

EXPLANATORY MEMORANDUM TO

THE JUSTICE AND SECURITY (NORTHERN IRELAND) ACT 2007 (EXTENSION OF DURATION OF NON-JURY TRIAL PROVISIONS) ORDER 2021

2021 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by Northern Ireland Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This instrument enables criminal trials to continue to be conducted without a jury in Northern Ireland where certain conditions are met, for a further two-year period from 31 July 2021. These provisions continue to be necessary in order to uphold the fair and effective administration of justice.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The Order comes into force the day after the day on which it is made. The effect of the Order is that provisions which would otherwise cease to have effect on 31 July 2021 would continue to have effect, and so the instrument only has any substantive effect from that date. Additionally, as the purpose of the Order is to continue in effect existing arrangements that have been in place for some time, it will not impose duties on people that are significantly more onerous than before, or require them to adopt different patterns of behaviour. For both reasons, commencement so soon after making would not give rise to the usual concern about whether those affected have a reasonable chance to adapt.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 The territorial application of this instrument is limited to Northern Ireland.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is limited to Northern Ireland, subject to one point. The provisions that continue in effect as a consequence of article 2 of this order include consequential amendments set out in Schedule 1 to the Justice and Security (Northern Ireland) Act 2007. To the extent that article 2 applies to those amendments, article 2 has the same extent as the consequential amendments.
- 4.2 The territorial application of this instrument is Northern Ireland.

5. European Convention on Human Rights

- 5.1 The Secretary of State for Northern Ireland has made the following statement regarding Human Rights:

“In my view the provisions of the Justice and Security (Northern Ireland) Act 2007 (Extension of duration of non-jury trial provisions) Order 2021 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 Under section 1 of the Justice and Security (Northern Ireland) Act 2007 (“the 2007 Act”), the Director of Public Prosecutions (“DPP”) may issue a certificate for any trial on indictment to be heard without a jury in certain circumstances. Sections 2 - 8 of the 2007 Act make related and supplementary provision. Section 9 of the 2007 Act provides that sections 1 – 8 (“the non-jury trial provisions”) shall expire two years after coming into force unless the Secretary State extends them by order, such order having the effect of extending the provisions for a further two years. These provisions were extended by order prior to their expiry on 31 July 2009 and have since been extended a further five times. They are currently due to expire on 31 July 2021. This instrument extends the non-jury trial provisions for a further two-year period from 31 July 2021 until 31 July 2023.

7. Policy background

What is being done and why?

- 7.1 The current non-jury trial regime was put in place in 2007 following the reform of the ‘Diplock Courts’ system. Under the Diplock system, which was in place from 1972 until 2007, persons charged with a scheduled offence were automatically tried before a single judge without a jury. This was to overcome the threat of terrorist intimidation of jurors when dealing with terrorism offences in Northern Ireland. In order to move towards normalisation in Northern Ireland, the 2007 Act replaced the Diplock system, moving from the presumption of a non-jury trial to a presumption of trial by jury in all cases.
- 7.2 Section 1 of the 2007 Act allows the DPP to issue a certificate for a trial to be heard without a jury. The DPP may issue a certificate if he suspects that any of the conditions set out in section 1 are met and is satisfied, in view of this, that there is a risk that the administration of justice might be impaired if there were to be a jury trial.
- 7.3 The decision for issuing a certificate involves a two-stage test set out in section 1(3) to (6) of the 2007 Act. The DPP may issue a certificate if the DPP suspects that any of four conditions is met and the DPP is satisfied that there is a risk that the administration of justice might be impaired if a jury trial were to be held. The four conditions are outlined below:
- 7.4 Condition 1 is that the defendant is, or is an associate of, a person who is a member of a proscribed organisation, or has at any time been a member of an organisation that was, at that time, a proscribed organisation.
- 7.5 Condition 2 is that the offence or any of the offences was committed on behalf of a proscribed organisation, or a proscribed organisation was otherwise involved with, or assisted in, the carrying out of the offence or any of the offences.
- 7.6 Condition 3 is that an attempt has been made to prejudice the investigation or prosecution of the offence or any of the offences and the attempt was made on behalf of a proscribed organisation, or a proscribed organisation was otherwise involved with, or assisted in, the attempt.

