EXPLANATORY MEMORANDUM TO

THE CIVIL PROCEDURE (AMENDMENT No.3) RULES 2011

2011 No. 2970 (L.21)

1. This explanatory memorandum has been prepared by the Ministry of Justice in consultation with the Home 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 80 containing rules about –
(i) terrorism prevention and investigation measures (TPIM) proceedings in the High Court, and
(ii) appeals to the Court of Appeal against orders in such proceedings brought under the Terrorism Prevention and Investigation Measures Act 2011 ('the Act').

(b) making consequential amendments and modifications to the CPR for the purpose of those proceedings.

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

3.1 The Act received Royal Assent on 14th December 2011 and came into force the following day. This instrument was also made on 14th December and came into force on 15th December. It was necessary for the Rules to come into force at the same time the Act came into force because TPIM proceedings need to take place immediately following the Act's commencement and these Rules make important provision in relation to such proceedings – in particular they provide for closed material to be used. This requirement for early commencement was anticipated in the Act, which, for that reason, confers the initial exercise of the rule-making power on the Lord Chancellor rather than the Civil Procedure Rule Committee (see paragraph 4.8 below).

3.2 If there had been a longer period between the laying and the commencement of the Rules, it would not have been possible for the Secretary of State to rely on closed material in her applications for permission to impose TPIM notices during that period and this would have prejudiced the protection of the public from a risk of terrorism.

3.3 It is intended that this instrument will be laid before Parliament on the day that it is made. If, however, the Act receives Royal Assent late in

the day on 14th December 2011, it may not be possible to lay this instrument on the same day. It is therefore possible that this instrument will be laid the day after it is made, at a time when it will already have been in force for a number of hours.

3.4 If this instrument is not laid until the day after it is made, the Secretary of State will write to the Speakers of both Houses, as required by section 4(1) of the Statutory Instruments Act 1946, to explain the reasons for laying the instrument after it has come into force.

3.5 If such letters to the Speakers of both Houses are necessary, they will explain that the instrument has been laid after it has come into force because it was not possible to lay the instrument on the day it was made, and it was necessary (for the reasons set out at 3.1 - 3.2 above) for this instrument to come into force on the same day as the Act.

4. Legislative Context

4.1 The Act provides for the imposition of measures on individuals by way of a TPIM notice if the following conditions are met:

- The Secretary of State reasonably believes that the individual is or has been involved in terrorism-related activity ("condition A");
- Some or all of that activity is "new" terrorism-related activity ("condition B"); new terrorism-related activity is defined at section 3(6) of the Act;
- The Secretary of State reasonably considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, for terrorism prevention and investigation measures to be imposed on the individual ("condition C");
- The Secretary of State reasonably considers that it is necessary, for purposes connected with preventing or restricting the individual's involvement in terrorism-related activity, for the specified measures to be imposed on the individual ("condition D");
- The court has given permission for the measures to be imposed, or the Secretary of State reasonably considers that the urgency of the case requires measures to be imposed without such prior permission ("condition E"). (An urgent TPIM notice must immediately be referred by the Secretary of State to the court for confirmation.)

4.2 If, following the Secretary of State's application, the court gives permission for the imposition of a TPIM notice – or if the court confirms a TPIM notice imposed without permission – the court will subsequently hold a directions hearing. At the directions hearing, the court will give directions for a substantive review hearing in relation to the TPIM notice.

4.3 At the substantive hearing, the court will review the Secretary of State's decisions that conditions A to D were met when the measures

were imposed, and continue to be met. The individual also has a number of rights of appeal against decisions taken by the Secretary of State in relation to the TPIM notice (including decisions relating to the variation, revocation, revival or extension of the TPIM notice). At these hearings, the court has the power to quash the TPIM notice, to quash particular measures in the notice or to direct the Secretary of State to revoke the notice or vary the measures specified in the notice.

4.4 A party may appeal (on a question of law) to the Court of Appeal against any decision of the High Court in TPIM proceedings.

4.5 All High Court TPIM proceedings are likely to involve the use of 'closed material' (that is, material the disclosure of which would be contrary to the public interest). And TPIM proceedings in the Court of Appeal may also involve closed material. Schedule 4 to the Act therefore provides a power to make rules of court, in particular to ensure that in TPIM proceedings and appeals, closed material may be relied on and is protected. The rule-making powers in Schedule 4 to the Act also enable rules to be made in relation to 'special advocates', who, under paragraph 10 of Schedule 4, may be appointed by the Attorney General to represent the interests of anyone other than the Secretary of State in relation to closed evidence and in closed proceedings at which the individual and the individual's legal representative cannot be present. (See also paragraphs 7.2 to 7.8 below.)

