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Independent Review of the Criminal Courts: Response

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1. Introduction

1.1. Dr Hodgson is an Assistant Professor in Law at the University of Nottingham, who researches domestic and international criminal law and procedure. Dr Thomason is an Assistant Professor in Law at the University of Nottingham, whose research concerns evidence and procedure in criminal trials.

Contribution to the Present Review

1.2. The Review's purpose is to 'produce options and recommendations for a) how the criminal courts could be reformed to ensure cases are dealt with proportionately, in light of the current pressures on the Crown Court; and b) how they could operate as efficiently as possible.' The Review invites comments on Auld LJ's proposal for an Intermediate Court with a tribunal consisting of a judge and two magistrates, and 'Any other structural changes to the courts or changes to mode of trial that will ensure the most proportionate use of resource.'

1.3. Every major review of the criminal courts for the past 40 years has considered reform to modes of trial. The Roskill Committee proposed that complex fraud trials be tried by a judge sitting with two lay financial experts.[1] The Auld Report made several recommendations; in addition to the intermediate tier tribunal being considered by this Review, Auld proposed that defendants tried on indictment be given the option to apply for a judge-alone trial.[2] The Law Commission is currently considering judge-alone trials specifically in relation to sex offence trials.[3] In addition to reforms to tribunals, reviews have also proposed significant shifts in caseload from Crown Court to Magistrates' Court as a means of improving efficiency,[4] and the removal of the defendant's right to elect trial by jury for either way offences.[5] The only one of these proposals which has been implemented is the downgrading of certain offences so that they can be dealt with at Magistrates' Court (or increases in the sentencing powers of Magistrates, which has the same effect).

1.4. Many of these reviews have noted that foreign common law jurisdictions, such as Canada and New Zealand, utilise judge-alone trials alongside jury trials for serious offences. Such mentions are generally done in passing and often accompanied by a complaint about the lack of available research into how these trials operate.[6] In contrast, the intermediate tribunal proposed in the

1 Roskill Committee, Fraud Trials Committee Report (1986).
2 R Auld (LJ), *Review of the Criminal Courts of England and Wales* (The Stationery Office: London, 2001) [5-110]–[5-118].
3 Law Commission, *Evidence in Sexual Offence Prosecutions: A Consultation Paper* (Law Com CP No 259, 2023) [13.215]–[13.274].
4 Royal Commission on Criminal Justice, *Report* (Cm. 2263, London: Home Office, 1996) ch. 6.
5 ibid [6-13]–[6-18]; B Leveson, *Review of Efficiency in Criminal Proceedings* (Judiciary of England and Wales, 2015) [342].
6 Auld (n 2) [5-110]–[5-112]; Leveson (n 5) [344]–[345]; Law Commission (n 3) [13.259]–[13.268].

Auld Report – while currently used in England and Wales only for appeals from the Magistrates' Court – has more in common with mixed tribunals utilised in civil law/continental jurisdictions (e.g. Norway uses a panel including professional and lay judges) than common law countries.

1.5. If radical reform to the criminal courts is being considered, we believe it would be more appropriate to draw on jurisdictions which share the adversarial procedural tradition, rather than reinventing the wheel or adopting models from jurisdictions with an incompatible procedural approach. We would therefore advise that the Review instead consider the possibility of introducing judge-alone trials for indictable offences as an alternative to operate alongside jury trials at the Crown Courts.

1.6. In this submission, we share some findings from our preliminary research (done in preparation for a funding proposal) into judge-alone trials in other common law jurisdictions. In Section 2, we summarise the legal regimes and existing research (where it exists) for seven jurisdictions: the Australian jurisdictions of the Australian Capital Territory (ACT), New South Wales (NSW), and South Australia, Canada, New Zealand, Northern Ireland, and the Republic of Ireland. In Section 3, we summarise key lessons from those jurisdictions for the Review's Terms of Reference.

1.7. We do not conclude by recommending the introduction of judge-alone trials in England and Wales. While we believe that judge-alone trials may be a more appropriate method of addressing the Crown Court backlog than a new intermediate court, and that it may be time for England and Wales to give serious consideration to expanding its usage of judge-alone trials,[7] we remain concerned at the lack of empirical research investigating the consequences of a shift to judge-alone trials for the quality of decision-making, procedural fairness, and the legitimacy of criminal adjudication. Ultimately, we believe that a decision to make such a significant and fundamental change to the criminal justice system should be underpinned by a robust evidence base. Further research is needed before any decision should be taken regarding a modification of factfinder in England and Wales.

2. Views from Common Law Comparators

2.1. Many common law jurisdictions (Canada, some Australian states and territories, New Zealand, the 50 US states, and the Republic of Ireland) utilise a mix of jury and judge-alone trials for serious offences, while some (India, Singapore, Pakistan, and Malaysia) have abolished juries entirely. In this section, we summarise the position in seven jurisdictions. The discussion below details the legal provisions that apply in 'ordinary' times and do not include emergency measures adopted during the Covid-19 pandemic. Extracts of relevant legislative provisions from each jurisdiction can be found in Appendix B.

Australia – Generally

2.2. The Australian Constitution provides limited protection for jury trials. Under s. 80 of the

[7] Currently, judge-alone trials are permissible in cases of jury tampering: Criminal Justice Act 2003 ss. 44–46.

Constitution, 'trial on indictment of any offence against any law of the Commonwealth shall be by jury.' This right only applies to trial on indictment (not summary offences),[8] and to offences against the laws of the Commonwealth (not state laws). As the majority of criminal law in Australia is state-based, in practice, s. 80 has limited scope.[9]

Australian Capital Territory

2.3. In the Australian Capital Territory (ACT), a judge-alone trial can only be ordered when a defendant, charged with any indictable offence other than an excluded offence, elects to be tried by judge alone.[10] In such circumstances, the Court must order a judge-alone trial; it has no discretion to refuse a defendant's election for a judge-alone trial.

2.4. Excluded offences are listed in sch 2 of the Supreme Court Act 1933 (ACT). These include murder, manslaughter, and a range of sexual offences.

2.5. A defendant must make their election before they know the identity of the judge for their trial,[11] and the defendant must have received legal advice about the election.[12]

2.6. In trials with multiple defendants, a judge-alone trial can only be ordered if all co-defendants elect for a judge-alone trial.[13]

2.7. A defendant who elects to be tried by a judge-alone can, at any time before they are arraigned, withdraw their election.[14] However, once withdrawn, the person may not make another election for a judge-alone trial.[15]

2.8. A judgment in a judge-alone trial must include the principles of law applied by the judge and the findings of fact that the judge relied upon.[16] Where a warning, direction, or comment would be required to be given to a jury, the judge must rely upon that warning, direction, or comment in considering their verdict.[17]

Historical Development and Evaluation

2.9. When the ACT first legislated to permit judge-alone trials, these were available at the request of the defendant in all indictable matters. It was expected that a defendant would only elect to trial by judge alone in limited circumstances.[18]

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8 *Kingswell v the Queen* (1985) 159 CLR 264, 276–277.

9 Note that, in contrast to the approaches taken in Canada and New Zealand (below), the Australian High Court has held that, where a defendant is charged with a Commonwealth indictable offence, a defendant cannot waive his or her right to trial by jury. See *Brown v The Queen* (1986) 160 CLR 171

10 Supreme Court Act 1933 (ACT) s. 68B(1).

11 ibid s. 68B(1)(c).

12 ibid s. 68B(1)(b).

13 ibid s. 68B(1)(d).

14 ibid s. 68B(2).

15 ibid s. 68B(3).

16 ibid s. 68C(2).

17 ibid s. 68C(3).

