



Northern  
Ireland  
Office

# CONSULTATION RESPONSE PAPER:

Outcome of the public  
consultation on non - jury trial  
provisions  
Justice and Security (Northern  
Ireland) Act 2007

June 2017

## 1. Introduction

1.1. On 16 November 2016, the Northern Ireland Office launched a 12 week public consultation<sup>1</sup> seeking views on non - jury trial provisions contained within the Justice and Security (Northern Ireland) Act 2007.

1.2. The consultation sought views on a proposal to extend non - jury trial provisions under the 2007 Act for a further two years. It also sought views on whether the conditions in the statutory test for the Director of Public Prosecutions for Northern Ireland (DPP) to issue a non - jury trial certificate (in Section 1 of the 2007 Act) and the current grounds on which the DPP's decision to issue a certificate may be challenged (in Section 7 of the 2007 Act) remain appropriate. It also welcomed any views from the public on the potential impact of non - jury trial provisions on equality in Northern Ireland.

1.3. The consultation closed on 8 February 2017. This document sets out a summary of the responses to our consultation and the Secretary of State for Northern Ireland's subsequent decision based on the matters raised.

1.4. This document is available at [www.gov.uk/consultations](http://www.gov.uk/consultations) under *Non-jury trial provisions Justice and Security (Northern Ireland) Act 2007*. You may make additional copies of the summary without seeking permission; it can also be made available on request in different formats for individuals with particular needs. If you require any additional copies of the summary or have any concerns or questions about the consultation process you should contact the consultation co-ordinator, by telephone, in writing, or by email:

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<sup>1</sup> [The full consultation document can be accessed by clicking here.](#)

## 2. Background

2.1. Non - jury trial provisions under the 2007 Act are temporary, however may be extended for a period of two years by Order approved in both Houses of Parliament. They were last extended in July 2015. At that time, a commitment was made to hold a full public consultation prior to the next expiry of the provisions in July 2017.

2.2. The provisions under the 2007 Act allow the DPP to certify that a trial on indictment is to be conducted without a jury in a specific case, provided a statutory test is met.<sup>2</sup> Today in Northern Ireland, there is a strong presumption for jury trials in all cases, with less than 2% of all Crown Court cases per year held without a jury<sup>3</sup> in Northern Ireland under the 2007 Act. However, the severe threat from Northern Ireland-related terrorism and the presence of violent paramilitary groups continues to pose risks to the criminal justice system which can necessitate non-jury trials in a small number of cases.

2.3. Non - jury trial provisions contained within the 2007 Act apply only in Northern Ireland. These replaced the former so-called “Diplock” system which existed from 1972 until its repeal in 2007.<sup>4</sup> Provisions under the 2007 Act are separate from those contained in Section 44 of the Criminal Justice Act 2003, which enables trials to be conducted in England, Wales and Northern Ireland without a jury, where there is evidence of a real and present danger that jury tampering would take place.

2.4. The proposal set out in the recent public consultation document by the NIO to extend non - jury trial provisions under the 2007 Act for a further two years was based on the current threat level for Northern Ireland-related terrorism<sup>5</sup> which is classified as SEVERE and the activities of violent paramilitary groups who continue

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<sup>2</sup> As set out in Section 1 of the [Justice and Security \(Northern Ireland\) Act 2007](#).

<sup>3</sup> Under non - jury trial provisions within the Justice and Security (Northern Ireland) Act 2007.

<sup>4</sup> For more information on the Diplock system please see Annex A of the original consultation paper on non - jury trial provisions in the Justice and Security (Northern Ireland) Act 2007 [by clicking here](#).

<sup>5</sup> The threat level for Northern Ireland-related terrorism is set separately for Northern Ireland and Great Britain (England, Wales and Scotland) [Click here to view the latest information from MI5 on NI Threat Levels](#).

to pose risks to the criminal justice system in Northern Ireland.<sup>6</sup> Given this unique context, we believe that there is still a substantial risk to the administration of justice in Northern Ireland with juries at risk from tampering and the possibility of community-based pressures to undermine a fair jury trial in a small number of cases. Furthermore, an initial review by the NIO also indicated that the four conditions in the DPP's statutory test remain relevant and that the grounds for challenge are in line with current case law.

### **3. Summary of responses received**

3.1. The Secretary of State for Northern Ireland has considered the responses received during the consultation. These, alongside a range of relevant briefings, have helped to inform his decision making on whether it is appropriate to extend provisions for non - jury trial under the 2007 Act.

A total of 10 responses were received from:

- The Director of Public Prosecutions for Northern Ireland
- The Police Service of Northern Ireland (PSNI)
- Independent Reviewer of the Justice and Security (Northern Ireland) Act 2007
- Chief Commissioner of the Northern Ireland Human Rights Commission
- The Minister of Justice for Northern Ireland
- The Chief Executive of The Bar of Northern Ireland
- The Lord Chief Justice of Northern Ireland
- The Director of Liberty
- The Crown Solicitor for Northern Ireland
- The Chair of the Northern Ireland Policing Board

#### *Responses broadly in favour of an extension*

3.2. Three of the 10 respondents, the Minister Justice, the Northern Ireland Human Rights Commission and the PSNI expressed they were broadly in favour of an extension of the provisions for non - jury trial under the 2007 Act.

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<sup>6</sup> In 2015 there were 16 national security attacks, 32 paramilitary style shootings/ attacks and 209 Bomb disposal team callouts in Northern Ireland. There were 4 national security attacks, 49 paramilitary style shootings/ attacks and 5 confirmed paramilitary related murders in Northern Ireland in 2016.

