EXPLANATORY MEMORANDUM TO

THE RULES OF THE COURT OF JUDICATURE (NORTHERN IRELAND) (AMENDMENT NO.4) 2009

2009 No. 345

1. This explanatory memorandum has been prepared by the Ministry of Justice (Northern Ireland Court Service) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Rules of the Court of Judicature (Northern Ireland) 1980 (S.R. 1980 No. 346) ("the principal Rules") govern the practice and procedure in the Court of Judicature in Northern Ireland.

2.2 This instrument amends the principal Rules so as to:

- assign certain appeals from the Taxing Master to the Queen's Bench Division;
- extend the time period allowed to serve a defence on the plaintiff and to specify matters which must be included in any defence;
- provide that the High Court may order a plaintiff to give security for the defendant's costs where the plaintiff is a company or other body and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so; and
- prescribe the practice and procedure for proceedings under the Presumption of Death Act (Northern Ireland) 2009 ("the 2009 Act").

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

3.1 In consequence of section 59 of, and Schedule 11 to, the Constitutional Reform Act 2005 ("the 2005 Act"), which came into operation on 1st October 2009, the Supreme Court of Judicature of Northern Ireland has been renamed the Court of Judicature of Northern Ireland, the Northern Ireland Supreme Court Rules Committee has been renamed the Northern Ireland Court of Judicature Rules Committee, and the Rules of the Supreme Court (Northern Ireland) 1980 have been renamed the Rules of the Court of Judicature (Northern Ireland) 1980.

3.2 While this instrument is the first to be made with this new title, it is the 4th amendment to the principal Rules to be made in 2009. Accordingly the instrument is entitled the Rules of the Court of Judicature (Northern Ireland) (Amendment No.4) 2009.

4. Legislative Context

4.1 This instrument (Rule 3(2)(b)) amends Order 1 of the principal Rules (which deals with the assignment of business amongst the Divisions of the High Court) to provide for the assignment to the Queen's Bench Division of appeals made from the Taxing Master under Rules 15 and 17B of the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 ("the 2005 Rules").

4.2 Order 18 of the principal Rules (which deals with pleadings in proceedings brought in the High Court) is amended to extend the time allowed to serve a defence and to specify matters which must be included in any defence (Rule 3(4)).

4.3 Order 23 of the principal Rules (which deals with security for costs) is amended to enable the High Court to make an order for security for costs against a plaintiff company where there is reason to believe that the company will be unable to pay the defendant's costs if ordered to do so. Article 674 of the Companies (Northern Ireland) Order 1986 ("the 1986 Order") currently provides that where a limited company is a plaintiff and there is reason to believe that the company will be unable to pay the defendant's costs if successful in his defence, the court may require security to be given for those costs. This Article is to be repealed without replacement by the Companies Act 2006 ("the 2006 Act"), and this amendment will address any consequent gap in the legislative provision (Rule 3(5)).

4.4 New Order 93A prescribes the practice and procedure to be followed when making an application for a declaration of presumed death, or for the variation or revocation of a declaration, under the 2009 Act (Rule 3(6) and Schedule 1). Order 1 of the principal Rules is amended so that proceedings under the 2009 Act are assigned to the Chancery Division (Rule 3(2)(a)). Some minor adjustments are also made to Order 7 of the principal Rules (which deals with originating summonses) in relation to arrangements for applications under the 2009 Act (Rule 3(3)).

5. Territorial Extent and Application

5.1 This instrument applies to Northern Ireland.

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 The 2005 Rules provide for the remuneration of solicitors and counsel in legally aided Crown Court cases. Rule 15 makes provision for appeals to the High Court against decisions of the Taxing Master. The 2005 Rules have recently been amended by the Legal Aid for Crown Court Proceedings (Costs)

(Amendment) Rules (Northern Ireland) 2009 to make provision, by the insertion of Rule 17B, for appeals against the decision of the Taxing Master to the High Court in "very high cost cases", which are not covered by Rule 15. The principal Rules were not previously amended to take account of the 2005 Rules, but it is now considered appropriate to clarify that appeals under the 2005 Rules will be heard in the Queen's Bench Division. This instrument makes minor technical amendments to Order 1 of the principal Rules to ensure that appeals to the High Court under Rules 15 and 17B of the 2005 Rules will be dealt with in the Queen's Bench Division.