18 Australian Capital Territory, Legislative Assembly, *Debates*, 17 February 2011, 255 (Corbell).

2.10. Following concerns that judge-alone trials were becoming the norm, a review was conducted by the Department of Justice and Community Safety. Examining statistics from 2004–2008, the Department found that 56% of all trials were judge-alone trials, with particularly high rates of judge-alone trials in cases involving murder, manslaughter, offences of a sexual nature, and child pornography.[19] Further, the Department found that, in the relevant period, judge-alone trials had a conviction rate of 0% for murder and 9% for sexual offences. The overall conviction rate for judge-alone trials was 47%.[20]

2.11. Consequently, in 2011, the Supreme Court Act was amended prevent judge-alone trials in proceedings for 'excluded offences'.[21] In proposing the reform, the Attorney General argued that reform was necessary to 'curtail the disproportionately high number of elections for trial by judge alone that are being made.'[22] However, it is possible that the low conviction rates in judge-alone trials for murder and sexual offences may also have played a role in motivating reforms.[23] In proposing the reforms, the government appeared to give little consideration the legitimate reasons why a defendant charged with those offences might prefer a judge-alone trial to a jury trial (including because of potential bias among jurors due to the graphic or repugnant nature of the charges, or pre-trial publicity).

New South Wales

2.12. Judge-alone trials have existed in New South Wales (NSW) since 1990.[24] Since 2011, judge-alone trials have typically comprised 15–25% of trials held in NSW higher courts.[25]

2.13. There are several situations where a defendant may be tried by judge alone.

2.14. Firstly, the Court may order a judge-alone trial if it is of the opinion that there is a substantial risk of jury tampering that cannot be reasonably mitigated by other means.[26] It appears that this avenue is rarely used in practice.[27]

2.15. Secondly:

a. Where the prosecutor and defendant person agree to a judge-alone trial, the

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19 ibid 256.
20 ibid.
21 Criminal Proceedings Legislation Amendment Act 2011 (ACT).
22 Australian Capital Territory, Legislative Assembly, *Debates*, 17 February 2011, 256 (Corbell).
23 Fiona Hanlon, 'Trying serious offences by judge alone: Towards an understanding of its impact on judicial administration in Australia' (2014) 23 Journal of Judicial Administration 137, 139-40.
24 Criminal Procedure Legislation (Amendment) Act 1990 (NSW).
25 Jonathan Gu, 'The effect of judge-alone trials on criminal justice outcomes' (2024) NSW Bureau of Crime and Statistics Crime and Justice Bulletin, No. 264 <https://bocsar.nsw.gov.au/documents/publications/cjb/cjb251-300/CJB264-Report-Effect-of-judge-alone-trials.pdf>. Note that this figure excludes 2020–22 when the use of judge-alone trials increased due to the Covid-19 pandemic.
26 Criminal Procedure Act 1986 (NSW) s. 132(7).
27 Gu (n 25) 4.

Court must make a trial by judge order.[28]

b. Where the prosecutor requests a judge-alone trial but the defendant does not agree, the Court must not make a trial by judge order.[29]

c. Where the defendant requests a judge-alone trial but the prosecutor does not agree, the Court may make a trial by judge order if it is in the interests of justice.[30]

2.16. When determining whether a judge-alone trial is in the interests of justice, the judge must balance multiple interests, including 'the interests of the parties and larger questions of legal principle, the public interest and policy considerations.'[31]

2.17. The Court may refuse to make a trial by judge order if it considers that the trial will involve a factual issue that requires the application of objective community standards, such as reasonableness, negligence, indecency, obscenity, or dangerousness.[32] In such cases, it is preferable in the interests of justice for there to be a trial by jury.[33]

2.18. Case law suggests that other factors relevant to determining the interests of justice include: the extent to which a jury trial would be fair to the defendant, including consideration of significant pre-trial publicity which could bias jurors; the complexity of the evidence, such as large amounts of financial evidence or scientific evidence; and cases which raise complex questions of law rather than fact.[34] While the likely length of a judge-alone trial is 'part of the mix of issues' that the Court can consider, any efficiency gains from a judge-alone trial are likely to be given little weight in determining the interests of justice.[35]

2.19. Except for in cases of jury tampering, the Court must be satisfied that the defendant has received legal advice before making a judge-alone trial order.[36] Where there are multiple defendants, a trial by judge order can only be made if all the defendants agree to a judge-alone trial.[37]

Practical Matters

2.20. Except for in cases of jury tampering, an application for a judge-alone trial must be made 28 days before the date of the trial.[38] This requirement was introduced to minimise the risk of 'judge shopping'; that is, applying for a judge-alone trial once the identity of the judge is

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28 Criminal Procedure Act 1986 (NSW) s. 132(2).
29 ibid s. 132(3).
30 ibid s. 132(4).
31 Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* <https://www.judcom.nsw.gov.au/publications/benchbks/criminal/judge_alone_trials.html> [1-050].
32 Criminal Procedure Act 1986 (NSW) s. 132(5).
33 *R v Villalon* [2013] NSWSC 1516, [20], *R v Belghar* [2012] NSWCCA 86, [100].
34 See, e.g. *R v GSR (No 3)* [2011] NSWDC 17, [18]–[24]; *R v Farrugia* [2017] NSWCCA 197, [11].
35 *R v Belghar* [2012] NSWCCA 86, [110]–[111].
36 Criminal Procedure Act 1986 (NSW) s. 132(6).
37 ibid s. 132A(2).
38 ibid s. 132A(1).

known.[39] An application for a judge-alone trial can only be made less than 28 days before the date of the trial with the leave of the Court.[40]

2.21. The Prosecutorial Guidelines of the NSW Office of the Director of Public Prosecutions specify the criteria that prosecutors must have regard to in determining whether to agree to a judge-alone trial. The criteria effectively direct prosecutors to weigh the interests of justice in making their decision. Specific criteria include: the important role of juries as representatives of the community; whether the trial involves a factual issue that requires the application of community standards; whether any potential prejudice to the defendant may be addressed through jury selection or judicial directions; and whether the trial involves highly technical or complex expert evidence.[41] Prosecutors are advised that they should not consider predictions as to the likelihood of conviction in determining their position.[42]

2.22. Case law recognises that the judicial role in judge-alone trials may vary from that in jury trials. In *FB v R*, Whealy JA set out the principles applicable to judicial questioning in a criminal trial without a jury. Noting that '[m]ost of the authorities which underline the caution to be properly exercised by the trial judge during a criminal trial relate to trials where there is a jury', Whealy JA found that, 'in appropriate circumstances, a judge sitting on a criminal trial without a jury will be entitled, within reasonable limits, to explore issues of fact with both Crown and defence witnesses.'[43] Such judicial intervention is said to 'reflect the contemporary desire for efficient and effective use of court time.'[44]

2.23. The judgment of a judge-alone trial must include the principles of law applied by the judge and the findings of fact on which the judge relied.[45] The judgment must 'expose[] the reasoning process' linking the principles of law and findings of fact that the judge has made.[46] However, a judge is not required to express 'all of the matters which necessarily have to be stated to a jury unfamiliar with even the basic principles of the law.'[47]

2.24. The verdicts of judge-alone trials are subject to appeal. In 2012, Mark Ierace SC, the Senior NSW Public Defender, observed that a 'frequent concern' in such appeals is the 'alleged insufficiency of stated reasoning for the verdict.'[48]

Evaluations

2.25. A recent study conducted by the NSW Bureau of Crime Statistics and Research (BOCSAR), analysing data from January 2011 to December 2019, found that judge-alone trials were more

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39 Parliament of New South Wales, Legislative Council, *Debates*, 24 November 2010, 28073 (Hatzistergos).
40 Criminal Procedure Act 1986 (NSW) s. 132A(1).
41 ODPP NSW, *Prosecution Guidelines* (March 2021) <https://www.odpp.nsw.gov.au/prosecution-guidance/prosecution-guidelines> [9.3].
42 ibid.
43 *FB v R* [2011] NSW CCA 217, [90].
44 *Director of Public Prosecutions (DPP) (NSW) v Wililo* (2012) 222 A Crim R 106, [53].
45 Criminal Procedure Act 1986 (NSW) s. 133(2).
46 *Fleming v The Queen* (1998) 197 CLR 250, 262–263 (Gleeson CJ).
47 *R v Winner* (1995) 79 A Crim R 528, 531.
48 Mark Ierace, 'Judge-alone trials' (2012) 24(9) Judicial Officers' Bulletin.

likely to result in an acquittal than jury trials. Specifically, judge-alone trials were associated with a statistically significant increase of 12 percentage points in the probability of acquittal.[49] Earlier studies have produced different findings; for example, Krisenthal found higher acquittal rates in judge-alone trials compared to jury trials from 1993–2007, but higher acquittal rates in jury trials compared to judge-alone trials from 2009–2014.[50] However, it is worth noting that Krisenthal's paper reported overall percentages without testing for statistical significance, and did not engage in the same robust process of matching similar cases used by BOCSAR to control for differences in case characteristics among the sample.