## Excerpts:

### The Minister of Justice

*"I welcome the full public consultation on the provisions at this time given that the provisions were initially designed to be temporary and that they have been extended on four occasions since their introduction.*

*Whilst I would wish to see a return to jury trials in all cases as soon as possible I am acutely aware that the threat level from Northern Ireland related terrorism remains severe. For the protection of administration of justice I would support a decision to extend the provisions once again for a further two years."*

### The Police Service of Northern Ireland

*"The provisions set out in the Act remain as valid now as they were at the time of the previous consultation and therefore an extension of the current provisions is considered necessary, proportionate and justifiable in order to address the potential risks to the administration of justice. This view is supported by the following:*

*As outlined at page 6-7 of the paper 'The threat level for Northern Ireland - related terrorism in Northern Ireland remains at SEVERE. The activities of violent paramilitary groups continue to pose risks to the criminal justice system.*

*...the primary risk to the administration of justice is posed by proscribed Dissident Republican Groupings and the presence of other violent paramilitary groupings who continue to operate within the Northern Ireland community.*

*The potential risk posed by suspected members or associates of the above groupings, whether sanctioned or otherwise, makes the application of available jury measures ineffective in the majority of cases.*

*In light of the above, and in a limited number of cases, there is a continuing risk of jury tampering/ intimidation arising. In addition, there is the risk of a fearful, partial or hostile jury returning a perverse verdict."*

*In conclusion, the risk to the administration of justice set out above and set out within the consultation paper, justifies the continuation of the provisions allowing for a non - jury trial in the limited circumstances provided for by the 2007 Act."*

## The Chief Commissioner of the Northern Ireland Human Rights Commission

*“The Commission is aware of the assessment of the continuing severe threat from terrorism in Northern Ireland. In those circumstances a further extension of the non - jury trial arrangements appear appropriate.*

*...the Commission recognises the need to find ways of ensuring jury trials apply wherever possible and that the right to trial by jury is considered an essential feature of the UK justice system. In 2013 the UN Committee against Torture recommended that the UK Government should:*

*take due consideration of the principles of necessity and proportionality when deciding the renewal of emergency powers in Northern Ireland, and particularly non - jury trial provisions. It encourages the State party to continue to moving towards security normalisation in Northern Ireland and envisage alternative juror protection measures. In light of it is disappointing the review does not appear to consider the development of alternative juror protection measures which may be put in place to avoid the necessity of the non - jury trial provisions.*

*In light of this recommendation it is disappointing that the review exercise does not appear to consider the development of alternative juror protection measures which may be put in place to avoid the necessity of the non - jury trial provisions.”*

3.3. The Chief Commissioner noted the Criminal Justice Act (2003) provides for trials on indictment without a jury in England & Wales and in Northern Ireland in certain circumstances. Under Section 44 of the 2003 Act a judge of the Crown Court may permit a trial to be conducted without a jury where there is evidence of a real and present danger that jury tampering would take place and where “notwithstanding any steps (including the provision of police protection) 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 the trial to be conducted without a jury.” He stated that in reviewing the provisions of the 2007 Act, the NIO should consider inserting a similar necessity condition into the process for determining whether a non - jury trial will take place. He also commented that the review should consider how effective equality monitoring can be assured.

Responses which accepted that the Secretary of State may continue to deem the provisions necessary given the risks that presently exist

3.4. Four respondents accepted that the Secretary of State may continue to deem the provisions necessary, given the risks that presently exist; the DPP, The Independent Reviewer of the 2007 Act, The Lord Chief Justice and The Chief Executive of The Bar of Northern Ireland.

**The Director of Public Prosecutions**

3.5. The DPP responded firstly on the issue of whether the provisions for non - jury trial in the 2007 Act should be extended, referring back to previous considerations of the matter by his office in 2011, 2013 and 2015. He also provided updated details of the number of certificates issued and refused since 2007, commenting that the enclosed figures suggest there remains an “ongoing and significant threat in this jurisdiction, which the Secretary of State may consider necessitates the continuing use of non - jury trials.” He also responded on the matter raised in the consultation paper of whether or not the criteria within the statutory test for issuing certificates and the challenge mechanism are appropriate.

**Excerpts:**

*“I can confirm that I agree with the analysis within the consultation paper that the four conditions remain appropriate. Whilst condition 3 has not been relied upon in the last 3 years there is evidence of its application to cases in decisions taken between 2011 and 2013. I can envisage a case in which condition 3 alone would apply, although this would undoubtedly be a rare occurrence.*

*Nevertheless, there is a clear logic to being able to certify a case for non - jury trial in circumstances where there is information providing a basis for suspecting that a proscribed organisation has been involved in an attempt to prejudice the investigation or prosecution of the offence(s) concerned. All of the remaining conditions are relied upon regularly and I consider that together they provide a proper framework for the first part of the statutory test.*

*I also agree with the view expressed within the paper that the test for challenge is appropriate in light of the nature of the decision that is being taken and the types of material that usually inform it. It seems to be that this view is strongly supported by the ruling of the Divisional Court in the Arthurs case to which your paper refers.”*

## Independent Reviewer of the Justice and Security (Northern Ireland) Act 2007

Mr David Seymour

*“As the Independent Reviewer of the JSA, I would not disagree with the proposal to extend these arrangements for a further two years. I base this on the following considerations -*

- (a) nothing has happened or changed in the last two years (particularly in relation to the security situation) to justify bringing these arrangements to an end*
- (b) In my discussions with a broad range of interested parties in Northern Ireland this issue has never been raised as a cause for concern - whereas I heard frequent complaints about the slowness of the criminal justice system, the level of punishments handed out by the courts for serious terrorist offences and the inability of the criminal justice system to deal efficiently with drug abuse and other anti-social criminal behaviour;*
- (c) the numbers of non jury trials remains small but there is no discernible and permanent downward trend which would justify bringing the current arrangements to an end;*
- (d) the acquittal rates for 2015 and 2016 for non jury trials compare favourably (if that is the right expression) with those for jury trials;*
- (e) There appears to have been no judicial review<sup>7</sup> of a DPP certificate suggesting that the system (or its impact in an individual case) has been improperly applied.”*

3.6. The Independent Reviewer of the 2007 Act also commented that there appear to be no statistics relating to how many successful appeals there have been to the Court of Appeal and that presumably, had there been any such appeals that would have been mentioned in the background briefing.<sup>8</sup> The Independent Reviewer stated that in the circumstances outlined, he can understand why the preferred option at this stage is a continuation of the current arrangements.

