EXPLANATORY MEMORANDUM TO

THE CIVIL PROCEDURE (AMENDMENT No. 5) RULES 2013

2013 No. 1571 L. 17)

1. This explanatory memorandum has been prepared by the Ministry of Justice in consultation with the Cabinet Office 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 Civil Procedure Rules ("CPR") by –

(a) inserting a new Part 82 containing rules about Closed Material Procedures ("CMPs") in civil proceedings brought under the Justice and Security Act 2013 ("the Act"); and

(b) making consequential amendments and modification to the CPR for the purposes of CMP proceedings.

3. Matters of special interest to the [Joint Committee on Statutory Instruments *or* the Select Committee on Statutory Instruments]

3.1 The Committee may wish to note that these Rules are made in the first exercise of the power to make rules under the Act for England and Wales, and are accordingly, as explained in paragraph 4.7 below, made not by the Civil Procedure Rule Committee, but by the Lord Chancellor, who has as required by the Act consulted the Lord Chief Justice before making the rules. Rules for Northern Ireland are also made by the Lord Chancellor, having consulted the Lord Chief Justice for Northern Ireland, and are being laid separately with their own Explanatory Memorandum.

4. Legislative Context

4.1 Part 2 of the Act makes provision establishing a general CMP regime for civil proceedings in the High Court, Court of Appeal, Court of Session, and the Supreme Court. This allows for the use in civil proceedings in those courts of "closed material procedure" to enable national security-sensitive material which is relevant to the proceedings to be relied upon in the proceedings without its being disclosed in a way which would be damaging to the interests of national security. In a closed material procedure, the sensitive material is, pursuant to the court's directions, withheld by the party which would otherwise have to disclose it (usually, but not necessarily, the Secretary of State) from the other party or parties (other than the Secretary of State) and is instead disclosed to the court and a special advocate or special advocates

representing the interests of the other party or parties. The Act provides, in section 6, for an initial gateway process under which the court seised of relevant civil proceedings may, on application of a party or of its own motion, make a declaration that the proceedings are proceedings in which a "closed material application" (an application to withhold sensitive material in the manner described above) may be made to the court. The court may make such a declaration if it considers that a party to the proceedings (whether or not the Secretary of State) would be required to disclose material in the course of the proceedings to another person (whether or not another party to the proceedings); that such a disclosure would be damaging to the interests of national security; and that a declaration would be in the interests of the fair and effective administration of justice. Before making a declaration in response to an application from the Secretary of State, the court must also be satisfied that that the Secretary of State has considered whether to make, or advise another person to make, a claim for public interest immunity for the material on the which the application is based.

4.2 The effect, under the Act, of the declaration is not that the proceedings as a whole are thereafter closed, but that closed material procedure may thereafter be used where necessary in the proceedings, but with those parts of the proceedings where sensitive material is not in issue being conducted in "open" procedure in the normal way. Tthe party holding the sensitive material may make a closed material application, that is to say, may apply for permission not to disclose the material except to the court, the Secretary of State (if a separate party to the proceedings), and any appointed special advocates. Special advocates, for whom section 9 of the Act makes provision, may be appointed to represent the interests of the other parties, and the court or tribunal may require the applicant to provide the other parties with a summary of the material. The Act makes provision to ensure that sensitive material is not disclosed where that would be damaging to the interests of national security, in particular so that if the permission to withhold sensitive material is not given but the applicant nonetheless chooses not to disclose the material, the court or tribunal may order the applicant to make various concessions in the proceedings.

4.3 A number of provisions of the Act govern the making of rules of court to give effect to aspects of closed material procedure. Subsection 6(9) of the Act allows rules of court to be made to: provide that any party, or the court itself, must notify the Secretary of State that a CMP may be needed (thereby affording him or her the opportunity to make an application for a declaration or be joined to proceedings for an application for a declaration; allow the proceedings to be stayed while a person considers whether to make an application for a CMP; and enable the Secretary of State to be joined as a party to proceedings for or about a declaration. Subsection 6(10) sets out that rules of court must require a person to give notice to every other person entitled to make an application in relation to the case of his or her intention to make an application for a declaration (and to inform them of the result of the application).

4.4 Section 8 of the Act provides a power for rules of court to make provision to the second stage of the process, following the granting of a declaration under section 6 (see above), and sets out vital matters which the rules must secure. These include matters fundamental to the operation of a CMP such as the ability for a relevant person to apply to the court to disclose relevant sensitive material to only the court

and any special advocate which has been appointed (clause 7(1)). Subsections (2) and (3) set out procedural protections which the court can order where a relevant person who is required to disclose material to a person other than the court or any special advocate decides not to make such disclosure. The protections include a direction to the relevant person to not take a particular point in a case or to make such concessions as the court may specify.

