



Public consultation: Non–Jury Trial Provisions
Northern Ireland Office (SPG)
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By email: NJTconsultation@nio.gov.uk

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Dear

Non-jury trial provisions

I write in response to the Northern Ireland Office (NIO) consultation on non-jury trials published in December 2018.

The Commission notes the proposal to extend the non-jury trial arrangements for a further two years. Article 14, International Covenant on Civil and Political Rights (ICCPR) enshrines the right to equality before courts and tribunals while Article 26 ICCPR further protects the right to equality before the law and prohibits discrimination on several protected grounds including sex, race, religious belief, and political affiliation. In its General Comment No. 32, the UN Human Rights Committee noted that in the context of judicial proceedings, equality before courts and tribunals "requires that similar cases are dealt with in similar proceedings". With reference to the provision of non-jury trials in the United Kingdom, the Committee states that "objective and reasonable grounds must be provided to justify the distinction" in treatment of defendants with and without access to a jury trial.¹

¹ CCPR/C/GC/32, UN Human Rights Committee, General Comment No.32 (23 August 2007), para.14.

The consultation paper records MI5's assessment of the current threat level for Northern Ireland-related terrorism in Northern Ireland as severe.² In these circumstances, the further extension of the non-jury trial arrangements appears appropriate.

However, the Commission notes that, while intended to be a temporary measure, the Government is proposing to extend the provision of non-jury trials for the sixth time. The Commission welcomes the Government's commitment to ending the use of non-jury trials,³ however, the Commission is concerned about temporary measures becoming 'normalised' as a semi-permanent feature of Northern Ireland's criminal justice system. The current process of biennial renewal may afford a lesser degree of parliamentary scrutiny than generally afforded to statutes.

The Commission therefore recommends that the Government considers the adoption of a number of tangible measures that are clearly aimed at reducing the use of non-jury trials and at improving the evidence base as to their current use.

a) Conditions required for abolishment of non-jury trials

The Commission welcomes the government's commitment to ending the use of non-jury trials when "safe and compatible" with the interests of justice. While the Commission acknowledges that the information that informs this assessment may be highly sensitive, the Commission recommends that the NIO sets out the conditions required for the "safe and compatible" test to be met.

b) Alternative juror protection measures

In 2013, the UN Committee against Torture issued its concluding observations on the UK Government's compliance with the Convention. The Committee "regrets" the provision of non-jury trials in Northern Ireland but:

[The Committee] encourages the State Party to continue moving towards security normalisation in Northern Ireland and to envisage alternative juror protection measures.⁴

² NIO, 'Consultation: Non-jury trials Justice and Security (NI) 2007' (December 2018), para.8.

³ *Ibid* para.7.

⁴ CAT/C/GBR/CO/5, UN Committee against Torture, Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI' (6 May 2013), para 13.

In preparation for this year's examination of the UK, the Committee has expressed further interest in the provisions for non-jury trials.⁵

The Independent Reviewer's recent report on the Justice and Security (Northern Ireland) Act 2007 discusses the issue of alternative juror protection measures. The report notes that the Director of Public Prosecutions does in practice consider juror protection measures before issuing a certificate.⁶ The Independent Reviewer recommends that the PSNI and PPS should continue to consider alternative juror protection measures and that a record of such considerations is put in the public domain.

The Commission endorses the Independent Reviewer's recommendation, which, if implemented would be consistent with the Committee against Torture's 2013 recommendation. The Commission deems that a record of the alternative juror protection measures considered by the PSNI and PPS would be helpful in assessing the continued need for a non-jury trial.

c) Insertion of necessity provision

In 2013, the Committee against Torture further recommended that the UK Government takes "due consideration of principles of necessity and proportionality" when deciding on the renewal of non-jury trial provisions.⁷ Cognisant of the Committee's position, the Commission recommended that the Justice and Security Act 2007 be revised to include a necessity provision.⁸ The Commission suggested that the necessity provision could mirror section 44 of the Criminal Justice Act 2003, which provides for non-jury trials where there is evidence of a "real and present danger" that jury tampering would take place and where "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 the trial to be conducted without a jury" [underlining added].

⁵ CAT/C/GBR/QPR/6, UN Committee against Torture, 'List of issues prior to submission of the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland' (7 June 2016), para.9.

⁶ Independent Reviewer of Justice and Security, 'The Tenth Annual Report of the Independent Reviewer of Justice and Security (NI) Act 2007 from 1 August 2016 – 31 July 2017 (April 2018), at para.19.3.

⁷ CAT/C/GBR/CO/5, UN Committee against Torture, Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI' (6 May 2013), para 13.

⁸ Commission response dated 24 January 2017 to the previous NIO consultation on the renewal of the non-jury trial provisions (2016).