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<sup>7</sup> To date, there have been no successful challenges of a non - jury trial certificate issued by the Director of Public Prosecutions under the 2007 Act.

<sup>8</sup> To date, there have also been no successful appeals in the Court of Appeal in cases where a non - jury trial has been used.



## The Lord Chief Justice of Northern Ireland

### Excerpts:

*“As the renewal of this legislation is a policy matter, and not therefore a matter which the judiciary would wish to comment on, the Lord Chief Justice is reluctant to express a view on whether or not it should be renewed. What I can say, however, is that the judiciary have no issues or concerns to raise with how the present system is operating.*

*Since this legislation was last renewed there has been no jury intimidation (there being no juries) and limited witness intimidation of which we are aware (mainly because most witnesses are police or professionals). In addition, the current trend favouring the use of no juries in contentious inquests flows from the perspective of avoiding bias/ perception of bias, as opposed to the perspective of avoiding intimidation. Bias, and the perception of bias, are concepts that are just as relevant as intimidation in the operation of the 2007 Act.”*

## The Chief Executive of The Bar of Northern Ireland

3.7. The Chief Executive of The Bar highlighted the importance of trial by jury across the United Kingdom, as a well-established and critical aspect of a defendant’s right to a fair hearing. He commented that trial by jury is an important form of democratic participation in the criminal justice system and forms a fundamental component in inspiring public confidence in the rule of law. In terms of the DPP’s statutory test and the current mechanism for challenging a non - jury trial certificate, he made the following comments:

### Excerpts:

*“A considerable degree of discretion exists under the test as a certificate may be issued if the DPP “suspects” that one or more of the four statutory conditions is met, including a defendant who is, or is an associate of, a person who is a member of a proscribed organisation. In addition, Section 1(2)(b) of the Act provides that the DPP must also be “satisfied” that there is a “risk the administration of justice might be impaired” if the trial were to be conducted with a jury. This subjectivity is problematic given that there is no requirement for the DPP to provide reasons for these decisions. The Bar is also concerned that the ability to challenge the issue of certificates by the DPP is subject to very stringent limitations. The right to legal challenge, particularly by way of judicial review, is an important basic right.*

*However the inclusion of Section 7 within the 2007 Act allows for a legal challenge “only on the grounds of dishonesty, bad faith or other exceptional circumstances, such as lack of jurisdiction or error of law. The Bar takes the view that these grounds are too narrowly defined at present.”*

3.8. The Bar noted in addition that the UN Human Rights Committee's Concluding Observations from 2008<sup>9</sup> highlighted that the decision of the DPP to certify particular cases for non - jury trial should be based on *"objective and reasonable grounds...and that there is a right to challenge these grounds."* This report also pointed to the divergence between the system in operation in Great Britain and Northern Ireland, stating the need to *"carefully monitor, on an ongoing basis, whether the exigencies of the situation in Northern continue to justify any such distinctions with a view to abolishing them."*

**Excerpts:**

*"We appreciate that the terrorist threat in Northern Ireland remains severe. The consultation document references that this this context means that juries can still be at risk from tampering in Northern Ireland and that this threat to the administration of justice justifies the continuation of non - jury trial provisions of the 2007 Act for a further two years. Consequently, whilst we have outlined above that the current system is not ideal, we accept that there are genuine threats to the administration of justice, including the work of the legal profession and judiciary in NI, which must be taken seriously."*

3.9. The Bar concluded however that:

**Excerpts:**

*"...If the NIO proceeds with the stated preferred option of extension of the current provisions under the 2007 Act for a further two years, the Secretary of State should consider a future review of this policy and the potential for bringing it into line with the Section 44 of the Criminal Justice Act 2003 in England and Wales. This would allow for the prosecution to apply for a trial without a jury through judicial order from the Crown Court. Under this legislation the judge must be satisfied that there is "evidence" of a real and present danger that jury tampering will occur and that, despite precautionary steps such as police protection, there remains a "substantial" likelihood of jury tampering making it necessary in the interest of justice for the trial to be conducted without a jury. This includes the safeguards of judicial oversight, high objective thresholds and consideration of alternative precautionary steps which are all built into the legislation. We believe that in the longer term Northern Ireland should seek to move towards this regime as soon as it is considered practically possible."*

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<sup>9</sup> Please visit <http://www.ohchr.org/EN/Countries/ENACARegion/Pages/GBIndex.aspx> where you can access the full paper.

Responses clearly opposed to an extension

3.10. One response was received, from the Director of Liberty, which was opposed to extending provisions for a further two years.

**The Director of Liberty**

3.11. Liberty stated that across the four corners of the United Kingdom, trial by jury acts as a common and essential mechanism for ensuring that due process, accountability and transparency sits at the heart of the criminal justice system of each nation. They also stated the right to a fair hearing is enshrined in law by article 6 of the European Convention on Human Rights (ECHR) as incorporated by the Human Rights Act 1998 and that it is a sign of a peaceful, stable and mature democracy. Liberty went on to say that the system put in place under the 2007 Act jeopardises the individual's right to a fair hearing by allowing the DPP, who comes with an institutionally vested interest in securing conviction - to oust the proper scrutiny of a jury on the basis of broadly defined circumstances and with a low evidential threshold of his personal "suspicion."