4.6 Schedule 4 to the Act provides that the rules of court must secure that the Secretary of State is required to disclose all the material which is relevant to the proceedings. However, it also provides that the rules must secure that, with the permission of the court, the Secretary of State may withhold closed material from the individual, although such material must be disclosed to the court and to the special advocate. The rules are also to make provision in relation to the summarising of closed material and the withdrawing of material (or other measures) where the Secretary of State elects not to make disclosure of material which the court does not grant permission to withhold.

4.7 Paragraph 5 of Schedule 4 provides that nothing in the relevant paragraphs of the Schedule or rules made under them (relating to the withholding of material from the individual) is to be read as requiring the court to act in a manner inconsistent with Article 6 (the right to a fair trial) of the European Convention on Human Rights (ECHR).

4.8 Paragraph 7 of Schedule 4 provides that –

- when the rule-making powers are first exercised after the passing of the Act in relation to proceedings in England and Wales, the Lord Chancellor may exercise that power to make the rules (after consulting with the Lord Chief Justice of England and Wales).

- such rules must be laid before Parliament and will cease to have effect unless approved by affirmative resolution of each House within 40 days (excluding periods during which Parliament is dissolved or prorogued or both Houses are adjourned for more than four days).

4.9 These rules are made by the Lord Chancellor in exercise of that power.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales. (The Rules of the Court of Judicature (Northern Ireland) (Amendment No.4) 2011 are being made to cover TPIM proceedings in Northern Ireland and TPIM proceedings in Scotland will be covered by Act of Sederunt (Rules of the Court of Session Amendment No. 8) (Terrorism Prevention and Investigation Measures) 2011).

6. European Convention on Human Rights

6.1 Jonathan Djanogly, Parliamentary Under-Secretary of State for Justice, has made the following statement regarding Human Rights:

In my view the provisions of the Civil Procedure (Amendment No.3) Rules 2011 are compatible with the Convention rights.

7. Policy background

The Act

7.1 The Act resulted from the Government's *Review of Counter-Terrorism and Security Powers Review Findings and Recommendations (Cm 8004),* published in January 2011[1]. This included a consideration of the control order regime contained in the Prevention of Terrorism Act 2005 ('the 2005 Act'). The review accepted that for the foreseeable future there are very likely to be a small number of people in the United Kingdom who are assessed to pose an immediate and significant terrorist threat but whom we can neither prosecute nor deport. The review findings and recommendations included a commitment to repeal the 2005 Act and introduce a new system of terrorism prevention and investigation measures. These are civil preventative measures intended to protect the public from the risk posed by such persons, by imposing restrictions intended to prevent or disrupt their engagement in terrorism-related activity. The TPIM regime, whilst containing robust measures to protect the public, contains less restrictive measures than those available under the control order regime, and greater safeguards for the individual.

[1] http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/

Rules of Court and use of closed material and special advocates

7.2 TPIM proceedings are likely to involve the use of closed material – that is sensitive, often intelligence material, the disclosure of which would be damaging to the public interest. For example, the disclosure of information that would reveal the techniques of the Security Service or police could prejudice current and future operations – making it harder to uncover and prevent terrorist plots. And the disclosure of information relating to individuals who provide information in confidence to the Security Service or the police could put those individuals in danger and deter them from providing information in future.

7.3 The system of closed material proceedings, special advocates and the associated disclosure processes were developed as a means of mitigating disadvantage to a party from whom information relevant to the party's case is withheld on the grounds that such disclosure would be contrary to the public interest or who has been excluded from a hearing for that reason.

7.4 The procedure prescribed by these rules is modelled on that adopted for the Special Immigration Appeals Commission (SIAC), which was also largely replicated in the rules for control order proceedings (in Part 76 of the Civil Procedure Rules 1998). The intention is that the use of closed material proceedings under the Act will operate in the same way as under the control order regime.

7.5 After service of a TPIM notice, the individual will be provided with the open case against him or her. The open case must contain as much material as possible, subject only to legitimate public interest concerns. Proceedings will have both 'open' and 'closed' elements. The individual and his or her legal representative may be present at the open hearings and see all the open material relevant to the proceedings. They cannot be present at the closed parts of the proceedings, or see the closed material.

