EXPLANATORY MEMORANDUM TO

THE JUSTICE AND SECURITY (NORTHERN IRELAND) ACT 2007 (EXTENSION OF DURATION OF NON-JURY TRIAL PROVISIONS) ORDER 2023

2023 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 His Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

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 until 31 July 2025. 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 2023 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.

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

4. Extent and Territorial Application

4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) 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 (that is, where the instrument produces a practical effect) 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 2023 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 six times. They are currently due to expire on 31 July 2023. This instrument extends the non-jury trial provisions for a further two-year period until 31 July 2025.

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. In 2021, only 0.6% (8 out of 1358) of all Crown Court cases in NI were conducted without a jury.

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 they suspect 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:

- 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;
- 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;
- 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;

- 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.

7.4 Non-jury trials are the exception in Northern Ireland: there were 8 non-jury trials in the Crown Court in 2021 (out of a total of 1358). 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.

7.5 On 28 March 2023, the threat level in Northern Ireland from Northern Ireland related terrorism was increased from 'SUBSTANTIAL' (meaning an attack is likely) to 'SEVERE' (meaning an attack is highly likely). Regrettably, violent dissident republican terrorist groups ("DRs") and paramilitary organisations 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 February 2022 to 31 January 2023, there was one security-related death, 9 casualties of paramilitary style shootings and 26 casualties of paramilitary style assaults. There were also 5 bombing incidents and 108 security related arrests under Section 41 of the Terrorism Act. These statistics are indicative of the violence and intimidation which paramilitary groups carry out, although they do not fully convey the influence that paramilitaries have on the communities in which they operate. In their fifth report (December 2022) the Independent Reporting Commission stated in respect of this influence that, "*often the control is insidious and involves communities and individuals adapting their behaviour to avoid the attention of paramilitaries."*

7.6 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.

7.7 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.

7.8 The Independent Reviewer of the 2007 Act has included the non-jury trial system in their review since 2018, 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 the 12th report, published in April 2020, the Independent Reviewer recommended that the Northern Ireland Office should set up a working group consisting of representatives from the Public Prosecution Service, the Police Service of Northern Ireland, the Court Service, 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). This group has developed two papers since the last renewal in 2021. One examines practical measures to reduce the number of non-jury trials and the second recommends a set of indicators that the Secretary of State could consider in order to

be satisfied that the non-jury trial provisions were no longer necessary. These indicators have formed a crucial part of the Secretary of State's decision to seek renewal for these provisions for a further two years alongside the responses to the public consultation.

7.9 Consideration has been given as to whether the provisions in Part 7 of the Criminal Justice 2003 Act ("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.

7.10 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 14th Report stated that the 2007 Act contains a much higher evidential threshold that exists under the 2003 Act for securing a non-jury trial.

7.11 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 and Future Relationship

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 consolidate any other instrument.

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 3 November 2022 to 30 January 2023) and received 15 responses. Of the responses received, nine were in favour of extending the provisions, two were 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 SUBSTANTIAL threat level from Northern Ireland related terrorism in Northern Ireland at the time of the consultation; the view that the continued coercive influence of paramilitary groups within communities

necessitates these provisions; the view that the alternative non-jury trial provisions in the Criminal Justice Act 2003 are not suited to deal with the unique challenges associated with Northern Ireland related terrorism and wider paramilitary activity. In particular there was a view that the 2007 Act provisions are needed not just for protecting against jury tampering, but also to protect defendants from perverse judgments as a result of juror bias.

10.3 Several respondents highlighted recent case history. Specifically, the views of Lord Kerr in re Hutchings [2019] that the need for the Director of Public Prosecutions to have their current powers was 'obvious' when considering the difficulties in eliminating the risk of bias with any degree of confidence.

10.4 The respondents 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.

10.5 Of those who indicated no clear position on whether the provisions should be extended, some expressed the view that the availability of non-jury trials in Northern Ireland means there is limited direct evidence that juror tampering or bias exists. Some respondents thought that the fact that the DPP regularly rejects applications demonstrates thorough consideration before a certificate is granted. Some thought that should the provisions not be renewed, there could be an impact detrimentally on the potential to obtain sufficient jurors to sit in high profile terrorist cases.

10.6 An official consultation response document will be published by the Northern Ireland Office on 24 April 2023 and made available to the public at: 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 A full 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 2025, 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 continue to seek the views of the 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 and any further preparatory steps the Government can take to transition away from these provisions.

15. Contact

15.1 Ben Cottrell-Boyce at the Northern Ireland Office Telephone: 07971960735 or email: Ben.CottrellBoyce@nio.gov.uk can be contacted with any queries regarding the instrument.

15.2 James Crawford, 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.