**Excerpts:**

*"It removes the vital protection that requires twelve fully independent members of the public to determine guilt or innocence on the basis of evidence and replaces it with the ruling of a single judge, who is also tasked with responsibility for ensuring the legal correctness of the proceedings and whose exposure to other criminal trials may have an impact on their view of the case.*

*The terms of the 2007 Act also pose a threat to a number of other rights. For example, the DPP is permitted to issue a certificate on the basis of suspicion that the defendant is a family member of a proscribed organisation, raising questions of the right to respect for private and family life (article 8 ECHR) and the right to freedom of association (article 11 ECHR).*

3.12. Liberty furthermore stated that they agree the state must take steps to protect the neutrality and safety of jurors; however, the Government has not adduced sufficient evidence to demonstrate that the threat to jurors in Northern Ireland is real,

present and significant. Nor do they believe it shown that there is a difference between Northern Ireland and other parts of the United Kingdom.

*“Nor has it shown that there is a difference between Northern Ireland and other parts of the United Kingdom in this regard. Even if the Government is able to provide robust evidence of a legitimate and specific threat, there are clearly other ways to protect the integrity of trial by jury. In other parts of the UK, the independence or security of a jury may come under question in particular cases and there exists a whole range of proportionate and targeted measures that can be taken to ensure that this does not impact on the right to a fair trial or the safety of jurors. It is difficult to understand why this tailored approach is not adopted in Northern Ireland, particularly in the absence of evidence that the threat to juries there is more widespread than elsewhere.”*

3.13. Liberty concluded that it is gravely concerning that the 2007 provisions concerning non - jury trials were introduced to be time - limited yet, if granted, the extension currently under consideration would mean that the provisions have now been in force for a decade. It commented that the repeated extension of the non - jury trial provisions contained in the 2007 Act by order of the Secretary of State therefore strikes at the heart of the principles of equal and fair treatment before the law and undermines both the perception and reality of political and social stability in Northern Ireland.

*Responses which did not comment on the proposal to extend*

3.14. The Chair of the Northern Ireland Policing Board stated that as the Board does not have access to the material that would evidence juror intimidation or undue influence, it is not in a position to assess the merits of the argument that a continued risk of paramilitary and community-based pressures on a jury warrants a continuation of non - jury trials, nor can it assess whether the four conditions in the DPP’s test remain relevant. Likewise the Chair noted that the Board does not have information that would allow it to reach a conclusion as to whether there was or was not an equality impact arising from the provisions. The Board therefore will not comment further.

3.15. The Crown Solicitor’s office replied indicating it had no comments to make in

respect of this consultation.

#### **4. Analysis of the issues raised in the consultation responses received**

##### *The SEVERE threat*

4.1. The consultation paper proposed that a further renewal of non-jury trial provisions under the 2007 Act is necessary due to the SEVERE threat from Northern Ireland - related terrorism and the ongoing activities of violent paramilitary groups, which continue to pose risks to the criminal justice system in Northern Ireland through juror intimidation. The majority of responses received recognised that this ongoing threat in Northern Ireland necessitates the continuation of at least *some* form of measures to mitigate potential risks to the administration of justice. For example, as described in the previous section, the PSNI argued that a further extension of the provisions in the Act was necessary, proportionate and justifiable in light of the SEVERE threat, agreeing with the point made in the consultation document that threats and acts of violence towards the police and bodies demonstrate continued attempts at intimidation of individuals and communities. David Seymour, Independent Reviewer of the 2007 Act also commented that he would not disagree with the proposal to extend the non - jury trial arrangements under the Act for a further two years, adding nothing has happened or changed in the last two years (particularly in relation to the security situation) to justify bringing these arrangements to an end. He further stated that in the circumstances, he can understand why the preferred option at this stage is the continuation of the current arrangements. **In light of these comments, it is our view that proportionate measures remain necessary to tackle this increased risk in Northern Ireland.**

##### *Evidencing juror intimidation*

4.3. Liberty were opposed to the proposal in the consultation document to extend non - jury provisions for a further two years, commenting that while the state must take steps to protect the neutrality and safety of jurors the Government had not adduced sufficient evidence to demonstrate that the threat to jurors in Northern Ireland is real, present and significant, and nor has it shown that there is a difference between Northern Ireland and other parts of the United Kingdom in this regard.

4.4. The NIO's assessment that there is a unique risk of jury tampering in Northern Ireland, particularly in cases involving members of proscribed organisations, is based on expert advice gathered from a range of criminal justice practitioners in this and previous consultations on the matter, as well as other relevant briefings. Our assessment also draws from research cited in the consultation paper which highlighted the specific challenges faced by Northern Ireland's communities.<sup>10</sup>

4.5. Providing *hard evidence* of a risk of jury tampering in the cases most at risk is difficult, given that these cases will be tried without a jury and there is therefore no clear counterfactual. By assessing there to be a risk to the administration of justice (for example, through jury tampering) and thus issuing a non-jury trial certificate, the DPP currently eliminates any opportunity for this to take place in relevant cases. We know that instances of witness and juror intimidation can and do still occur in Northern Ireland from figures released by the PSNI. Recent figures from 2016/2017 show 197 offences of intimidation/threat to harm witnesses/ jurors were recorded and 56 offences were detected by police.<sup>11</sup>

4.6. Any robust assessment of the true scale of this problem also relies on consistent reporting. For example, these figures do not include instances which are *not reported* to police. This concern was alluded to in the Fresh Start Panel Report on the Disbandment of Paramilitary Groups in Northern Ireland (published June 2016) which argued that a lack of reporting can undermine understanding of the true scale of the issue of paramilitary style attacks in communities.<sup>12 13</sup> **Despite this, we believe that the low but consistent number of cases each year which meet the**

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<sup>10</sup> Research indicates approximately 1,000 people were driven out of their homes between 2012/13 and 2014/15 due to paramilitary intimidation from within their community. The Fresh Start Panel report on the Disbandment of Paramilitary Groups in Northern Ireland June 2016, page 9.