4.5 Section 10 makes separate provision in relation to what the Rules must specify, providing that where a CMP is used the normal rules of disclosure which would apply to the proceedings continue to apply in relation to the disclosure obligations of the relevant person (subject to the CMP provisions); so that, for example, duties to search for material as part of disclosure will still apply.

4.6 Subsection 11(1) establishes the overarching proposition that a person making Rules of Court must have regard to the need to ensure that disclosures of information are not made where they would be damaging to the interests of national security; and subsection 11(2) provides an illustrative list of the matters about which the rules may make provision. This includes the mode and burden of proof, the conducting of the proceedings in the absence of the individual and his legal advisers and the function of special advocates.

4.7 Paragraph 3 of Schedule 3 to the Act sets out the procedure for the initial exercise of the rule making power in England and Wales and Northern Ireland in respect of the courts covered by the Act within these jurisdictions with the exception of the Supreme Court. The initial exercise of the rule-making power in England, Wales and Northern Ireland (except in relation to the Supreme Court) is to be by the Lord Chancellor rather than by the usual rule-making body for rules of court, namely the Civil Procedure Rules Committee (in England and Wales) and the Court of Judicature Rules Committee (in Northern Ireland). Before making the Rules, the Lord Chancellor is required to consult with the Lord Chief Justice of England and Wales or the Lord Chief Justice of Northern Ireland as appropriate. And after the Rules are made they must be laid before Parliament and approved by resolution of both Houses within 40 days (not counting time during which Parliament is adjourned for more than 4 days or is dissolved or prorogued), failing which the Rules will cease to have effect.

4.8 After the initial exercise of the powers, should the Rules need amendment, the usual rule-making procedure in the Civil Procedure Act 1997 (for England and Wales) and in the Judicature (Northern Ireland) Act 1978 (for Northern Ireland) will be followed. This is the negative resolution procedure, but the rules will be made by the relevant Rules Committee and following the usual consultation requirements if applicable.

4.9 In Scotland, the Court of Session will make the rules in the usual way. Although the rules are not subject to formal Parliamentary approval in Scotland, they are subject to Parliamentary scrutiny.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales. Separate rules are being made to cover Northern Ireland and Scotland.

6. European Convention on Human Rights

The Rt Hon Chris Grayling, the Lord Chancellor and Secretary of State for Justice, has made the following statement regarding Human Rights:

> In my view the provisions of the Civil Procedure (Amendment No. XX) Rules 2013 are compatible with the Convention rights.

7. Policy background

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

Background

7.1 The provisions of the Act stem from the Government's *Justice and Security Green Paper* (Cm 8194). It noted an increase in the number and diversity of judicial proceedings which relate to national security-related actions. As of 31 October 2012, there are 20 live civil damages in which sensitive national security information is centrally relevant. There are also a number of other live cases, including some judicial review challenges in which national security information is also centrally relevant. A number of these cases relate to several individuals. The overall figure includes seven new civil damages cases (including those at pre-action stage) which were launched against the Government between October 2011 and 31 October 2012. Three civil damages cases have been settled in the last year. PII is not considered to offer the solution: it either excludes material from cases or runs the risk of the court ordering damaging disclosure. In heavy document cases it is problematic in practice. The Government's current assessment is that there is centrally relevant material in all of these cases which could only be heard in a CMP. Without a CMP that evidence would be excluded entirely from the courtroom.

7.2 The effect has been, in the Government's view as explained in the Green Paper and during the passage of the Ac, that courts are not getting to the bottom of very serious allegations, since evidence which might either prove allegations or exonerate the Government in these cases cannot be taken into account by the court. This has some very serious side effects. Firstly the Government may have to put aside large sums of money in order to settle these cases to the claimant's satisfaction. Secondly, although cases are settled without liability, it is widely assumed that the UK is only settling because there has been some wrongdoing on the Government's part. That causes significant reputational damage, and can be used to legitimise extremism and terrorism against the UK. Thirdly, settling is a far from certain resolution: if the claimant is not willing to settle, the Government is left with the options of seeking to exclude its own defence by means of PII, of facing potentially damaging disclosure of sensitive material, or of offering no defence and losing by default. Finally, there is worry among liaison partners – not just the US – about the nature and growing scale of litigation faced by UK authorities, and the growing risk of disclosure, particularly in civil cases, such that there appears increasingly that the UK's allies do not accept that PII in the existing structure provides sufficient security.

7.3 This was the background against which the CMP provisions were developed, with the intention of allowing national security-sensitive evidence to be heard in CMPs in the very small number of relevant civil cases in the High Court, Court of Appeal, Court of Session and the UK Supreme Court. CMPs are not a new type of procedure in the justice systems in the UK, but are already made possible through statute in several areas, including immigration, employment, Terrorism Prevention and Investigatory Measures, and proscription hearings. They have also been used with the consent of the court in judicial review proceedings and in compensation cases (that is to say, claims for damages in tort). The procedure for which the Act provides, and which the Rules supplement, is explained below.