- 7.7 Condition 4 is that the offence or any of the offences was committed to any extent (whether directly or indirectly) as a result of, in connection with or in response to religious or political hostility of one person or group of persons towards another person or group of persons.
- 7.8 Non-jury trials are the exception in Northern Ireland: there were 14 non-jury trial cases in the Crown Court in 2019 (out of a total of 1295). In comparison the average number of Diplock Court cases in the last five years that the system was in operation (up until 2007) was 64 per year.
- 7.9 The threat level in Northern Ireland from Northern-Ireland-related terrorism continues to be assessed as ‘SEVERE’ (meaning an attack is highly likely). Violent dissident republican terrorist groups (“DRs”) and paramilitary groups continue to be both capable and influential. Paramilitary groups (both loyalist and republican) continue to carry out brutal attacks against members of their own communities in an attempt to exert control. During the period 1 January 2020 to 31 December 2020, there were 13 casualties as a result of paramilitary style shootings and 42 casualties of paramilitary style assaults. 2,773 people were driven from their homes from 2014 to date due to paramilitary and sectarian intimidation. These statistics are indicative of the violence and intimidation which paramilitary groups carry out, although they do not fully convey the hold that paramilitaries have on the communities in which they operate. In their third report (November 2020), the Independent Reporting Commission stated that, “for too many people the reality of a paramilitary presence, and all that that involves, afflicts their daily lives and experiences”.
- 7.10 In this context, where prosecutions are brought in relation to current DR and paramilitary criminal activity, there remains a risk that members of the jury would be subject to threat or intimidation. Cases relating to DR and paramilitary criminal activity are high profile and continue to provoke public opinion on both sides of the community in Northern Ireland. In addition to the risk of juror intimidation, there is also the potential for jury bias as a result of a defendant's alleged association with a proscribed organisation or if the offence being tried is in connection with religious or political hostility.
- 7.11 The legacy of The Troubles remains an unresolved, divisive and emotive issue in Northern Ireland. Legal cases related to the Troubles continue to proceed through the criminal justice system and attract significant public and media attention. There is therefore also the potential for jury bias or intimidation in this context.
- 7.12 Since the renewal of the provisions in 2017, the Independent Reviewer of the 2007 Act has included the non-jury trial system in their review, reports of which are published annually. These reports have been generally supportive of the operation of the non-jury trial system and the process for issuing a non-jury trial certificate. In their findings in the 10th report (the first in which non-jury trials were considered), published in April 2018, the Independent Reviewer found that the existing arrangements work well and did not suggest any changes to the legislation or the process of renewing the provisions under the 2007 Act. In the 12th report, published in April 2020, the Independent Reviewer confirmed the analysis in his 10th report and did not expressly recommend that the non-jury trial provisions should not be renewed in 2021. However, he made recommendations to help pave the way to a return to jury trials. He recommended that the Northern Ireland Office should set up a working group consisting of representatives from the PPS, PSNI, the Court Service, the Bar, the Law Society and other independent organisations. He recommended the group

look at practical measures that could be taken to reduce the number of non-jury trials taking place (see paragraph 14.3 below).