2.26. Possible reasons for the higher acquittal rate in judge-alone trials include that that judges are cautious to convict because they know their reasons will be scrutinised and subject to appeal, and that judges might be more sceptical than jurors when it comes to particular forms of evidence, such as DNA evidence.[51] There may also be an element of case selection, such that weak prosecution cases are more likely to be heard by judge-alone; Gu gives the example of a defendant accused of committing an offence while in prison. In such cases, the prejudicial fact of his or her incarceration might result in the defendant requesting a judge-alone trial, while the prison environment might also mean that witnesses are less likely to give evidence for the prosecution due to the fear of potential reprisals, increasing the likelihood of acquittal.[52]

2.27. Beyond conviction rates, BOCSAR also found that judge-alone trials were associated with a statistically significant decrease in average trial days for prejudicial and complex offences.[53] This might be due to factors including: increased use of written submissions in judge-alone trials, particularly for expert evidence; the ability to address evidentiary issues mid-trial with substantially less disruption; less risk of disruption from juror absences; and streamlined opening and closing statements.[54] It is unclear whether these figures take into account the fact that judge-alone trials are less likely to be aborted or result in a hung jury,[55] potentially producing further efficiency gains.

2.28. Possibly tempering these gains, slightly more judge-alone convictions are appealed than jury convictions. As a percentage of guilty verdict trials finalised between 20 November 2018 and 8 November 2021, 27.9% of judge-alone trial matters were appealed compared to 26.5% of jury trial matters.[56] Judge-alone appeals have a slightly lower rate of success than jury appeals; between 1 January 2021 and 19 December 2023, 25.6% of appeals against judge-alone trial convictions were successful compared to 29.3% of appeals against jury trial convictions.[57]

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49 Gu (n 25) 19.
50 Peter Krisenthal, 'Judge Alone Trials in NSW: Practical Considerations' <https://criminalcpd.net.au/wp-content/uploads/2016/09/Judge_alone_trials_in_NSW_peter_krisenthal.pdf>.
51 Gu (n 25) 21–22.
52 ibid 22.
53 ibid 33.
54 ibid 24-25.
55 Joanne Baker, Adrian Allen and Don Weatherburn, 'Hung juries and aborted trials: An analysis of their prevalence, predictors and effects' (2002) NSW Bureau of Crime and Statistics Crime and Justice Bulletin, No. 66 <https://www.austlii.edu.au/au/journals/NSWCrimJustB/2002/3.pdf>.
56 Gu (n 25) 20–21.
57 ibid 21.

However, neither of these findings are statistically significant.

South Australia

2.29. In 1984, South Australia became the first Australian jurisdiction to legislate to permit judge-alone trials. A defendant may be tried by judge alone in two situations:

2.30. Firstly, a person charged with an indictable offence can elect to be tried by judge alone.[58] If a defendant elects to be tried by judge alone, the judge must order the judge-alone trial as long as the defendant has received legal advice prior to their election.[59] In a case with multiple co-defendants, a judge-alone trial cannot be ordered unless all co-defendants agree to be tried by judge alone.[60]

2.31. A defendant wishing to be tried by judge alone must make their election before their first arraignment date, unless the Court extends the time period for making an election.[61] A defendant who elects to be tried by judge alone can only revoke their election with the leave of the Court.[62]

2.32. Secondly, where a case involves a serious and organised crime offence, the Director of Public Prosecutions may apply to the Court for a judge-alone trial order.[63] The Court may make the order if it considers that it is in the interests of justice.[64] Without limiting the factors that the Court may consider, the Court may make an order for a judge-alone trial if there is a real possibility of jury tampering or witness tampering.[65]

2.33. A serious and organised crime offence is defined as: (a) an offence specified in Part 3B of the Criminal Law Consolidation Act 1935, which concerns 'offences relating to criminal organisations'; or (b) an aggravated offence or offence punishable by life imprisonment, that is committed in circumstances where the act was for the benefit of a criminal organisation, directed by a criminal organisation, or where the offender identified as a member of a criminal organisation.[66]

2.34. A decision to order a judge-alone trial for a serious and organised crime offence can be appealed by the defendant.[67]

2.35. Despite the relevant legislation remaining silent on the issue, case law has confirmed that South Australian judges are required to give written reasons for their verdicts.[68]

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58 Juries Act 1927 (SA) s. 7(1).
59 ibid.
60 ibid s. 7(3).
61 South Australia, Joint Criminal Rules 2022, rr. 94.4(1), 94.1(2).
62 ibid r. 94.4(1).
63 Juries Act 1927 (SA) s. 7(3a).
64 ibid s. 7(3b).
65 ibid s. 7(3c).
66 Criminal Law Consolidation Act 1935 (SA) s. 5.
67 Juries Act 1927 (SA) s. 7(3d).
68 *R v Keyte* (2000) 78 SASR 68.

2.36. A judge-alone verdict may be appealed. Notably, while the prosecution is not ordinarily permitted to appeal an acquittal, a limited exception exists permitting the Director of Public Prosecutions to, with the permission of the Court of Appeal, appeal against an acquittal on any ground if the trial was by judge-alone.[69]

Practice

2.37. In 2003, Waye observed that the 'very low rate' of judge-alone trials in South Australia meant that 'South Australian judges have not developed a distinct style of procedure, as observed by Doran and Jackson in Northern Ireland.'[70] Among South Australian judges, judges different in the extent to which they were willing to intervene in criminal trials. Judges who identified as being more interventionist generally indicated that they were more likely to ask witnesses questions in judge-alone trials compared to jury trials, and were more comfortable directing counsel to pursue an issue in judge-alone trials.[71]

Evaluations

2.38. In 1998, Willis analysed data on judge-alone trials in South Australia held between 1989 and 1993. In that period, there were 58 judge-alone trials and 970 jury trials.[72] The 58 judge-alone trials included 20 trials involving sexual offences, nine trials involving drug offences, and seven trials involving murder, attempted murder, or manslaughter.[73]

2.39. Willis compared the conviction rates in judge-alone trials and jury trials for sexual offences in that period. From 1989 to 1993, 20% of judge-alone trials for sexual offences resulted in a guilty verdict (4 guilty verdicts out of 20 trials total), and 23.7% of jury trials for sexual offences resulted in a guilty verdict (58 guilty verdicts out of 245 trials total).[74] This led Willis to conclude that the outcomes of judge-alone trials 'are not significantly out of step with the results in jury trials.'[75]

Canada

2.40. Under the Canadian Charter of Rights and Freedoms, any person charged with an offence has the right 'to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.'[76] A defendant is permitted to waive their right to trial by jury.[77]

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69 Criminal Procedure Act 1921 (SA) s. 157(1)(b)(i).
70 Vicki Waye, 'Judicial Fact-Finding: Trial by Judge Alone in Serious Criminal Cases' (2003) 27 Melbourne University Law Review 423, 432. See further below.
71 ibid.
72 John Willis, 'Trial by Judge Alone' (1998) 7 Journal of Judicial Administration 144, 148.
73 ibid.
74 ibid.
75 ibid.
76 Canadian Charter of Rights and Freedoms, s. 11(f), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11.
77 *R v Turpin* [1989] 1 SCR 1296.

