EXPLANATORY MEMORANDUM TO

THE JUSTICE AND SECURITY (NORTHERN IRELAND) ACT 2007 (EXTENSION OF DURATION OF NON-JURY TRIAL PROVISIONS) ORDER 2017

2017 No. [XXXX]

1. Introduction

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

2. Purpose of the instrument

2.1 This Order extends the duration of non-jury trial arrangements specific to Northern Ireland for a further period of two years, from 31 July 2017. These arrangements continue to be required, for the small number of cases in which they are used, in light of the ongoing security situation in Northern Ireland 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 None.

Other matters of interest to the House of Commons

3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Northern Ireland and is not a financial instrument that relates exclusively to England, Wales and Northern Ireland.

4. Legislative Context

4.1 Sections 1 to 9 of the Justice and Security (Northern Ireland) Act 2007 (the "2007 Act") provide for a system of system of non - jury trial, applicable in particular circumstances, in Northern Ireland. These are temporary provisions which may be extended by order for a period of two years. The non-jury trial system will expire on 31 July 2017 unless the 'effective period' during which the provisions are in force is extended by order for a further two years.

4.2 The initial effective period (which ran until 13th July 2009) was the period of two years from the date section 1 of the 2007 Act came into force. The non-jury trial provisions were extended until 31 July 2011 by S.I. 2009/2090 further extended until 31 July 2013 by S.I. 2011/1720, until 31 July 2015 by S.I. 2013/1619 and again until 31 July 2017 by S.I. 2015/1572. This is the fifth time an order is being made to extend the effective period and this Order further extends the effective period until 31 July 2019.

5. Extent and Territorial Application

5.1 The extent of this instrument is the United Kingdom.

5.2 The territorial application of this instrument Northern Ireland.

6. European Convention on Human Rights

6.1 The Secretary of State for Northern Ireland James Brokenshire 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 2017 are compatible with the Convention rights."

7. Policy background

7.1 The non-jury trial system contained in the 2007 Act applies only in Northern Ireland. It replaced the old so-called "Diplock" system that existed from 1972 until its repeal in 2007. The system in the 2007 Act is risk-based: it enables the Northern Ireland Director of Public Prosecutions to issue a certificate for a non-jury trial in relation to an indictable offence if he suspects one or more of four conditions in the Act apply, and he is satisfied that in view of that there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury. The four conditions relate to connections between the offence, or the defendant, and a proscribed organisation connected with the affairs of Northern Ireland; an attempt, connected to such an organisation, to prejudice the investigation or prosecution; or connections between the offence and religious or political hostility.

7.2 The system is temporary, and expires on 31 July 2017. However, its operation can be extended for periods of two years. This reflects Government's view that this is an exceptional system that ought to be kept in force only for the duration of time the security situation requires such measures. Government has made clear on many occasions its aspiration to return to jury trial for all cases as soon as the security situation in Northern Ireland allows.

7.3 A system of non-jury trial for cases falling in the categories above was, and is, considered necessary to address paramilitary and community-based pressures on jurors that create a risk to the administration of justice. These risks are considered more significant in Northern Ireland than elsewhere in the UK.

7.4 The non-jury trial system remains an exceptional one, used in very limited circumstances. The decision for holding a non-jury trial is made on a case by case basis taking into account the circumstances of both the offence and the defendant. Although non-jury trials can take place in respect of any indictable offence (so long as the conditions are met), there is a prevalence of jury trials in the vast majority of criminal cases, and the vast majority of defendants tried, in the Crown Court in Northern Ireland. In 2015, non - jury trials accounted for 1.6% of all Crown Court cases dealt with in Northern Ireland; in 2016 this figure was provisionally 0.7%. From January - May 2017, this figure was 0.5%, which is also provisional.