<sup>11</sup> Figures provided the PSNI. An offence includes all offences that are recorded as crimes (including those that are detected or remain undetected) and a detected offence includes all those which are solved or cleared up by police. Due to the method used to record these statistics by the PSNI, we cannot isolate the figures further to reveal the scale of intimidation/ threat to harm jurors exclusively.

<sup>12</sup> There have been almost 4,000 recorded casualties resulting from such attacks since the start of 'the Troubles'. The number of recorded attacks has generally reduced in recent years, with 88 casualties recorded by the PSNI in 2015.

<sup>13</sup> The Fresh Start Panel report on the Disbandment of Paramilitary Groups in Northern Ireland June 2016, page 9.

**threshold for a non-jury trial certificate indicate the provisions remain necessary to mitigate juror intimidation.**

#### The Criminal Justice Act (2003)

4.7. The Bar stated they appreciate there are genuine threats to the administration of justice which must be taken seriously, but noted if we proceed with the proposal in the consultation paper of extending the provisions, we should consider a future review of this policy and the potential for bringing Northern Ireland in line with the Criminal Justice Act (CJA) 2003 which allows for non - jury trial in England, Wales and Northern Ireland.

4.8. There are key differences between the provisions in the 2007 Act and the CJA: the threshold for declaring a non -jury trial in CJA is higher (requiring evidence of a 'real and present danger that jury tampering would take place'); furthermore, the 2007 Act allows for consideration of all risks to the administration of justice, not just that of jury tampering. This allows the 2007 Act to take account of community based pressures on a jury or the prospect of a potentially hostile and partisan jury.<sup>14</sup> The 2007 provisions were agreed by Parliament even though the CJA provisions had already been passed (although not yet in force) and were designed to be complementary to the CJA provisions. The NIO is therefore concerned that a reliance on this legislation alone would prove inadequate for the unique situation in Northern Ireland. This point was debated in Parliament at the time of drafting the 2007 non -jury trial provisions. Lord Goldsmith outlined that the CJA 2003 and 2007 Act provisions were "intended to deal with somewhat different things," due to the distinction between the CJA requiring evidence of a real and present danger of jury tampering, rather than intelligence in the 2007 Act which can reveal risks, but is not always evidential.<sup>15</sup>

4.9. Section 44 of the CJA (2003) came into force in July 2007. To date, across the

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<sup>14</sup> Evidence provided by the PSNI and the Lord Chief Justice to this consultation has indicated that non-jury trial provisions within the JSA (2007) are also being used in contentious inquests to protect a defendant from bias and the perception of bias.

<sup>15</sup> HL Deb 19 March 2007 : Column GC99

England, Wales and Northern Ireland, just two non-jury trials have been conducted under Section 44 of the CJA (2003).<sup>16</sup> The relatively low use of the provisions in Section 44 CJA in comparison to Section 7 in the 2007 Act could be because it has a considerably higher threshold for non-jury trials than in the 2007 Act and the difficulty in obtaining the evidence required of jury tampering/ intimidation. However, it may also be due to the unique set of circumstances that exist in Northern Ireland, for example, the combination of the ongoing presence of violent paramilitaries and relatively smaller communities in comparison to England and Wales. We believe these factors have the potential to have a powerful impact on jurors. **Given our concerns about the risk and possible nature of potential jury tampering from active members of proscribed organisations in Northern Ireland, the CJA alone is likely to prove ineffective at mitigating these risks.**

#### Alternative Juror Protection Measures

4.10. There was some appetite from the responses received for more consideration to be given to using alternative juror protection measures in the place of non - jury trials. The Chief Commissioner of the NIHRP was disappointed the consultation had not considered the development of alternative juror protection measures which may be put in place to avoid the necessity of non - jury trial provisions. The PSNI however stated that the risks posed to administration of justice by suspected members or associates of paramilitary groupings makes the application of available jury measures ineffective in the majority of cases that are considered at risk.<sup>17 18</sup>

4.11. The Chief Commissioner also suggested the NIO should consider inserting a

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<sup>16</sup> The trial of *R v Twomey and Others*, in a case relating to an armed robbery at Heathrow Airport in 2004, took place without a jury in 2009 under the CJA (2003). The England and Wales Court of Appeal confirmed the convictions from this trial in 2011. In February 2017, Mr Justice Gross also applied non - jury trial provisions under the CJA (2003) in the trial of *R v Hussain and Others*.

<sup>17</sup> Prior to the last extension of the provisions in 2015, the PSNI also indicated that other measures necessary to protect a jury would require “significant additional expenditure.”

<sup>18</sup> The Department of Justice developed a manual for the police and criminal justice practitioners (such as the Public Prosecutions Service and Northern Ireland Courts & Tribunals Service ) in 2015 which identified strategies for effectively identifying, managing and supporting intimidated witnesses as they progress through the criminal justice system. NICTS also have a policy on “Countering Intimidation on Court and Tribunal Premises” which ensures court officials are aware of the procedures to follow if a report of intimidation of jurors is made to them. This was last updated in 2012 and is due to be updated again this year.



clear requirement into Section 7 of the 2007 Act for the DPP to consider, as part of his decision making process each time, what other steps or measures could be put in place to mitigate any risks in individual cases. While condition one of Section 44 of the CJA (2003) allows for non - jury trial if there is evidence of a real and present danger that jury tampering would take place condition two is that this is notwithstanding any steps (including the provision of police protection) 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 interest of justice for the trial to be conducted without a jury.