- 7.13 Consideration has been given as to whether the provisions in Part 7 of the Criminal Justice Act 2003 (“the 2003 Act”), could be relied on instead of the provisions of the 2007 Act. The 2003 Act provides that a judge of the Crown Court must order a non-jury trial if satisfied that two conditions are met. The first is there is evidence of a real and present danger that jury tampering would take place. The second is that, notwithstanding any steps which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be so substantial as to make it necessary in the interests of justice for there to be a non-jury trial. The threshold for ordering a trial without a jury is therefore considerably higher than that in the 2007 Act.
- 7.14 The 2003 Act is only concerned with jury tampering and witness intimidation whereas the 2007 Act also contemplates that in Northern Ireland the risk of impairment to the administration of justice can arise from a fearful or hostile jury. Given the nature of continued DR and paramilitary activity and the tight-knit communities in which these organisations operate, as well as the fact the legacy cases continue to proceed through the criminal justice system, reliance on the provisions in the 2003 Act would be inadequate to fully mitigate the risks to the administration of justice in Northern Ireland at this time. In addition to the real possibilities of jury tampering and/or jury bias, it is sometimes the jurors’ perceptions as to the risks posed to them and their families in a small jurisdiction which is relevant, rather than the risk itself. The Independent Reviewer has also considered the use of the 2003 Act in their reports and in the 11th Report stated that the 2007 Act contemplates the wider range of risks to the administration of justice in Northern Ireland than the 2003 Act.
- 7.15 In light of all the current circumstances and having carefully considered the consultation responses, the Secretary of State has concluded that the non-jury trial provisions under the 2007 Act should be extended for a further two years.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 This instrument does not amend existing provisions and therefore consolidation is not an issue.

10. Consultation outcome

- 10.1 The Northern Ireland Office held a public consultation on whether to extend the non-jury trial provisions under the 2007 Act for a further two years. The consultation was open for 12 weeks (from 23 November 2020 to 15 February 2021) and received 13 responses. Of the responses received, eight were in favour of extending the provisions, one was not in favour, and four stated no clear position.
- 10.2 Respondents who were in favour of extending the non-jury trial provisions for a further two years typically cited the current threat from Northern Ireland Related Terrorism, as well as continued paramilitary activity, including forcing people from their homes, as justification for a further extension given the risk of jury tampering in

this context. Some also highlighted the potential for jury bias as legacy cases continue to proceed through Northern Ireland’s criminal justice system. Although agreeing that an extension to the provisions is necessary at this time, most of the respondents in this category expressed a desire for them to be removed when it was safe and compatible with the interests of justice.

- 10.3 The respondent that opposed the extension of the provisions felt that Northern Ireland should move towards the non-jury trial regime under the Criminal Justice Act 2003; that the threshold needed to pass the statutory test under the 2007 Act is too low; and that the ability to challenge a non-jury trial certificate is subject to limitations which are too stringent.
- 10.4 Of those who indicated no clear position on whether the provisions should be extended, some thought that the current system, including the statutory test for issuing a non-jury trial certificate, should be reviewed. Some respondents thought that the fact that the DPP regularly rejects applications demonstrates thorough consideration before a certificate is granted. Other respondents suggested the removal of non-jury trial provisions under the 2007 Act would reduce delay in the criminal justice system.
- 10.5 An official consultation response document has been published by the Northern Ireland Office and made available to the public at <https://www.gov.uk/government/organisations/northern-ireland-office>

11. Guidance

- 11.1 As this Order extends the period of validity of existing provisions it is not considered necessary to provide guidance.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because no impact on business is foreseen.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is that the Northern Ireland Office will continue to monitor and review these provisions prior to the expiry of the non-jury trial provisions in July 2023, including considering any further findings of the Independent Reviewer, giving consideration to whether a further extension by order is necessary and appropriate.
- 14.2 The Secretary of State has requested, under section 40(3) of the 2007 Act, that the Independent Reviewer include the non-jury trial provisions in the Independent Reviewer’s annual report. There is therefore an independent, annual review of these provisions.
- 14.3 The Northern Ireland Office will also establish a multi-disciplinary working group to identify practical measures within the framework of the 2007 Act that could be taken to reduce the number of non-jury trials taking place. The group should also examine

what indicators would assist in determining when it would be safe and compatible with the interests of justice to allow the provisions to expire.

15. Contact

- 15.1 Kathy Donnell at the Northern Ireland Office Telephone: 07775 548 137 or email: Kathy.donnell@nio.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Nikki Bodel, Deputy Director for the Security & Protection Group, at the Northern Ireland Office can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Secretary of State for Northern Ireland can confirm that this Explanatory Memorandum meets the required standard.