8. Consultation outcome

8.1 A full public consultation was held on a proposal to extend provisions for non - jury trial within the 2007 Act in their current form for a further two years. The Secretary of State made his decision to extend the provisions in light of the responses received and of the ongoing security situation in Northern Ireland, of which he is regularly briefed on by security personnel. In 2015 the Secretary of State committed to holding a public consultation as opposed to another targeted consultation on the provisions, in order to ascertain whether there were any wider views not previously captured in targeted

consultations, and in order to ensure there was opportunity for a full public debate on provisions which have now been in force for ten years. Views were received from a range of interested groups and individuals. This included The Minister of Justice, The Independent Reviewer of the 2007 Act, practitioners in the criminal justice system and organisations concerned with upholding equality and human rights in Northern Ireland. Out of the ten responses received by the Northern Ireland Office, two were broadly supportive of an extension, five accepted that the Secretary of State may continue to deem the provisions necessary given the risks that presently exist, one was clearly opposed to an extension and two did not directly comment on the proposal to extend.

8.2 Those broadly supportive of an extension primarily cited the security situation in Northern Ireland as justification for continuing with the provisions, specifically the existing SEVERE threat from Northern Ireland - related terrorism and the risks this poses to the administration of justice in Northern Ireland, including an increased risk of jury tampering and the risk of a fearful, partisan or hostile jury returning a perverse verdict. Those who accepted that the Secretary of State may continue to deem the provisions necessary however also indicated recognition of the risks to the administration of justice which exist as a result of the current security situation.

8.3 One response which was opposed to extension stated that the Government had not adduced sufficient evidence to demonstrate that the threat to jurors in Northern Ireland is real, present and significant and it had failed to show that there is a tangible difference between Northern Ireland and other parts of the United Kingdom in this regard. Several responses however indicated that significant, and unique risks that continue to exist in Northern Ireland, one commenting that these are distinct from those presented elsewhere in the United Kingdom. The response opposed to extension also commented that the provisions under the 2007 Act jeopardise the individual's right to a fair trial (article 6 of the European Convention on Human Rights (ECHR)) and that they pose a threat to the defendant's right to respect for private and family life (article 8 ECHR) and their right to freedom of association (article 11 ECHR).

8.4 Criticism was also raised over a perceived lack of accountability of the Director of Public Prosecution's decision making process. As well as this, there was noticeable appetite for more consideration to be given to alternative juror protection measures in the place of non - jury trials. One response suggested the insertion of a clear requirement into the 2007 Act for the Director of Public Prosecutions 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 in line with provisions in the Criminal Justice Act 2003. While one response stated that the current mechanism for challenging the issue of a non - jury trial certificate in the 2007 is too narrowly defined at present, several more indicated support for how the system is currently operating, including the view that the challenge mechanism and the four conditions within the Director of Public Prosecution's statutory test both remain valid.

8.5 Some responses provided specific information that could support the extension of the provisions, including confirmation that the current trend favouring the use of non - jury trials flows from the perspective of avoiding bias directed at the defendant from a jury. Another recognised that there are genuine threats to the administration of justice which must be taken seriously, yet urged for a future review of this policy including the potential for bringing it in line with non - jury trial provisions existing in the Criminal Justice Act 2003. However it was recognised by some that these provisions

were designed to be temporary and that an end to non - jury trials in Northern Ireland would be a positive step towards normalisation when this is deemed possible. An official consultation response document will be published by the Northern Ireland Office and will be made available to the public.

9. Guidance

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

10. Impact

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

10.2 The Order has no impact on the public sector: it extends existing provisions already in force. Prior to the last extension of the provisions in 2015, the Police Service of Northern Ireland (PSNI) indicated that alternative measures necessary to protect a jury would require significant additional expenditure. The PSNI confirmed in December 2016 that this view remains the case.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

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

12. Monitoring & review

The Northern Ireland Office will continue to monitor and review these provisions prior to the expiry of the Order in July 2019. The Secretary of State has also decided to introduce regular independent review of the operation of these provisions following their extension in July 2017. This will be undertaken by the Independent Reviewer of the 2007 Act. Section 40(3) of the Act 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 2007Act.

13. Contact

Clare Sloan at the Northern Ireland Office Tel: 02890527017 or email: clare.sloan@nio.gov.uk can answer any queries regarding the instrument.