4.12. He commented that the latter condition is essentially a test of necessity and proportionality and that we should consider inserting a similar necessity condition into the DPP's process for determining whether a non-jury trial should take place in the 2007 Act. While it is the NIO's position that the DPP and the PSNI will routinely consider these factors under the current system for each individual case before deciding on a non - jury trial certificate, we recognise that having this on a statutory footing *may* introduce greater clarity and assurance for those affected. If we ultimately pursue this option, this would of course require primary legislation to amend the Act and could not be achieved with secondary legislation used to extend the current provisions. We will seek to explore this possibility after July 2017.

#### *Protecting equality and human rights in Northern Ireland*

4.13. In accordance with Section 75 of the Northern Ireland Act 1998, the NIO undertook an Equality Screening exercise<sup>19</sup> prior to the launch of the consultation to assess whether or not there are likely equality of opportunity and/ or good relations impacts associated with extending the non - jury trial provisions. The provisional outcome of the screening exercise was that the likely impact of extending the provisions is minor in respect of 2 of the Section 75 categories (religious belief and political opinion). We concluded that the provisions did not unlawfully discriminate and any residual potential impacts on people were judged to be negligible and none in respect of the other categories. To help inform this screening exercise and to

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<sup>19</sup> [Please click here for more information on the Equality Commission's Section 75 guidance](#) or go to <http://www.equalityni.org/S75duties>. A full copy of the Northern Ireland Office's Equality Screening Exercise document for this consultation is available on request.

determine whether a full Equalities Impact assessment would be necessary, we welcomed further views from the public in the consultation document.

4.14. Liberty raised concerns that the 2007 Act jeopardises the individual's right to a fair trial (Article 6 of ECHR) by removing the jury, as well as their right to respect for private and family life (Article 8) and right to freedom of association (Article 11) by permitting the DPP to issue a certificate "on the basis of suspicion that the defendant is a family member of a proscribed organisation."<sup>20</sup> We recognise the importance of Article 6 although it is our view that the 2007 Act does not jeopardise this. The potential breach of Article 6 in the 2007 Act was challenged in the *Arthurs'* case<sup>21</sup> in 2010, with the defendants arguing that DPP's decision to issue a non - jury trial certificate was procedurally unfair and undermined their right to a fair trial. The Court dismissed the application on all grounds, concluding that a jury trial is not synonymous with a fair trial. In cases where there are risks of hostile or partisan juries in connection with paramilitary associated offences, we believe that jury trial could actually jeopardise the defendant's Article 6 right. Acquittal rates on the whole over the past four years for non-jury trials also do not indicate that defendants are any more likely to secure an acquittal *where a plea of not guilty has been entered* from a jury trial.<sup>22</sup>

4.15. We also recognise the importance of upholding the defendant's right to respect for private and family life at all times, as well as their right to freedom of association. However, we would argue that the provisions under the 2007 Act protects these by removing any opportunity for the defendant to experience juror bias due to their level of association with a proscribed organisation as well as the potential for a juror and

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<sup>20</sup> To clarify this comment, please note that the four conditions within the DPP's statutory test all to an extent (with the exception of one) relate to the perceived level of connection between the accused and a proscribed organisation whose activities 'are (or were) connected with the affairs of Northern Ireland.'

<sup>21</sup> The grounds for challenging the issue of a non - jury trial certificate, as set out in Section 7 of the 2007 Act, were challenged in *Brian and Paula Arthurs' Application 2010*, with the applicant arguing that the DPP's decision that there should be a non - jury trial was substantively flawed, procedurally unfair and in breach of Article 6 ECHR (the right to a fair trial).

<sup>22</sup> Please see Annex A for a full breakdown of acquittal rates for those Crown Court Defendants dealt with where a plea of not guilty is entered by those in non - jury trials, compared with those in jury trials (2013 – 2016). Note we have also included provisional figures for 2017.

even a member of their family to be intimidated outside of a court setting in their private life. We do of course also have a duty to safeguard jurors' and their families' Article 2 rights to life which could be put at risk by paramilitaries intent on influencing a jury's decision through violence or the threat of violence.

#### DPP's four criteria and challenge mechanism

4.16. We also welcomed views from stakeholders on whether the current mechanism for challenging a non-jury trial certificate, as well as the four conditions within the DPP's statutory test remain appropriate. This was to inform an ongoing review being conducted by the NIO to determine whether both these aspects of the provisions remain relevant. The DPP confirmed that he agreed with the position set out in the consultation paper that the four conditions within the statutory test remain appropriate. He also agreed with the view expressed in the paper that the current challenge mechanism also remains appropriate and is strongly supported by the ruling of the Divisional Court in the *Arthurs* case.<sup>23</sup>

4.17. The PSNI agreed that where one or more of the DPP's conditions have been met that there would be a potential risk of jury intimidation or a fearful, partial or hostile jury providing an adverse verdict in the case, for or against the defendant, but did not feel it was appropriate to comment on challenge mechanism. The Bar did however raise concerns that the ability to challenge the issue of certificates by the DPP is "subject to very stringent limitations," which he views as being "too narrowly defined at present." Despite this, a response from the Lord Chief Justice of Northern Ireland commented that they have "no issues or concerns with how the present system is operating."