"Stage One" – the declaration

7.4 As has been explained above, the fundamental structure, and underlying principles, for closed material procedure and its use in civil proceedings is contained in the Act. The Rules provide procedural detail, as well as making provision for some fundamental matters which the Act requires to be contained in the Rules, and other matters for which the Act enables provision to be made in the Rules to give effect to the overriding aim of the Act that sensitive material should be able to be used in civil proceedings without its being disclosed in a way which would be damaging to the interests of national security.

7.5 Section 6, as explained above, provides the gateway to the ability to use closed material procedure in any given proceedings where sensitive material is in issue. It allows for any party to apply for a declaration, not just the Secretary of State, and requires provision to be made to ensure that the party intending to apply for a declaration gives notice to all other parties of that intention. It is also a requirement that the Secretary of State has first considered whether to make, or advise another person to make, a claim for public interest immunity for the material on which the application is based. The way in which this is to work was explained during the passage of the Act, as involving the Secretary of State providing to the court written submissions detailing the reasons for not making or advising another person to make a claim for PII in relation to the material on which the application is based. The court must, as a safeguard against the use of closed material procedure where it is not genuinely necessary, may make a declaration under section 6 only if it would be in the interests of the fair and effective administration of justice in the proceedings (Section 6 (5)).

7.6 The applicant for a declaration under section 6 will accordingly need to be able to persuade the court that there is relevant material the disclosure of which would damage national security and to put forward arguments as to why a CMP would be in the interests of the fair and effective administration of justice (for example, explaining the degree of relevance of sensitive material to the issues in the case). An application need not be based on all off the sensitive material or indeed on material held by the applicant. A sample should be sufficient, section 6(6). The Rules make provision for how the application is to be made, including the material which it should contain, in Section 3 of the new Part 82.

7.7 In order for the procedure not to be self-defeating, the disclosure required for this critical stage has to be treated as if it were itself an application for permission to

disclose only in closed session (that is, to the court and special advocate only). Section 11(4) accordingly provides for the application for the declaration to be made itself in closed session by treating the proceedings as "section 6 proceedings" for the purpose of making a closed material application, thereby permitting applications for specific material to be heard in closed as part of the application for a declaration.

7.8 In debates Ministers set out what they thought the judge would have to consider where open disclosure of relevant material would be damaging to the interests of national security. In examining what is in the interests of the fair and effective administration of justice in the proceedings, the court will focus on the relevance of the sensitive material to the issues in the case in order to assess how necessary it is to take it into account to resolve the issues in the case, and whether there are alternative measures that would enable the case to be heard without a CMP. The court will also need to take into account other factors,which may include whether both parties would consent to a CMP, the importance of the sensitive material to the issues in the case and the existence of material—such as intercept material—that could only be dealt with in closed proceedings.

"Stage 2" – considering sensitive material in closed session

7.9 If a declaration is made under section 6 of the Act, establishing the general principle that it may be possible for parts of the case to proceed under closed material procedure, the court would then need to decide how each individual piece of evidence should be dealt with ('stage two') – whether that be in closed session, or in open session.

7.10 The procedure for applying for permission to disclose sensitive material "in closed session" is contained in Section 2 of the new Part 82. The rules in this Section are based to a considerable extent on rules made to govern closed material procedure in other contexts, such as terrorism prevention and investigation measures (Part 80 of the CPR) and terrorist asset-freezing (Part 79 of the CPR), and the powers under which they are made, and the specific matters which are required to be included in the rules, are similar to those in the corresponding legislation pursuant to which the other rules such as Parts 79 and 80 of the CPR were made. A crucial element is the requirement, if permission is given for material to be disclosed in closed session, for the court to consider whether a summary (gist) should be provided in open session. (section 8 (1)(d) and, in particular, rule 82.14).The court must ensure that any such summary would not itself be damaging to the interests of national security, (section 8 (1)(e)) save where a damaging summary is required for ECHR purposes, section14(2)(2). But in the latter case, the party seeking to disclose the material in closed session will have the option of declining to provide the damaging summary and instead being unable to rely on the material, or having to make concessions in the proceedings.

7.11 Special Advocates will represent the interests of an excluded party (section 9, and rules 82.9 and 82.10 which cover their appointment and functions), and are likely to argue for maximum disclosure in open court. But ultimately the decision will rest with the court, subject ultimately to the safeguard provided by section 14(2) of the Act which provides that nothing in the Act or in the rules made by virtue of it is to be

read as requiring the court to act in a manner inconsistent with Article 6 of the European Convention on Human Rights.