7.2 Order 18 (Pleadings) is amended to extend the time allowed to serve a defence and to specify matters which must be included in any defence. The amendments to Order 18 will require fuller defences to be served by defendants (which present the substance of the defendant's case) and will allow them sufficient time to do so, by increasing the current time allowed from 21 days to 6 weeks. This will prevent blanket defences being filed and the plaintiff being unaware of the nature of the particular defence to be raised at the hearing.

7.3 The instrument inserts provision into Order 23 of the principal Rules to enable the Court order the plaintiff to give security for a defendant's costs where the plaintiff is a company or other body, and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so. The policy objective is to address a potential gap in the legislative provision in respect of security for costs which will arise following the repeal of Article 674 of the 1986 Order by the 2006 Act. The effect of the repeal of this Article will be that the primary legislation will no longer make provision for security for a defendant's costs where the plaintiff is a limited company.

7.4 The 2009 Act makes provision enabling the High Court to make a declaration of presumed death, and to determine questions relating to the property of missing persons where no body has been recovered.

7.5 It was originally anticipated that the 2009 Act would provide a mechanism whereby the families of "the disappeared" (those people who are believed to have been killed during the Troubles in Northern Ireland, but whose bodies have never been found) could register the death in the absence of physical remains. In developing this issue, however, it became clear that the legislation should aim to address not only the needs of the families of the disappeared, but also to provide a procedure whereby the cases of other missing persons who are presumed to have died could be addressed.

7.6 Accordingly the Act allows for each of these cases by providing that where a missing person is thought to have died or has not been known to be alive for a period of at least 7 years, the Court may hear an application for a declaration provided:

(i) the missing person was domiciled in Northern Ireland on the date on which he or she was last known to be alive or had been habitually resident there throughout the period of one year ending with that date;

(ii) the applicant is the spouse or civil partner of the missing person; and is domiciled in Northern Ireland on the date when the proceedings are begun or has been habitually resident in Northern Ireland throughout the period of one year ending with that date; or

(iii) the applicant is a close relative (defined as the parent, child or sibling) of the missing person where the missing person is a victim of violence.

7.7 The 2009 Act also provides for the Court's powers on making a declaration of presumed death and on making a variation order, and requires that rules of court make provision in relation to the practice and procedure for proceedings under the Act. New Order 93A is inserted to ensure that the necessary Rules are in place to coincide with the commencement of the main provisions of the Act.

8. Consultation outcome

8.1 Limited consultation was undertaken with the Northern Ireland Human Rights Commission in relation to the draft Rules under the 2009 Act, due to the subject matter of the Act, and the Commission's interest in it as it passed through the Northern Ireland Assembly. In its response the Commission made some comments about the underlying policy of the Act, but were content with the draft Rules.

8.2 Due to the representative nature of the Northern Ireland Court of Judicature Rules Committee no formal consultation was considered necessary on the remainder of the Rules given that they are procedural in nature and therefore of limited public interest.

9. Guidance

9.1 These Rules will be published on the Northern Ireland Court Service website.

10. Impact

10.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

Regulating small business

11.1 The legislation does not apply to small business.

Monitoring and review

12.1 The Rules will form part of the Rules of the Court of Judicature (Northern Ireland) 1980 which are kept under review by the Northern Ireland Court of Judicature Rules Committee. Any subsequent amendment to these Rules will be made by the Northern Ireland Court of Judicature Rules Committee with the agreement of the Lord Chancellor.

13. Contact

13.1 Angela Bell at the Northern Ireland Court Service (Criminal Policy Division) Tel: 028 9041 2201 or email: angelabell@courtsni.gsi.gov.uk can answer any queries regarding the instrument.