**4.18. In light of the overall support for how the system is currently operating, in regards to the challenge mechanism and conditions within the DPP's statutory test, our view is that both remain appropriate and do not require further changes.**

4.19. Concerns were raised over a perceived level of subjectivity in the DPP's

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<sup>23</sup> Brian and Paula Arthurs' Application 2010

decision making under the current system. Liberty stated that the system in the 2007 Act currently jeopardises an individual's right to a fair trial as it allows the DPP "who comes with an institutionally vested interest in securing a conviction to oust the proper scrutiny of a jury on the basis of broadly defined circumstances and a low evidential threshold of his personal *suspicion*." The Bar were also concerned that as the DPP must only *suspect* one or more of the four conditions is met and be *satisfied* that there is a risk that the administration of justice might be impaired. They stated that "this subjectively is problematic given there is no requirement for the DPP to provide reasons for these decisions." The latter point hints at a possible concern over the DPP's current level of accountability.

4.20 We fully support the independence of the DPP and his unique role in the operation of the NJT system under the 2007 Act. The very low number of cases in which a certificate for NJT is granted and the comments gathered from this consultation support the view that the system is operating effectively and how it was designed to. We do however recognise the concerns raised in relation to transparency and accountability and our decision set out below to keep the operation of the provisions under independent review is designed to respond to those concerns offering scrutiny on the effectiveness, necessity and proportionality of the system and to ensure greater transparency.

## **5. Conclusion**

5.1. This Government remains fully committed to seeing an end to non - jury trials in Northern Ireland, where safe and compatible with the interests of justice. The NIO also recognises that non - jury provisions were designed to be temporary. **In light of the issues raised in the consultation however, we have decided it is necessary to extend non - jury trial provisions under the 2007 Act for a further two years, and to keep the operation of the provisions under regular independent review.**

5.2. This is primarily due to the ongoing SEVERE threat from Northern Ireland - related terrorism and the presence of violent paramilitary groups in Northern Ireland, who continue to pose risks to the criminal justice system. **The majority of responses received in this consultation recognised this ongoing threat necessitates the continuation of at least some form of measures to mitigate**

**potential risks to the administration of justice, such as an increased risk of jury tampering.**

5.3. The NIO has considered the view expressed by Liberty that the Government has not adduced sufficient evidence to demonstrate that the threat to jurors in Northern Ireland is real, present and significant. While the difficulty of providing hard evidence of an increased risk of jury tampering is outlined in 4.5, the rationale behind this view was based on expert advice received at the time of the last extension of the provisions. Similar concerns have been raised by respondents in this most recent consultation, who have recognised that there are legitimate risks to the administration of justice in Northern Ireland which need to be mitigated. **It is for this reason we have concluded it is necessary to extend non - jury trial provisions under the 2007 Act for a further two years.**

5.4. The NIO also understands that there is appetite for alternative juror protection measures to be used in place of non - jury trials. While it is our position that these considerations will be routinely weighed up under the current system (before a decision is made to issue a certificate) the PSNI stated in their response to this consultation that the nature of the risk posed by suspected members or associates of paramilitary groups makes the application of available jury measures ineffective in the majority of cases. It is also important to note that non - jury trials are also used to mitigate other risks to the administration of justice, such as the potential risk of a perverse acquittal from a hostile or partisan jury. This is supported by the view expressed by the Lord Chief Justice, who noted the current trend favouring the use of no juries in contentious inquests flows from the perspective of avoiding bias/ perception of bias, with this view supported by the PSNI.

5.5. It is also for this reason that the NIO believe that the provisions in the CJA alone would prove to be ineffective. Furthermore, the threshold for declaring a non - jury trial in CJA is much higher (requiring evidence of a real and present danger that jury tampering would take place). The provisions under the 2007 Act were also designed to be complementary to the CJA provisions. It is the NIO's view that a reliance on the CJA alone would prove inadequate for the unique situation in Northern Ireland.

5.6 The consultation paper also welcomed views on whether the current mechanism for challenging a non-jury trial certificate, as well as the four conditions within the DPP's statutory test remain appropriate. While the NIO notes the concerns expressed by The Bar that the current grounds for challenge are too narrowly defined at present, it retains the view that these grounds are in line with current case law.<sup>24</sup> Furthermore, our overall conclusion that non - jury trial provisions should be extended in their current form. This view is further informed by evidence provided by the PSNI, the DPP and the Lord Chief Justice to this consultation on how the system is currently operating under the 2007 Act, as discussed in the previous section.

5.6. The NIHRC however also emphasised the need to find ways of ensuring jury trials are utilised where possible and that the Government should take due consideration of the principles of necessity and proportionality when it comes to using non-jury trials. While we believe necessity and proportionality are already clearly in evidence with the low number of certificates issued, we understand that his suggestion as explored in the previous section of placing this consideration on a statutory footing would put beyond doubt that such considerations remain at the forefront of the process.

5.7. As outlined, the NIO undertook an Equality Screening exercise prior to the launch of the consultation to assess whether or not there are likely equality of opportunity and/ or good relations impacts associated with extending the non - jury trial provisions. The provisional outcome of the screening exercise was that the likely impact of extending the provisions is minor in respect of 2 of the Section 75 categories (religious belief and political opinion). At this time, we concluded that the provisions did not unlawfully discriminate and any residual potential impacts on people were judged to be negligible and none in respect of the other categories. To help inform this screening exercise and to determine whether a full Equalities Impact assessment would be necessary, we welcomed further views in the consultation.

5.8. The NIO concurs with the view expressed by Liberty that the rights of the defendant must be upheld and protected at all times. However, as discussed in more

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<sup>24</sup> Meaning, with the views expressed in the *Arthurs* case.

detail in the previous section, we do not share the view that the current system jeopardises these rights. Furthermore, based on the information we have received in this consultation, we believe that the initial assumptions in our Equality Screening exercise document remain true and that an Equality Impact assessment will not be necessary. The initial assumptions were that the impact of the provisions remain only minor on the Section 75 categories of political opinion and religious belief and none on the remain 7 Section 75 categories. We have seen no further evidence from consultees to contradict this view.