2.41. Consequently, a defendant who is charged with an indictable offence (other than an offence specified in s. 469 of the Criminal Code) can elect to be tried by judge alone.[78]

2.42. The offences in s. 469 of the Criminal Code include murder, treason, sedition, piracy, and mutiny. For these offences, a defendant can be tried by judge alone where they elect to be tried by judge alone and the Attorney General consents to the judge-alone trial.[79] The Attorney General's consent appears to rarely be withheld.[80]

2.43. The defendant is required to make the election at their first appearance.[81] If no election is made, the default mode of trial is trial by jury.[82] Anecdotally, it is common for a defendant to elect to trial by jury so as to preserve that right.[83] A defendant is subsequently able to re-elect their mode of trial.[84]

2.44. To our knowledge, there has not been any significant quantitative or qualitative evaluations of judge-alone trials in Canada. There is anecdotal evidence that defendants commonly elect for judge-alone trials in cases involving: inflammatory or prejudicial pre-trial publicity; complex forensic or other technical evidence; the admission of the defendant's criminal record or other unsavoury evidence; and serious child abuse.[85]

New Zealand

2.45. Similarly to Canada, s. 24(e) of the New Zealand Bill of Rights Act provides that everyone who is charged with an offence shall have the right 'to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for 2 years or more.' A defendant can waive this right in some circumstances.

2.46. Primarily, the mode of trial is contingent on the category of criminal offence that a person is charged with:

a. Category 1 offences are minor offences not punishable by imprisonment.[86] Category 2 offences are minor offences that are punishable by a term of imprisonment of less than two years.[87] Category 1 and 2 offences must be tried by judge alone procedure,[88] and cases will be heard by a judge or community magistrate.

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78 Criminal Code (Can) RSC, 1985, c. C-46, s. 558
79 ibid s. 473(1).
80 Laura Hoyano, 'Opinion: Judge-alone trials can deliver justice – but only if defendants choose them', Counsel, 5 May 2020 <https://www.counselmagazine.co.uk/articles/judge-alone-trials-can-deliver-justice-but-only-if-defendants-choose-them>.
81 Criminal Code (Can) RSC, 1985, c. C-46, ss. 536(2), 536(2.1).
82 ibid s. 471.
83 Hoyano (n 80).
84 Criminal Code (Can) RSC, 1985, c. C-46, s. 561.
85 Hoyano (n 80).
86 Criminal Procedure Act 2011 (NZ) ss. 4(1)(d), 6.
87 ibid ss. 4(1)(h), 6.
88 ibid ss. 71, 72.

b. Category 3 offences are offences punishable by imprisonment of two years or more, except for those offences specified in Schedule 1.[89] Category 3 offences are tried by judge-alone procedure:

   i. Where the Court orders a judge-alone trial because the case is likely to be 'long and complex' or involves a risk of jury tampering;[90] or

   ii. Where the defendant does not elect to be tried by jury.[91]

   If a defendant elects to be tried by jury, they will be tried by a jury unless there are other factors justifying a judge-alone trial (namely, that the trial is likely to be 'long and complex' or involves a risk of jury tampering).

c. Category 4 offences are offences listed in Schedule 1 of the Criminal Procedure Act.[92] These include murder, manslaughter, terrorist offences, and international crimes. Category 4 offences must be tried by jury unless a judge-alone trial is ordered because there is a risk of jury tampering or, for offences with a maximum penalty of less than 14 years imprisonment, where they are likely to be 'long and complex'.[93]

2.47. For offences with maximum penalties of less than 14 years,[94] if a trial is likely to be long and complex, the Court may, on the application of the prosecutor or on its own motion, order a judge-alone trial.[95] To make this order, the Court must be satisfied: (a) that all reasonable procedural orders and arrangements have been made to facilitate the shortening of the trial, but the duration of the trial is still likely to exceed 20 sitting days; and (b) that in the circumstances of the case, the defendant's right to trial by jury is outweighed by the likelihood that potential jurors will not be able to perform their duties effectively.[96] Prior to making an order, the Court must give the prosecution and the defence the opportunity to be heard in relation to the application.[97]

2.48. In determining whether the defendant's right to trial by jury has been outweighed, the Court must consider: the number and nature of offences with which the defendant is charged, the nature of issues likely to be involved, the volume of evidence likely to be presented, the imposition on potential jurors of sitting for the likely duration of the trial, and any other matters the Court considers relevant.[98]

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89 ibid ss. 4(1)(k), 6.
90 ibid ss. 102, 103.
91 ibid s. 50.
92 ibid ss. 4(1)(q), 6.
93 ibid s. 74(2).
94 ibid s. 102(1).
95 ibid s. 102(2).
96 ibid s. 102(4).
97 ibid s. 102(4).
98 ibid s. 102(5).

Practical Matters

2.49. A defendant charged with a Category 3 offence who elects to be tried by jury must make the election at the time of their guilty plea.[99] An election can only be made at a later point in time with the leave of the Court,[100] and once a defendant has elected for a trial by jury, this election can only be withdrawn with the leave of the Court.[101]

2.50. Unless the Court directs otherwise, the prosecution's opening statement must be limited to a 'short outline of the charge or charges the defendant faces', and the defence's opening statement must be limited to 'a short outline of the issue or issues at trial.'[102] Further, unless the Court directs otherwise, neither party may make submissions on the facts or address the Court on the evidence given.[103] However, the defendant may address the Court at the end of the prosecution case to submit that the charge should be dismissed.[104]

2.51. A judge must give reasons for their verdict.[105] Reasons should 'show an engagement with the case, identify the critical issues in the case, explain how and why those issues are resolved, and generally provide a rational and considered basis for the conclusion reached.'[106]

Existing Research and Evaluation

2.52. Research on judge-alone trials in New Zealand has primarily focused on judge-alone trials in cases of sexual assault.

2.53. In 2022, McDonald found that judge-alone trials (n = 8) had a conviction rate of 88%, which was substantially higher than the jury trial (n = 30) conviction rate of 40%.[107]

2.54. There might be factual and evidentiary differences between judge-alone trials and jury trials which explain this difference in conviction rates. Counsel tend to advise clients to elect a jury trial in cases where the key factual findings relate to credibility or reliability.[108] In contrast, counsel appear more likely to advise a judge-alone trial where the client's defence is technical or involves complex law or propensity evidence.[109] As such, stronger prosecution cases may be more likely to be heard by judge alone, explaining the increased conviction rates, while weaker prosecution cases may be more likely to be heard by juries, explaining their reticence to convict.

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99 ibid s. 51.
100 ibid s. 51(2).
101 ibid s. 53.
102 ibid s. 105(1).
103 ibid s. 105(4).
104 ibid s. 105(5).
105 ibid s. 105(5).
106 *Sena v Police* [2019] NZSC 55, [36].
107 ibid s. 106.
108 Elizabeth McDonald, *In the Absence of a Jury: Examining Judge-Alone Rape Trials* (2022) <https://dx.doi.org/10.26021/11869> 16.
109 ibid 16.

2.55. McDonald's study further found that the jury trials in the sample lasted an average of 4.5 days, compared with the judge-alone trials in the sample which lasted an average of 2 days.[110] The complainant's evidence was 14% shorter in judge-alone trials compared to jury trials, and the complainant's cross-examination was 30% shorter in judge-alone trials compared to jury trials.[111]

2.56. However, judge-alone trials are not a panacea for efficiency. In September 2024, the New Zealand Ministry of Justice commenced a consultation on 'Improving Jury Trial Timeliness', responding to increased delays in the New Zealand District Court.[112] While the current law permits a person to elect for jury trial when they are facing an offence with a maximum penalty of 2 years or more imprisonment, the Government was proposed increasing the threshold for a jury trial to offences with a maximum penalty of 3 years, 5 years or 7 years.[113] The proposed changes were opposed by the Law Association of New Zealand.[114]

Northern Ireland - Diplock Courts

2.57. Northern Ireland's trial system is very similar to England and Wales, utilising jury trials in Crown Court for indictable offences, and a panel of lay magistrates in Magistrates' Court. During 'The Troubles', the risk of jury intimidation and/or sympathy with defendants' motives was considered so great that the right to trial by jury was removed for a specific list of scheduled offences. Known as Diplock Courts, defendants were tried by judge-alone. This system ran from 1973 to 2007,[115] when it was replaced by a more generic juryless trial system. The Justice and Security (Northern Ireland) Act 2007 currently permits judge-alone trials in a variety of circumstances, all related to terrorism.