7.6 The special advocate, who is appointed by the Attorney General, acts in the interests of such a party in relation to the closed material and closed hearings. The special advocate attends all parts of the proceedings (both open and closed) and, like the High Court judge (or Court of Appeal judges), sees all the material, including the closed material not disclosed to the individual. The Secretary of State must apply to the court for permission if she wishes to withhold from the individual and their legal adviser any material that is relevant to the proceedings. Part of the function of a special advocate is to ensure that the closed material is subject to independent scrutiny and adversarial challenge. This includes making submissions (in closed session) on whether or not the closed material should in fact be disclosed to the individual and on whether (and to what extent) summaries (or 'gists') of the closed material should be provided to the individual. It is not the

Secretary of State but the court that determines whether material may be withheld.

7.7 The provision in paragraph 5 of Schedule 4 to the Act (see paragraph 4.7 above) means that the Article 6 right to a fair hearing of the individual takes precedence over anything in the legislation – in particular the provisions about withholding information from the individual. This provision reflects the House of Lords' judgment in *MB & AF*[2]. In that judgment, the Law Lords found that in rare cases the provisions of the 2005 Act (on which the system in Schedule 4 to the Act is modelled) might lead to a breach of Article 6 (civil) but concluded that it was possible to read down the provisions so they could be operated compatibly with Article 6 in all cases. They therefore read down the provisions under the 2005 Act requiring the court to ensure closed material is withheld from the controlled person, such that material must only be withheld if it is compatible with Article 6 to do so. The wording in paragraph 5 gives effect to the read down in *MB & AF*.

7.8 Subsequent to the *MB & AF* judgment, the Law Lords handed down a further judgment – *AF (No. 3)*[3] – on the compatibility of control order proceedings with Article 6, which took into account the European Court of Human Rights decision in *A & Others*[4]. In brief, the *AF (No. 3)* judgment held that, in relation to the stringent control orders before the Law Lords, the controlled persons must be given sufficient information about the allegations against them to enable them to give effective instructions to the special advocate in relation to those allegations. The disclosure obligations required by the judgment in *AF (No. 3)* will be applied as appropriate by the courts in TPIM proceedings.

Anonymity orders

7.9 The Rules also provide that the court may make an anonymity order which would provide that nothing should be published that identifies or would tend to identify an individual as being subject to a TPIM notice. Reasons for granting anonymity include limiting the impact of the TPIM notice on the individual's private and family life, making it easier for the individual to engage in stabilising activities such as employment or education, assisting the effective monitoring and enforcement of the TPIM notice and preventing media coverage which could prejudice any future prosecution for terrorism-related activity.

8. Consultation outcome

[2] *Secretary of State for the Home Department v MB & AF [2007] UKHL 46*
[3] *Secretary of State for the Home Department v AF and others [2009] UKHL 28*
[4] *A & Others v United Kingdom [2009] ECHR 301*

8.1 The TPIM system, of which the Rules form part, is the product of the extensive government review of counter-terrorism and security powers referred to above, during which a wide variety of stakeholders were consulted or contributed their views[5]. Independent oversight of the review was provided by Lord Macdonald of River Glaven QC.

8.2 In relation to the Rules specifically, in accordance with the consultation requirement contained in paragraph 7(2)(a) of Schedule 4 to the Act, the Lord Chancellor has consulted the Lord Chief Justice of England and Wales. While the Act does not require any other consultation on these Rules, the Rules also take into account comments on a draft made by Civil Procedure Rule Committee.

9. Guidance

9.1 These Rules will be published on the Ministry of Justice website.

10. Impact

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

10.2 There is no impact on the public sector – court proceedings under these rules will have the same impact as the control order proceedings they replace.

10.3 An Impact Assessment has not been prepared for this instrument because no impact on the private or voluntary sectors is foreseen. An Impact Assessment was prepared for the Act and can be found on the Home Office website.[6]

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 19 of the Act provides that the Secretary of State must report to Parliament every quarter on the exercise of her powers under the Act. And under section 20 of the Act, the

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[5] See the summary of responses to the consultation on the review, which can be found at http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/

[6] http://www.homeoffice.gov.uk/publications/about-us/legislation/tpim-bill/

independent reviewer of the Act will produce an annual report on the operation of the Act, which is laid before Parliament.

12.3 Section 21of the Act provides that the Secretary of State's TPIM powers expire after five years unless renewed by Order. Before making the renewal Order, the Secretary of State must consult the independent reviewer of the Act, the Intelligence Services Commissioner and the Director-General of the Security Service.

12.4 The Act will also be subject to the usual post-legislative scrutiny requirements: a memorandum providing a preliminary assessment of how the Act has worked in practice must be submitted to the relevant departmental select committee (in this case the Home Affairs Select Committee) and laid before Parliament. The Select Committee then decides whether it wishes to undertake further post-legislative scrutiny of the Act.