Review and revocation of declarations

7.12 Section 7 of the Act requires the court to pause to consider the revocation of the CMP declaration if it is no longer in the interests of the fair and effective administration of justice in the proceedings. This review should take place after the detailed disclosure exercise which takes place in both open and closed sessions, but before the start of the substantive proceeding.

7.13 At this stage, the court will be in a much better position to make a decision about whether or not to continue with a CMP, as it will have had the benefit of scrutinising in detail all of the relevant sensitive material, as well as all the relevant open material, and—with the assistance of special advocates—deciding what should be disclosed, whether a summary of any closed material not damaging to national security should be provided, and what would be necessary for the proceedings to comply with Article 6 of the ECHR. This will require the court to reconsider its original declaration, and therefore the best way for the case to be heard, after it has examined relevant material received thus far in the case. The court also has an explicit power to revoke a CMP declaration at any point in the proceedings if it concludes a declaration is no longer in the interests of the fair and effective administration of justice in the proceedings, section 7(2).

7.14 Rules for the procedure governing such reviews, including the definition required by section 7 of when the "pre-trial disclosure stage" of the proceedings is to be taken to have finished, are in Section 4 of the new Part 82.

"Norwich Pharmacal"

7.15 Section 17 of the Act prevents the court in certain narrow circumstances from exercising the *Norwich Pharmacal* jurisdiction so as to order the disclosure of sensitive information. A *Norwich Pharmacal* order (taking its name from the case of *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133) is a remedy developed by the courts in England and Wales, under their inherent jurisdiction, with an equivalent jurisdiction in Northern Ireland. There is no equivalent jurisdiction in Scotland. The requirements for granting a *Norwich Pharmcal* order are generally recognised to be that (i) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer; (ii) the person against whom the order is sought must have been "mixed up" or involved in the wrongdoing, (iii) the information sought is necessary for the claimant to pursue redress or to rely on a defence in relation to proceedings concerning the wrongdoing and (iv) the court considers it should exercise its discretion in favour of granting the relief. Orders are commonly used to identify the proper defendant to an action or to obtain information to plead a claim.

7.16 Sensitive information for the purposes of section 17 is defined as information held by, originating from or relating to the intelligence services, or information certified by the Secretary of State as information which ought not to be disclosed as it would be contrary to the public interest. The section defines disclosure contrary to the

public interest, if it would cause damage to the interests of national security, or international relations of the UK. Section 18 provides that a party to the proceedings in which the Secretary of State has issued a certificate under section 17(3)(e) (that is, a certificate in relation to information the disclosure of which would damage national security or the international relations of the UK, other than intelligence service information), may apply to the court for the certificate to be set aside on the ground that the Secretary of State ought not to have determined that the disclosure would be contrary to one of those interests. In deciding whether to set aside the certificate the court must apply judicial review principles. If such an application were successful, the prohibition on the court ordering disclosure of the information referred to in the certificate would not apply and disclosure could be ordered (if the *Norwich Pharmacal* criteria are met).

7.17 Any review of the certificate is to be conducted under a closed material procedure (as provided for in sections 8 to 14), but in this case, the test is glossed by the Act, so that the court is to consider whether disclosure would be damaging to the interests of national security or of the international relations of the UK. Rules governing the procedure for an application for the review of a certificate are contained in Section 5 of the new Part 82.

8. Consultation outcome

8.1 The CMP provisions of the Act, from which the rules flow, are the product of an extensive Government consultation on the issues involved – the *Justice and Security Green Paper* – which invited the views of a wide variety of stakeholders. The provisions themselves were subject to intense scrutiny during the passage of the Justice and Security Bill, and were significantly amended as a result of this.

8.2 In relation to the rules specifically, in accordance with the consultation requirement contained in Schedule 3 of the Act, the Lord Chancellor has consulted the Lord Chief Justice of England and Wales. The rules have also been the subject of consultation with Special Advocates.

9. Guidance

9.1 These rules will be published on the Cabinet Office website; and they will also be published both as an individual update, and as part of a consolidated version of the Civil Procedure Rules, via the Ministry of Justice website, as is done for Civil Procedure Rule amendments in the normal way.

10. Impact

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

10.2 There is no significant anticipated impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument because no impact on the private or voluntary sectors is foreseen.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 These rules will form part of the Civil Procedure Rules 1998 which are kept under review by the Civil Procedure Rule Committee. Any subsequent amendment to these rules will be made by the Civil Procedure Rule Committee.

12.2 More generally, section 12 of the Act provides that the Secretary of State must report to Parliament every twelve months on the number of CMP applications, declarations and closed judgments made. And under section 13 of the Act, an independent reviewer till report on the operation of sections 6 to 11 of the Act within 5 years of commencement.

13. Contact

Jane Wright at the Ministry of Justice Tel: 020 3 334 3184 or email: Jane.Wright@justice.gsi.gov.uk can answer any queries regarding the instrument.