is only one aspect of diversity - just as a defendant cannot reject a tribunal on the grounds of ethnicity or age s/he should not be able to do so on gender grounds.

Elections and bench officers

8.4 The creation of a more flexible election process was widely supported. The key concerns raised related to: the right of the chairmen to decide upon the numbers of deputies s/he wishes to work with; the introduction of a notice of candidacy and removal of the need for seconders and proposers; and the abolition of the statutory requirement to hold annual bench meetings, youth panel meetings and family panel meetings.

8.5 In response to these concerns the working group decided that:

8.6 The Chairmen, who is directly elected, is the best person to decide how many deputies he requires to carry out his role effectively. It is then for the magistrates to decide who should be elected to such positions.

8.7 Proposers and seconders should not be required as they do not enhance the election procedure and could influence the outcome unduly, and there should be detailed guidance for (a) a standard notice of candidacy; (b) a fair and transparent election process.

8.8 The working party felt that the concerns of the magistrates relating to the holding of meetings could be met through protocols agreed between the Senior Judiciary and HMCTS. This breaks the link to the election procedure, where the timing of meetings is governed by the elections, rather than by any other need; but it maintains the flexibility to alter the protocol if circumstances change.

Justices' approvals, authorisations, training and appraisal in all jurisdictions

8.9 There was widespread concern with the original proposal to replace the existing Bench Training and Development Committees and Magistrates Area Training Committees with a single JTAAAC. The key areas of concern were: the need to separate the criminal and family jurisdictions; the size of the areas to be covered would be too wide; the numbers on the committee too few to carry out the workload.

8.10 The working group, with the support of the President of the Family Division decided to include an FTAAAC that would consider all matters relating to the family jurisdiction. The Judicial College have agreed to provide clear guidance for the operation of such committees, to ensure that annual training plans can be agreed effectively.

8.11 When considering competence for a role there should be no requirement for contextualisation (as was suggested in a large number of responses), decisions should be taken based upon the evidence provided in the documentation, members of the

committee should not be adding the detail. The larger areas covered would create greater objectivity within the more robust process, whilst retaining a link to local benches through election to the selection panels.

8.12 The working group felt that the maximum number of members on the JTAAAC and FTAAAC should be 24, and the JTAAAC numbers should include sufficient youth members to consider appraisals/authorisations and approvals relating to the youth court.

8.13 The workload for family justices is becoming increasingly complex and the new allocation guidelines in the criminal jurisdiction are intended to enable magistrates' courts to retain more serious cases. These changes, alongside the general demands for improved performance, call for a more robust and objective system for assessing magistrates' competence. The Justices of the Peace Rules 2016 improve the procedures for reviewing competence, for approvals to preside and for authorisations to specialise. They also create provisions to challenge magistrates when their competence is compromised because of failure to attend essential training.

9. Guidance

9.1 These Rules will be published on www.legislation.gov.uk. Any protocols will be agreed and issued prior to the commencement

10. Impact

10.1 The impact on business, charities or voluntary bodies is limited to the magistracy in their capacity as judicial office holders.

10.2 The impact on the public sector is that the organisation of justices' benches is simplified.

10.3 An Impact assessment has not been prepared for this instrument. No impact on the private or voluntary sector is foreseen and there is minimal impact beyond the effect on the justices. The impact on the justices is not anticipated to be above the £5m per annum benchmark for when an Impact Assessment must be completed for public sector costs.

11. Regulating small business

11.1 The legislation does not apply to small businesses.

12. Monitoring & review

12.1 The implementation of the new arrangements will be reviewed within five years of implementation.

13. Contact

13.1 Jane Wignall at the Ministry of Justice email: jane.wignall1@hmcts.gsi.gov.uk can answer any queries regarding the instrument.