2.58. The list of offences triable by Diplock Courts was revised several times throughout the period.[116] Certain offences, such as those relating to the use of explosives and hijacking, automatically required a judge-alone trial. Other offences, such as murder, kidnapping, and burglary, could only be sent for judge-alone trial if the offence was determined by the Attorney General to be connected with terrorism. Research suggests that this system was imperfect, and up to 40% of Diplock Courts concerned offences which arguably did not in fact relate to the Troubles.[117]

2.59. As an emergency limitation on jury trials, designed for a specific situation, the Diplock Trials

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110 ibid 58–61.
111 ibid 59.
112 Minister of Justice, *Improving Jury Trial Timeliness: Discussion Document*, September 2024 <https://www.justice.govt.nz/assets/Documents/Publications/Discussion-document-Improving-jury-trial-timeliness.pdf>.
113 ibid.
114 The Law Association of New Zealand, 'Improving Jury Trial Timeliness: Submissions on Behalf of the Law Association of New Zealand by the Criminal Law Committee and the Public and Administrative Law Committee' <https://thelawassociation.nz/wp-content/uploads/2022/12/20241106-TLANZ-Improving-Jury-Trials-timeliness-Submission.pdf>.
115 Northern Ireland (Emergency Provisions) Acts 1973, 1975, 1978, 1987, 1991, 1996, 1998.
116 For the final list, see Northern Ireland (Emergency Provisions) Act 1996, sch. 1.
117 DPJ Walsh, *The Use and Abuse of Emergency Legislation* (Coben Trust, 1987).

are somewhat idiosyncratic and may not be representative of judge-alone trials more generally. However, some aspects of their implementation are worth considering, and their longevity has resulted in significant academic research which England and Wales can learn from.

Relevant Features of Diplock Trials

2.60. Certain rules of evidence were altered for Diplock Trials. Some reforms, for example the test for admission of confession evidence being relaxed, were attempts to increase conviction rates for crimes committed in relation to The Troubles and are therefore unrelated to the change in tribunal.

2.61. Two alterations are of greater relevance. The first is the requirement for judges in Diplock Courts to provide reasons for their verdict in the event of a conviction,[118] in contrast to unreasoned jury verdicts. Secondly, defendants were granted an automatic right to appeal their conviction and sentence,[119] unlike defendants convicted following jury trial who required leave to appeal. Both measures were intended as safeguards against wrongful convictions and were considered particularly important given the political context at the time.

Existing Research

2.62. Jackson and Doran's landmark study of Diplock Trials, *Judge Without Jury*,[120] is a key resource for understanding Diplock Trials, and how a change of factfinder impacts the criminal trial process and those within it. Several key findings deserve highlighting.

2.63. Judges in Diplock Courts must play competing roles, that of factfinder and umpire.[121] This can cause conflicts and potential (real or perceived) unfairness when judges intervene to ask questions in a way which can reveal which way they are leaning.

2.64. Rules of evidence and procedure are (generally) designed for bifurcated tribunals, causing difficulties in application where the judge rules on both fact and law. For example, where a defendant makes a submission of no case to answer, Jackson and Doran found that the result of that decision almost always provided an indication of the ultimate outcome: if the judge accepted it, they were minded to find D not guilty anyway; if the judge refused the application, the defendant was invariably convicted.[122] Problems also arise where there is a dispute over the admissibility of evidence – if the evidence is ruled inadmissible then the judge cannot forget he/she has heard it. Of course, the requirement to provide a reasoned verdict provides some safeguard, in that inadmissible evidence cannot be used to justify the verdict, but Jackson and Doran found evidence that some judges who acquitted defendants would refer to the fact that the outcome would have been different had certain evidence been admissible, undermining the

[118] Northern Ireland (Emergency Provisions) Act 1996, s. 11(5).
[119] ibid, s. 11(6).
[120] J Jackson and S Doran, *Judge Without Jury: Diplock Trials in the Adversary System* (Oxford: Clarendon, 1995).
[121] ibid chs. 5 and 6.
[122] ibid 184–191.

outcome and presumption of innocence.[123]

2.65. The end of the trial in Diplock Trials was quite different to jury trials. There tended to not be counsel speeches, instead there was a 'deliberation between equals' where the judge would discuss the main disputed issues in the trial with counsel, identifying the key points of contention and inviting specific comments from each party.[124] Judges could also signal the strengths and weaknesses of the case, allowing counsel to focus their comments to maximise their potential impact on the outcome.

2.66. Trials tended to be more concentrated, pared down to the 'absolute minimum.'[125] Issues which may sometimes find favour with juries, based on sympathy or prejudice, were absent. Witnesses who would normally be called to provide live evidence for the benefit of a jury would not be called, and instead their written statement would be admitted.

2.67. There was no guidance given to judges as to the content of their reasons for verdict. As such, practice varied widely.[126] Judges reported that they found it a burdensome and time-consuming task.[127]

2.68. Jackson and Doran argued that the automatic right to appeal was not as great a protection for defendants as envisioned.[128] The Court of Appeal deferred to trial judges on matters of fact in the same way that they do with juries. They were more willing to let errors in judicial reasons go, explained away as 'slip[s] of the tongue,'[129] than they were with errors in directions to juries. Overall, the numbers of appeals made to Diplock convictions was substantially higher than as for jury trials, though the success rate was lower.[130] Given that defendants were given an automatic right to appeal, and lengthy documents of reasons which any lawyer could – given some time – find fault in, this is perhaps unsurprising. Though unable to identify any examples of the practice, Jackson and Doran also raise the possibility that judges would be able to 'appeal-proof' their reasons once sufficient case law on reasons is established.[131]

2.69. The main message which Jackson and Doran emphasise is that a change in factfinder fundamentally alters the dynamic of the criminal trial and impacts all elements of pre- and post-trial procedure.[132] Very few alterations were made to trial procedure to accommodate Diplock Courts; this, Jackson and Doran argue, was a major error which led to an 'adversarial deficit.'[133] Put simply, rules of evidence do not make sense when the factfinder cannot be shielded from excluded evidence. Opportunities for adversarial argument are minimised when the tribunal deciding the ultimate outcome is also the tribunal deciding whether there is a case to answer or

[123] ibid 248–249.
[124] ibid 194.
[125] ibid 200.
[126] ibid ch. 9.
[127] ibid 265–266.
[128] ibid 280.
[129] ibid 280.
[130] ibid 281.
[131] ibid 282.
[132] ibid 288–292.
[133] ibid 292.

an abuse of process. In sum, if judges act as factfinders, then more fundamental changes to trial procedure are required to accommodate them.

Republic of Ireland

2.70. The Republic of Ireland has a three-tier criminal court system. Minor offences are dealt with in the District Court by a judge sitting alone, middling offences are dealt with in the Circuit Court by a jury, and the most serious offences are tried in the High Court (sitting as the Central Criminal Court) by a jury. However, the right to jury, contained in Article 38 of the Constitution of Ireland, may be set aside where 'the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order.'[134]

2.71. The Republic of Ireland operates a special system of juryless trials for a limited number of serious offences. The Special Criminal Court No. 1, established in 1972 by a government order made under the s. 35 of the Offences Against the State Act 1939, originally introduced juryless trials as an emergency response to criminal activity connected to the Troubles, primarily to circumvent possible jury intimidation.[135] A second Special Criminal Court (No. 2) was established in 2004 and began operating in 2016.[136] Cases involving terrorism or organised crime are now automatically brought before a Special Criminal Court, and the Director of Public Prosecutions may also send other criminal cases for trial under the Special Criminal Court system if the ordinary courts are, in their view, unable to secure the effective administration of justice and the preservation of public peace and order[137] – again, this primarily exists to manage risks of jury tampering.