In its report to the 2017 consultation, the NIO acknowledged that placing a necessity condition “on a statutory footing *may* introduce great clarity and assurance for those affected.”⁹ As such, the NIO committed to “explore this possibility after July 2017”. Unfortunately, however, the current consultation document makes no further reference to this issue.

The Commission acknowledges that an amendment to the Justice and Security Act 2007 would require primary legislation, however, the Commission reiterates the need for NIO to explore this further.

d) Data

The Committee against Torture has advised on the importance of disaggregated data to enable States parties and the Committee to adequately evaluate the implementation of the Convention.¹⁰ The Committee advises that such data “permits the States parties and the Committee to identify, compare and take steps to remedy discriminatory treatment”.¹¹

The Commission welcomes that the NIO report on the 2017 consultation provided some data relating to intimidation of witnesses and jurors. The report cited figures provided from the PSNI that show that 197 offences of intimidation/threat to harm witnesses/jurors were recorded in 2016/17 and 56 offences were detected by police.¹² This information is helpful in understanding the context underpinning non-jury trials.

The Commission recommends that data on intimidation/ threat to witnesses/jurors is routinely recorded, published and considered as part of the biannual decision to extend the non-jury trial provisions.

The NIO report on the 2017 consultation provides some statistics on non-trials in Northern Ireland with figures provided on: the number of certificates issued; the number of certificates refused; the percentage of crown court cases tried by way of a non-jury trial; the number of defendants tried by way of a non-jury trial and acquittal rates for non-jury trials compared to jury trials.¹³ The Commission

⁹ Northern Ireland Office, ‘Consultation response paper: outcome of the public consultation on non-jury trial provisions in Justice & Security Act (Northern Ireland) Act 2007 (June 2017), para 4.12.

¹⁰ CAT/C/GC/2, UN Committee against Torture, General Comment No. 2 (Jan 2008), para. 23.

¹¹ *Ibid.*

¹² Northern Ireland Office, ‘Consultation response paper: outcome of the public consultation on non-jury trial provisions in Justice & Security Act (Northern Ireland) Act 2007 (June 2017), para 4.5.

¹³ *Ibid.*, at Annex A.

commends the NIO for recording and publishing this data. The Commission, nonetheless, considers that additional data would aid the NIO, Parliament and others in assessing the need to renew non-jury trial provisions. In particular, the Commission considers that information as to defendants' community background would be helpful.

The Commission recommends the recording and publishing of data as to the community background of the defendant being tried by way of a non-jury trial.¹⁴

e) Response to the Independent Reviewer's recommendations

In addition to the Independent Reviewer's recommendations on the consideration of alternative juror protection and the inclusion of a necessity provision (discussed above), the report recommends: that the PSNI's letter to the PPS setting out the initial view as to the need for a non-jury trial certificate is issued more quickly;¹⁵ that the PSNI and PPS meet annually to discuss the handling of such cases;¹⁶ that the PPS maintains a central register of non-jury trial certificates;¹⁷ and that the PPS notifies the defendant that they are minded to issue a non-jury trial certificate.¹⁸ The Commission endorses these recommendations.

It is noted that the Northern Ireland Office has not yet published a full response to the Independent Reviewer's report.

The Commission recommends that NIO publish a response to the Independent Reviewer's recommendations without further delay.

I hope these observations and recommendations are useful as the continuing monitoring and review of non-jury trial arrangements is undertaken.

¹⁴ This recommendation chimes with an outstanding recommendation of 2013 by the NI Policing Board to the PSNI i.e. that the PSNI, as soon as reasonably practicable, consider how it records the community background of all persons stopped and searched under powers contained within the Terrorism Act 2000 and within the Justice and Security (NI) Act 2007. See: NI Policing Board, 'Human Rights Thematic review on the Use of Police Powers to Stop and Search and Stop and Question under the Terrorism Act 2000 and the Justice and Security (NI) Act 2007. The Independent Reviewer David Seymour notes that "little progress has been made" on this issue. See Independent Reviewer of Justice and Security, 'The Tenth Annual Report of the Independent Reviewer of Justice and Security (NI) Act 2007 from 1 August 2016 – 31 July 2017 (April 2018), at para 9.1.

¹⁵ Independent Reviewer of Justice and Security, 'The Tenth Annual Report of the Independent Reviewer of Justice and Security (NI) Act 2007 from 1 August 2016 – 31 July 2017 (April 2018), at para 23.2(a).

¹⁶ Ibid, at para 23.2(b).

¹⁷ Ibid, at para 23.2(d).

¹⁸ Ibid, at para 23.3.

Yours sincerely

Les Allamby
Chief Commissioner