EXPLANATORY MEMORANDUM TO

THE JUSTICE AND SECURITY (NORTHERN IRELAND) ACT 2007 (EXTENSION OF DURATION OF NON-JURY TRIAL PROVISIONS) ORDER 2019

2019 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 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 2019. 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 None.

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 Northern Ireland.

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 2019 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 four times. They are currently due to expire on 31 July 2019. This

instrument therefore extends the non-jury trial provisions for a further two-year period from 31 July 2019 until 31 July 2021.

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 terror offences in Northern Ireland. In an attempt to move towards normalisation in Northern Ireland the 2007 Act was introduced to replace the Diplock system, moving from the automatic 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 Non-jury trials are the exception in Northern Ireland: there were 12 non-jury trial cases in the Crown Court in 2016 (out of a total of 1640), and a further 9 in 2017 (out of a total of 1409). 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.

7.4 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. The intent and capability of DRs was most recently demonstrated by the tragic murder of 29 year old journalist Lyra McKee on 18 April in the Creggan area of Derry/Londonderry. Lyra McKee was shot by a violent dissident republican gunman as he fired at police with a handgun during rioting which also saw up to 50 petrol bombs being thrown and three hijacked vehicles being set on fire. Police had been conducting searches for firearms and explosives. There was also the reckless and indiscriminate attack in January 2019, in which a device located inside a vehicle was detonated outside Derry/Londonderry Courthouse. 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 March 2018 - 28 February 2019, there were 16 casualties as a result of paramilitary style shootings and 56 casualties of paramilitary style assaults. A report commissioned by the Northern Ireland Department of Justice and published in March 2019 found that 29% of those living in mainly loyalist areas and 25% of those living in mainly republican areas think that paramilitaries create fear and intimidation (compared with 15% of people in Northern Ireland generally). 2,061 people were driven from their homes between 2014 and 2018 (up to mid-November 2018) due to paramilitary and sectarian intimidation.

7.5 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 the defendant's alleged association with a proscribed organisation or if the offence being tried is in connection with religious or political hostility.

7.6 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.

7.7 The Northern Ireland Office issued 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 and received 15 responses. Of the responses received, eight were in favour of extending the provisions, three were not in favour, and four stated no clear position.

7.8 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. Although agreeing that an extension to the provisions is necessary, 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.

7.9 Among respondents opposing an extension, there were general concerns about extending the provisions for a sixth time, considering that the 2007 Act provided for an initial period of validity of only 2 years. Some respondents also questioned whether a non-jury trial equated to a fair trial, given that trial by jury has been commonly associated with a fair trial.

7.10 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 raised concerns around the subjectivity of the DPP, in issuing a certificate and the limited ability to challenge a certificate.

7.11 Since the most recent renewal of the provisions in 2017, the Independent Reviewer of the 2007 Act has incorporated observations of the non-jury trial system into his reports which are published annually. These observations have been generally supportive of the operation of the non-jury trial system and the process for issuing a non-jury trial certificate. In his findings in the 10th report, 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. The majority of non-legislative changes which he proposed were subsequently accepted and implemented. The 11th report, published in March 2019, provided an update on these recommendations.

7.12 Some respondents to the consultation recommended that the non-jury trial system in Northern Ireland should be more closely aligned with the provisions in the Criminal Justice Act 2003 (“the 2003 Act”). The 2003 Act states that the Court must order a non-jury trial if the judge is satisfied that there is evidence of a real and present danger that jury tampering would take place. It also states that, notwithstanding any juror protection measures which might reasonably be put in place, the likelihood that jury tampering would take place must 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 far higher than that in the 2007 Act.

7.13 Relying on the provisions in the 2003 Act is an issue which was considered by the Independent Reviewer in his 10th and 11th reports of the 2007 Act. It was noted that 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, 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. The Independent Reviewer also highlighted that 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.

7.14 Some responses to the consultation also suggested that alternative juror protection measures be considered. As was stated in the 10th Report of the Independent Reviewer of the 2007 Act, the DPP routinely considers alternative juror protection measures prior to issuing a non-jury trial certificate even though he is not required to do so. However, in the Northern Ireland context, alternative measures, such as transferring the trial to another location, screening the jury from the public in court, or isolating the jury for the duration of the trial, are unlikely to be effective. 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 consultation closed on 27 February 2019 and the responses are described in detail in paragraphs 7.7 to 7.14. The Secretary of State for Northern Ireland considered the responses to the consultation and decided to extend the non-jury trial provisions under the Justice and Security (Northern Ireland) Act 2007 for a further two years.

10.2 An official consultation response document will be published by the Northern Ireland Office and will be made available to the public.

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 effect of this instrument is that the non-jury trial provisions will remain in force for a further two years, when they will expire unless further extended by order. The Northern Ireland Office will continue to monitor and review these provisions prior to the expiry of the Order in July 2021, including considering any further findings of the Independent Reviewer, giving consideration to whether a further extension by order is necessary and appropriate.

15. Contact

15.1 Byron Grant at the Northern Ireland Office Telephone: 02072100275 or email: byron.grant@nio.gov.uk can be contacted with any queries regarding the instrument.

15.2 Adele Brown, Deputy Director for the Security and 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.