2.72. The Special Criminal Court is composed of three professional judges, drawn from the High Court, Circuit Court, and District Court. The Special Criminal Courts resolved 9 offences in 2012,[138] rising to 177 cases in 2021[139] and 57 cases in 2022.[140] Though initially established to deal with terrorism,[141] the caseload of the Special Criminal Court in recent years appears to primarily concern organised/gang-related crime (where similar concerns of jury tampering arise as with terrorism).

Critiques and Challenges

2.73. Much like the Diplock Courts in Northern Ireland, the political context within which the Special Criminal Court was established has generated criticism, most of which has been directed at the

[134] Constitution of Ireland art 31(3)(1).
[135] Although it is worth noting that variants of special juryless courts have existed in the Republic of Ireland for much longer: F Davis, *The history and development of the Special Criminal Court, 1922–2005* (Four Courts Press, 2007).
[136] Offences Against The State Acts 1939 to 1998; Special Criminal Court No 2 Rules 2016.
[137] Constitution of Ireland art 31(3)(1).
[138] Courts Service, *Annual Report 2012* (2012).
[139] Courts Service, *Annual Report 2021* (2021).
[140] Courts Service, *Annual Report 2022* (2022).
[141] Sophie Treacy, 'Should the Irish Special Criminal Court Continue to Operate? Evaluating the Role of this Court on its 50th Anniversary' (Oxford Human Rights Hub, 19 December 2022) <https://ohrh.law.ox.ac.uk/should-the-irish-special-criminal-court-continue-to-operate-evaluating-the-role-of-this-court-on-its-50th-anniversary/>.

alleged lack of impartiality of the tribunal.[142] However, the ECtHR has twice dismissed challenges on this ground.[143]

2.74. Critiques have also been levelled at particular unique evidentiary rules which apply only to the Special Criminal Court, such as the power under s. 3(2) of the Offences Against the State (Amendment) Act 1972 which allows the admission of 'belief evidence' (evidence from a senior officer of the Garda Síochána that he/she believes the defendant to be a member of an unlawful organisation is admissible as evidence that the individual is in fact a member of that organisation) which would not be considered admissible under the ordinary rules of evidence in a jury trial.

2.75. There have been two major governmental reviews into the operation of the Special Criminal Court, in 2002[144] and 2023.[145] Both of these Reviews advocated repealing the Offences Against the State Acts, and therefore abolishing the Special Criminal Court (and the rules of evidence which apply only there), but recognised that there should be a new procedure for ordering juryless trials on a case-by-case basis to manage risks of jury tampering.

2.76. As far as we have been able to discover, there has been no significant research on differences in procedure, conduct, appeals, (etc.) between normal jury trials and Special Criminal Court trials in Ireland as there has been in Northern Ireland. Nor is there any research on comparative costs or efficiency between the two modes of trial. What research does exist focuses more on the (lack of) justification for the Special Criminal Court system, and critiques of its political nature.[146]

3. Lessons from Comparators

3.1. Drawing on the above case studies, in this section we highlight elements of comparative experience salient to the Review's Terms of Relevance. We focus on the potential impact of introducing judge-alone trials as an option for indictable offences.

3.2. We note that the impetus for this Review is the need to enhance the efficiency of the justice system. However, efficiency is only one facet of dealing with cases 'justly' as required by the Overriding Objective of the Criminal Procedure Rules. Equally important are the requirements that the innocent be acquitted and the guilty convicted,[147] and procedural fairness to the

[142] Amnesty International, 'Republic of Ireland: Submission to the Committee to Review the Offences Against the State Acts and Other Matters' (1999); *Irish Council for Civil Liberties*, 'State of Emergency? 52 years of the Special Criminal Court' <State of Emergency? 52 years of the Special Criminal Court - Irish Council for Civil Liberties>.

[143] *X and Y v Ireland* [1980] No. 8299/78; *Thomas Eccles and Others v Ireland* [1988] No. 12839/87.

[144] *Report of the Committee to Review the Offences Against the State Acts, 1939-1998 and Related Matters* (2002) <Word Pro - ~0032426.lwp>.

[145] Independent Review Group to Examine the Offences Against the State Acts, *Report of the Majority* (2023) <www.gov.ie/pdf/?file=https://assets.gov.ie/261194/ccaf5dfd-a74e-4583-8694-83705e44e3d7.pdf#page=null>; Independent Review Group to Examine the Offences Against the State Acts, *Report of the Minority* (2023) <www.gov.ie/pdf/?file=https://assets.gov.ie/261196/17d25b8a-70e4-440e-beca-a413a5d8beb9.pdf#page=null>.

[146] MTW Robinson, *The Special Criminal Court* (Dublin University Press, 1974); Davis (n 135).

[147] CrimPR r. 1.1(2)(a).

defendant.[148] Beyond the Overriding Objective, we strongly believe that efficiency should not be pursued at the cost of legitimacy.

A. The impacts any changes could have on how demand flows through the criminal courts

3.3. Introducing judge-alone trials as an option for indictable offences would not fundamentally alter demand flows to the two criminal courts. Summary-only offences would continue to be tried at Magistrates' Court and indictable offences would continue to be tried at the Crown Court. There may be outstanding issues relating to either way offences (see Section 3.E below).

3.4. The introduction of judge-alone trials may assist cases to flow more quickly through the criminal courts. There is limited research on whether judge-alone trials are quicker than jury trials. In NSW, BOCSAR found that judge-alone trials were associated with a statistically significant decrease in average trial days for prejudicial and complex offences.[149] Legal practitioners and judges interviewed by the study agreed that judge-alone trials were shorter and more efficient than jury trials.[150]

3.5. Gu explains that judge-alone trials in NSW produce efficiency benefits because of 'increased flexibility in how evidence is presented and hearings are scheduled. Individually, these factors likely reduce the numbers of hours each trial day but together can cut whole days from trial proceedings.'[151] Further, Gu notes that judge-alone trials can operate in a more agile manner:

> 'Jury trials typically run continuously, as adjourning/resuming trials across weeks would be disruptive to jurors' lives. In contrast, judge-alone trials have increased flexibility to adjourn/ resume across non-consecutive days to meet the needs of the accused, complainant, and other witnesses. If a witness is unavailable, judges can "intersperse matters in between" and "come back to the trial when the witness is available, which you can't really do with a jury". Judges acting alone may also make sitting hours start earlier or lengthen them.'[152]

3.6. In Northern Ireland, Jackson and Doran provide mixed evidence concerning trial efficiency. On the one hand, some judge-alone trials lasted less than one hour, a feat no jury trial could ever realistically achieve.[153] However, on average, Diplock trials lasted longer than jury trials, though this could be attributed to the types of offences tried by judges over juries (including trials with multiple defendants, complex forensic evidence, etc.).[154] Although judge-alone trials were able to dispense with some formalities and procedures (such as opening speeches explaining the case, which are unnecessary where a judge has read the case papers in advance), the time required for judges to write reasoned verdicts which stand up to scrutiny can be

[148] ibid rr. 1.1(2)(c), (d).
[149] Gu (n 25) 33.
[150] ibid 25.
[151] ibid 24.
[152] ibid.
[153] Jackson and Doran (n 120) 198–9.
[154] ibid 199–200.

significant. Much also seems to depend on case-specific variables such as offence type and complexity of evidence/issues; where one tribunal is seen as preferable for a certain class of offences, any inferences about comparative trial lengths would be skewed.

