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# CHIEF EXECUTIVE

David Mulholland

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Consultation Co-ordinator  
Non-Jury Trial Provisions  
Northern Ireland Office (SPG)  
Stormont House  
Stormont Estate  
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27 February 2019

Dear Sir/Madam,

## **Non-Jury Trial Provisions in Northern Ireland**

Thank you for your correspondence inviting the Bar Council to provide views in relation to the public consultation on the non-jury trial system in light of the upcoming expiry of the present arrangements in July 2019 under provisions contained in the Justice and Security (Northern Ireland) Act 2007. The Bar Council is the representative body of the Bar of Northern Ireland. Our members specialise in the provision of expert independent legal advice and courtroom advocacy. This response also reflects the views of the Criminal Bar Association which represents the views of prosecuting and defence counsel with specialist criminal law expertise.

The Bar previously responded to the public consultation on non-jury trials in February 2017. Meanwhile the Chair of the Bar Council and Chair of the Criminal Bar Association met with the Independent Reviewer, David Seymour, in October 2017 and November 2018. During these meetings we highlighted the Bar's support for bringing our system into line with Section 44 of the Criminal Justice Act 2003 in England and Wales given the safeguards in operation of a high objective threshold and appropriate judicial oversight. We are concerned that the non-jury trial provisions in the 2007 Act are simply being maintained as the default system for Northern Ireland. Our recent engagement with the Independent Reviewer, who did not have sight of our previous consultation response, confirmed that no steps have been taken since the extension of the provisions in July 2017 to properly test the evidence base being used to justify the continued use of non-jury trial provisions in this jurisdiction.

The Bar reiterates 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. Trial by jury is an

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important form of democratic participation in the criminal justice system and forms a fundamental component in inspiring public confidence in the rule of law. The Secretary of State's foreword in the consultation asserts that non-jury trials are still necessary in a small number of exceptional cases where there is a *"risk that the administration of justice might be impaired if the trial were to be conducted with a jury"*. For example, where intimidation, violence or the threat of violence against members of a jury could result in a perverse conviction or acquittal. Whilst we note that the terrorist threat in this jurisdiction is severe given the risks to individuals and communities posed by paramilitary groups, no evidence is presented in the paper which links this directly to jury tampering. Instead this risk of jury tampering is presented as a theoretical one with no examples provided to demonstrate that this poses an actual threat to the administration of justice and thereby justifying the continued extension of the provisions in the 2007 Act.

Furthermore, the operation of the provisions under Section 1 of the 2007 Act currently allow the DPP to certify that a trial on indictment is to be conducted without a jury, provided that a statutory test is met. 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 that the administration of justice might be impaired"* if the trial were to be conducted with a jury.

In our most recent meeting with the Independent Reviewer, the Bar was keen to establish if the grounds giving rise to the retention of non-jury trials were based on actual or theoretical risks. Whilst we note that the DPP must identify the conditions relied upon in applying the provisions of the 2007 Act to issue a non-jury trial certificate, we remain unclear that this decision making is based on proven actual concerns rather than a templated and somewhat generic potential risk. In this meeting we drew comparisons between high profile, powerful and well-known figures in civil cases being able to stand trial with a jury despite their standing or influence in their local communities and yet there being an apparent presumption that criminal trials would make juries instinctively vulnerable to influence or persuasion without clear grounds to establish that this would be the case.

As referenced in our previous response, it is also concerning 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*

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*jurisdiction or error of law*". The Bar takes the view that these grounds are very narrowly defined at present.

We note the publication of the tenth report of the Independent Reviewer in April 2018 and the suggested recommendations contained in section 23 around improvements to existing processes for non-jury trials. However, no indication has been provided as to whether any of these will be implemented. Some of the suggestions in point 23.2 could be useful reforms, such as point f which highlights that there should not be an assumption in each case that juror protection measures will never be appropriate as an alternative to a non-jury trial. The suggestion that the PSNI, after consultation with the PPS, could place in the public domain a detailed document explaining the difficulties associated with juror protection measures and the reasons why, in the prevailing circumstances, they do not provide an easy alternative to NJTs would be helpful. However, we would also point out that witnesses in certain cases can arguably be more vulnerable to intimidation and threats than juries yet there is no suggestion that this poses such a risk to the administration of justice as to justify a trial being conducted without a jury.

The suggestion at paragraph 23.3 around improving the lack of transparency around NJTs highlights that the PPS could consider, once they have formed a view that a NJT certificate should be issued but before the submission goes to the DPP, notifying the defendant that they are minded to issue a certificate, specifying the condition or conditions and any other material which is in the public domain and invite representations within a specified period. We note that there is no legal requirement to do this and that there are concerns that this might have an impact on sensitive intelligence. However, we consider that if the existing arrangements are to continue from July 2019 that this could help to secure some degree of enhanced transparency.

The consultation states that these "*provisions were designed to be a temporary measure*" and emphasises that the Government remains fully committed to seeing an end to NJTs in Northern Ireland. The Bar takes the view that the Secretary of State must consider a wider 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 as soon as possible. This would allow for the prosecution to apply for 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 interests of justice for the trial to be conducted without a jury. This

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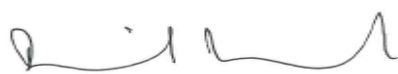
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includes the safeguards of judicial oversight, high objective thresholds and consideration of alternative precautionary steps which are all built into the legislation. We see no evidence base in the consultation paper to suggest that jury tampering is a risk that could not be dealt with effectively under the provisions of the 2003 Act in this jurisdiction, as routinely happens in England and Wales.

Over a decade has now passed since the UN Human Rights Committee's Concluding Observations in 2008 which pointed to the divergence between the system in operation in Great Britain and Northern Ireland, stating the need to "*carefully monitor, on an on-going basis, whether the exigencies of the situation in Northern Ireland continue to justify any such distinctions with a view to abolishing them*". The Bar sees no justification for the continued maintenance of non-jury trial provisions in the 2007 Act and takes the view that Northern Ireland should seek to move towards the regime operated under the Criminal Justice Act 2003 as soon as it is considered practically possible.

If I can be of any further assistance in this matter, please do not hesitate to get in contact.

Yours sincerely,



David Mulholland  
**Chief Executive**