5.9. The NIHRC queried however the extent to which data is gathered for all 9 Section 75 categories. Our recent Equality Screening exercise confirmed that the Northern Ireland Courts and Tribunals Service (NICTS) only officially collect data on 2 categories: age and gender. We have some insight relating to political belief from information provided by the PSNI, who indicated that provisions continue to be sought (and are of significance) in cases involving individuals from dissident republican and loyalist paramilitary groups. While the NIO would welcome more information being collected across all Section 75 categories in relation to non-jury trials, the current number of certificates issued remains relatively low, therefore hindering reliable statistical analysis of this. It is worth emphasising that the need for further equality monitoring information being collected should be balanced against upholding the defendant's Article 8 right to private and family life.

**Decision to extend non - jury trial provisions under the Justice and Security (Northern Ireland) Act 2007 in their current form for a further two years before 31 July and to keep them under regular independent review.**

5.10. As a result of the issues discussed above, the NIO have decided to renew the provisions under the 2007 Act for a further two years and to introduce a further independent safeguard in requesting the Independent Reviewer of the Justice and Security (Northern Ireland) Act 2007 to keep the operation of the provisions under review. His role will be to see that the provisions remain effective, necessary and proportionate to the situation in Northern Ireland.

### Extension of the provisions in Parliament

5.11. An affirmative statutory instrument has now been laid for consideration in Parliament. NIO Ministers will now proceed with hosting debates in both Houses of Parliament in order to gain approval to once again extend the provisions in their current form under the 2007 Act, before they expire on 31 July 2017.

### Regular independent review

5.12. The NIO recognise non - jury trial provisions under the 2007 Act were designed to be temporary, and have noted the specific issues raised in the consultation responses received. We have therefore concluded it would be helpful to keep the operation of the provisions under regular independent review. This will be undertaken by the Independent Reviewer of the 2007 Act<sup>25</sup> and will focus on a series of engagement with the key stakeholders of the provisions

5.13. All findings from this review will be included and published in the Independent Reviewer's annual report<sup>26</sup>, so that any issues arising could inform public debate and provide greater transparency and detail in relation to the operation of the provisions. This will allow the NIO to make a robust assessment of how the provisions are functioning and if they still remain necessary prior to their next expiry in 2019.

## **Northern Ireland Office**

**June 2017**

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<sup>25</sup> Section 40 of the 2007 Act established a Reviewer to review the powers under the Act. Section 40(3) requires the reviewer to comply with any request of the Secretary of State, to include in a review specified matters which need not relate to matters specified in the Act.

<sup>26</sup> The Independent Review of the 2007 Act meets each year with parties, government officials and community representatives amongst many others, to gather views and information on the use of powers associated with the Justice and Security Act, on which he reports annually. His latest report covering the period 1 Aug 15 - 31 Jul 16 was laid in parliament on 13 March 2017 and can be accessed by [clicking here](#).



## ANNEX A

### Non – jury trials in Northern Ireland: Updated statistics

Table 1: Certificates issued for non – jury trial by the DPP under the 2007 Act (2007 – 2017 provisionally)

Year	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Certificates issued	12*	25	11	14	28	25	23	14	15	19	4**

Source: Northern Ireland Director of Public Prosecution's Office

\*Please note, provisions under the 2007 Act were brought into effect on 1 August 2007

\*\*Provisional figures, please note this is up to 5 June 2017

Table 2: Certificates for non - jury trial refused under the 2007 Act (2007 - 2016)

Year	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Certificates refused	2*	2	0	0	0	3	3	1	0	1**

Source: Northern Ireland Director of Public Prosecution's Office

\*Please note, provisions under the 2007 Act were brought into effect on 1 August 2007

\*\*Up to 18 November 2016

Table 3: Crown Court cases dealt with by means of a non - jury trial under the Justice and Security (Northern Ireland) Act 2007 as a percentage of all disposals (2013 – 2017 provisionally)

Year	J&S 2007 Act	Other	Total	% J&S 2007 Act
2013	36	1917	1953	1.8%
2014	28	1660	1688	1.7%
2015	17	1063	1080	1.6%
2016[PF]*	12	1626	1638	0.7%
2017[PF]**	3	658	661	0.5%

Source: NI Courts & Tribunals Service

[PF]\* Please note 2016 figures will remain provisional up until the 30th June 2017

[PF]\*\* Provisional Figures, January - May 2017

**Table 4: Number of Crown Court defendants dealt with, whose cases were tried by means of a non - jury trial, under the Justice and Security (NI) Act 2007 as a percentage of all defendants dealt with (2013 – 2017 provisionally)**

Year	J&S 2007 Act	Other	Total	% J&S 2007 Act
2013	65	2526	2591	2.5%
2014	63	2100	2163	2.9%
2015	25	1369	1394	1.8%
2016 [PF]*	15	2008	2023	0.7%
2017 [PF]**	5	813	818	0.6%

Source: NI Courts & Tribunals Service

[PF]\* Please note 2016 figures will remain as provisional figures up until the 30th June 2017

[PF]\*\* Provisional Figures, January - May 2017

**Table 5: Acquittal rates for those Crown Court Defendants dealt with *where a plea of not guilty is entered* by those in non - jury trials, compared with those in jury trials (2013 – 2017 provisionally)**

Year	Non - jury trials	Jury trials
2013	13.64%	24.87%
2014	27.45%	25.21%
2015	47.62%	20.80%
2016[PF]*	11.11%	23.71%
2017[PF]**	66.67%	26.01%

Source: NI Courts & Tribunals Service

[PF] Provisional Figures, correct as of December 2016

[PF]\*\*Provisional Figures, January - May 2017