3.7. There is limited research from other jurisdictions on the efficiency of judge-alone trials. The judge-alone trials included in McDonald's study of adult rape trials in New Zealand were similarly shorter on average than jury trials,[155] however, the small sample used by this study suggests against extrapolating this finding more broadly. Certainly, the current court backlog in New Zealand demonstrates that backlogs can accrue despite the existence of judge-alone trials.

3.8. While judge-alone trials may produce efficiency gains in the courtroom, they also impose a greater workload on judges, particularly with respect to providing written judgments.[156] It is reasonable to expect that judges unfamiliar with this style of judgment writing might initially take longer to draft their verdicts, but will become more efficient over time. Further, beyond the increased workload associate with judge-alone trials, judges also report a personal (psychological / emotional) burden associated with judge-alone trials.[157] Supporting judges to manage the personal burden associated with judge-alone trials is necessary to protect against work-related stress which might lead to sickness absences.

3.9. As noted below (Section 3.D), judge-alone convictions may be appealed at higher rates than jury convictions. Some efficiency gains at the trial stage may therefore be offset by efficiency losses at the appeal stage.

3.10. We cannot confidently conclude, on the basis of the available evidence, that judge-alone trials would definitely enhance efficiency if they were introduced in England and Wales. At best, the evidence suggests that judge-alone trials *may* be more efficient than jury trials, but more research is needed to understand if this trend is repeated across other common law jurisdictions. Further, a greater understanding is needed of the administrative court processes in NSW (e.g. listing practices, use of pre-trial hearings, etc.) and how these processes and resourcing compare with practice in England and Wales, before we could confidently predict whether the efficiency savings found in NSW would translate to England and Wales.

B. The potential impacts of any structural changes on the fairness of proceedings, particularly the impact on court users such as witnesses and defendants, and how these could be mitigated where necessary

3.11. The primary criticism raised against judge-alone trials is the impact of a change in fact-finder on the fairness of the trial for the defendant. Put simply, there are concerns that judge-alone trials are unfair to accused persons.

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[155] McDonald (n 108) 58–61.
[156] Gu (n 25) 25.
[157] ibid 26.

3.12. It is difficult to ascertain the accuracy of this concern. Different jurisdictions have adopted different procedures which may be more or less fair to defendants, but much depends on how one conceptualises fairness (whether in theory or in relation to constitutional/human rights law). The limited evidence we do have on judge-alone trials is not uniform, but the prospect of widespread unfairness to defendants from judge-alone trials appears unlikely so long as sufficient procedural safeguards are implemented. However, there are also significant gaps in existing research which leaves much unknown about the fairness of judge alone trials.

Fairness as Participation – The Decision to Hold a Judge Alone Trial

3.13. One facet of fairness concerns defendant participation and autonomy.[158] The extent to which the defendant is involved in the decision about mode of trial (judge-alone or jury trial) may therefore be considered one measure of fairness.

3.14. Along these lines, the fairest regimes would involve a defendant being able to choose whether to be tried by jury or judge alone (Table 1). As a corollary of this, the fairest regimes would also avoid or limit the circumstances where a judge-alone trial is ordered against the wishes of the defendant (see Table 2).

Table 1. Criteria for Holding a Judge-Alone Trial by Jurisdiction

A judge-alone trial will be held when:	ACT	NSW	SA	Can	NZ	NI	RoI
D elects for judge-alone trial	✓		✓	✓	✓		
D elects for judge-alone trial and a judge-alone trial is in the interests of justice		✓					
Case involves risk of jury tampering		✓			✓	✓	✓
Case involves organised crime and judge-alone trial in the interests of justice			✓			✓[1]	
Case likely to be long and complex and D's right to jury trial outweighed					✓		
Trial concerns an offence which appears on a specific list of offences						✓[2]	✓

1. The criteria for ordering a trial are broad enough to include organised crime, despite being originally intended for terrorism offences
2. Under the Diplock Trial regime.

3.15. In the ACT, South Australia, Canada, and New Zealand, a defendant can elect to be tried by judge alone. In NSW, a defendant can elect to be tried by judge alone, but additional criteria must be satisfied before such a trial can be ordered. Significantly, in NSW, consideration must be given to whether a judge-alone trial would be in the interests of justice, either by the prosecutor (through the application of the test in the DPP Prosecutorial Guidelines) or the Court. Such a process may be thought of as helping to achieve a balance between a defendant's right

[158] P Roberts, 'Theorising Procedural Tradition: Subjects, Objects and Values in Criminal Adjudication' in RA Duff, L Farmer, S Marshall and V Tadros (eds), *The Trial on Trial Volume Two – Judgment and Calling to Account* (Hart, 2006); A Owusu-Bempah, *Defendant Participation in the Criminal Process* (Routledge: 2017).

to elect a judge-alone trial and broader justice considerations.

Table 2. Can a Judge-Alone Trial be Ordered Against the Wishes of the Defendant?

	ACT	NSW	SA	Can	NZ	NI	RoI
No	✓			✓			
Yes, if there is a risk of jury tampering		✓			✓		
Yes, for specific offences			✓[1]				
Yes, in long and complex cases					✓		
Yes, in all eligible cases						✓	✓

1. For serious and organised crime offences

3.16. As far as we are aware, neither the ACT nor Canada make statutory provision for a judge-alone trial being ordered against a defendant's wishes. During the Covid-19 pandemic, the ACT controversially altered this position, passing emergency legislation to permit the Court to order a judge-alone trial where the order would 'ensure the orderly and expeditious discharge of the business of the court' and such an order was 'otherwise in the interests of justice.'[159] The curtailing of the defendant's right to choose a jury trial was strongly criticised by the Law Council of Australia, the ACT Law Society, and the ACT Bar Association,[160] demonstrating the importance of defendant choice to perceptions of the fairness of judge-alone trials (see further Section 3.F below).

3.17. Some jurisdictions can order a defendant to be tried by judge alone, regardless of the defendant's wishes, in certain limited circumstances. In NSW, New Zealand, and the Republic of Ireland, a defendant can be tried by judge alone where there is a risk of jury tampering. While the specific tests used differ, the rationale is largely the same as for the current English and Welsh regime under the Criminal Justice Act 2003. Further, in South Australia, a judge-alone trial can be ordered against a defendant's wishes in cases involving serious and organised crime, with this provision encompassing situations where there is a risk of jury tampering in a trial involving a serious and organised crime offence. Where jury tampering is a problem caused by a defendant, removing a defendant's ability to be tried by jury may be perceived as a legitimate and proportionate response.

3.18. A second, arguably wider, exception exists in New Zealand, where a judge-alone trial can be ordered against a defendant's wishes in cases likely to be 'long and complex'. In determining whether to order a judge-alone trial in such cases, the Court must consider factors including the number and nature of offences with which the defendant is charged, the nature of issues likely to be involved, the volume of evidence likely to be presented, and the imposition on potential jurors of sitting for the likely duration of the trial.[161] In such cases, the defendant must be given an opportunity to be heard in relation to the application before an order is made. There are notable parallels between New Zealand's exception for long and complex trials and s. 43 (now

[159] Covid-19 Emergency Response Act 2020 (ACT) sch. 1, pt 1.19, inserting a new s. 68BA into the Supreme Court Act 1933 (ACT).

[160] Sol Dolor, 'Legal bodies slam ACT's suspension of right to trial by jury amid coronavirus crisis', *Australasian Lawyer,* 7 April 2020, <https://www.thelawyermag.com/au/news/general/legal-bodies-slam-acts-suspension-of-right-to-trial-by-jury-amid-coronavirus-crisis/219047>.

[161] Criminal Procedure Act 2011 (NZ) s. 102(5).

repealed) of the Criminal Justice Act 2003, which would have permitted judge-alone trials in England and Wales for fraud offences where 'the complexity of the trial or the length of the trial (or both) is likely to make the trial so burdensome to the members of a jury hearing the trial that the interests of justice require that serious consideration should be given to the question of whether the trial should be conducted without a jury.'[162]

3.19. In Northern Ireland, the prior Diplock Court system ordered judge-alone trials if the offence charged fell within a list of scheduled offences (some of which required there to be a link with terrorism). The present regime under the Justice and Security (Northern Ireland) Act 2007 is generic and applies to all offences, but certain criteria must be met (substantively, there needs to be some connection with terrorism). These decisions are made by the Director of Public Prosecutions (previously the Attorney General), without any input from the Court or the defendant. In terms of defence participation in the process, this regime ranks very low by excluding defendants from the decision entirely.

3.20. In situations where a judge-alone trial is not mandatory, a range of procedural safeguards can operate to protect defendants, including:

- Requiring a defendant to have received legal advice prior to making an order for a judge-alone trial, ensuring that any such elections are properly informed;[163]

- In cases with multiple co-accused, not ordering a judge-alone trial unless all defendants agree to be tried by judge alone;[164]

- Permitting a defendant who has elected a judge-alone trial to change their mind and be tried by jury (albeit that different jurisdictions adopt different approaches as to when and how many times a defendant may change their mind);[165] and

- Providing that the decision to (or not to) order a judge-alone trial is capable of appeal, ensuring that judge-alone trials are only ordered in appropriate cases, in line with statutory criteria.[166]

3.21. Practice across the jurisdictions demonstrates a range of potential approaches to legislating for judge-alone trials, with some approaches likely to be perceived as fairer to defendants than others. While a fair process for determining whether or not a judge-alone trial will be held does not ensure that the resulting trial itself will be fair (see below), ensuring fairness at this initial

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[162] Criminal Justice Act 2003 s. 43(5).

[163] *Supreme Court Act 1933* (ACT) s. 68B(1)(b); *Criminal Procedure Act* 1986 (NSW) s. 132(6); *Juries Act 1927* (SA) s. 7(1).

[164] *Supreme Court Act 1933* (ACT) s. 68B(1)(d); *Criminal Procedure Act* 1986 (NSW) s. 132A(2); *Juries Act 1927* (SA) s. 7(3).

[165] *Supreme Court Act 1933* (ACT) ss. 68B(2), (3); *Criminal Procedure Act* 1986 (NSW) s. 132A(3); South Australia, Joint Criminal Rules 2022, rr. 94.4(1); Criminal Code (Can) RSC, 1985, c. C-46, s. 561; Criminal Procedure Act 2011 (NZ) s. 53.

[166] *Juries Act 1927* (SA) s 7(3d). For NSW, see, e.g. *R v Farrugia* [2017] NSWCCA 197 where the Director of Public Prosecutions appealed a judge-alone trial order.

stage may help to minimise community, practitioner, and political objections to perceived restrictions on the defendant's 'right to trial by jury' (see further 3.F below).

Fairness in the Trial Process and Outcome

3.22. There is limited research exploring the extent to which the trial process in judge-alone trials differs from jury trials, and the extent to which judge-alone trial processes are unfair to the defendant. The most comprehensive study of such differences is Jackson and Doran's study of the Diplock Trials in Northern Ireland, however, given the unique political context within which those trials occurred, we are cautious about extrapolating the findings from Jackson and Doran's study to judge-alone trials more generally.

3.23. The law of evidence was famously described by Thayer as 'the child of the jury.'[167] A judge rules on the admissibility of evidence, and a jury considers only that evidence which is admissible. While most jurisdictions appear to retain the same rules of evidence for judge-alone trials and jury trials,[168] we know little about the practical operation of rules of evidence in judge-alone trials in the above jurisdictions.

3.24. There is a significant (if rather dated) body of American literature on the application of evidence in judge-alone trials.[169] This literature observes that rules of evidence are applied in a more relaxed fashion in judge-alone trials, in that judges are more likely to admit evidence which would have been excluded before a jury, but this is allegedly not be problematic as judges are better able than juries to give potentially prejudicial evidence (such as hearsay, bad character, confessions) the proper weight it deserves. Notwithstanding the fact that this latter claim is now highly questionable in light of recent psychological research (see below), the former finding is arguably an inevitable consequence of removing the bifurcated structure of judge/jury trial.

3.25. We believe that a legitimate concern relating to the fairness of judge-alone trials emerges when the same judge rules on the admissibility of evidence and the verdict of the trial. In jury trials, inadmissible and/or prejudicial evidence is kept from the factfinder; the jury only sees that evidence which is admissible in making their decision (or, where they do hear inadmissible evidence by accident, are given clear directions to ignore it). In judge-alone trials, this bifurcation is removed; the judicial factfinder is exposed to all evidence in the process of ruling on its admissibility. While a judge may attempt to consciously disregard any inadmissible

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[167] JB Thayer, *A Preliminary Treatise on Evidence at the Common Law* Boston, MA: Little Brown & CoP, 1898) 266. See further: P Roberts, *Roberts and Zuckerman's Criminal Evidence* (3nd edn, Oxford: OUP, 2022) Ch. 2.

[168] Some jurisdictions, such as Northern Ireland and the Republic of Ireland, made minor modifications to the law of evidence, but these were related more to the political context of the Troubles than the change in factfinder. See above at [2.60] and [2.74].

[169] JA Love, 'The Applicability of the Rules of Evidence in Non-Jury Trials' (1952) 24(4) Rocky Mountain Law Review 480; KC Davis, 'An Approach to Rules of Evidence for Nonjury Cases' (1964) 50(8) American Bar Association Journal 723; AL Levin and HK Cohen, 'Exclusionary Rules in Nonjury Criminal Cases' (1971) 119(6) University of Pennsylvania Law Review 905; J Sheldon and P Murray, 'Rethinking the Rules of Evidentiary Admissibility in Non-Jury Trials' (2003) 86(5) Judicature 227; D Hendrix and D Slayton, 'Rethinking the Rules of Evidentiary Admissibility in Non-Jury Trials: Another View' (2003) 87(2) Judicature 51.

evidence, psychological literature suggests that judges may nonetheless be subconsciously affected by their exposure to such evidence.[170]

3.26. Beyond the issue of the admissibility of evidence, it appears that judges in judge-alone trials take a more interventionist role with respect to the questioning of witnesses than in jury trials. This was observed in the Diplock Trials[171] and appears to be the case in NSW[172] and South Australia.[173] It is difficult to ascertain the impact of a more active judicial role on substantive fairness. The Northern Ireland experience suggests it can, at the very least, generate a *perception* of unfairness. However, we lack an understanding of whether this is the case in jurisdictions beyond Northern Ireland.

3.27. Judge-alone trials also appear to rely on written evidence to a greater extent that jury trials.[174] This appears to be particularly true for expert evidence; such evidence often needs to be simplified and explained at length to jurors, but judges may 'require less framing due to their legal training and ability to read lengthy documents out of court compared to juries.'[175] It is unclear whether any issues of fairness arise from this practice. Beyond fairness, an increasing reliance on documentary evidence, which may not be read out loud at trial,[176] has implications for open justice, as neither the press or public will hear the entirety of the evidence used to convict or acquit the defendant.

3.28. Two key procedural safeguards that may help to protect against an unfair verdict are the requirement that judges must give reasons for their verdict, and the ability for verdicts from judge-alone trials to be appealed. However, while these requirements may play a role in safeguarding the fairness of a trial for a defendant, both these requirements appear to cause some stress for judges, with judges in NSW describing the scrutiny of decisions by the Court of Criminal Appeal as 'very confronting' and a major burden.[177]

3.29. Conviction rates are a common metric used to compare the performance of judge-alone trials and jury trials, sometimes being used as a proxy for unfairness, with higher conviction rates indicating that judge-alone trials are unfair for defendants. While we have reported research on conviction rates where they are available, we would caution against giving these studies undue weight:

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[170] Andrew J Wistrich, Chris Guthrie and Jeffrey J Rachlinski, 'Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding' (2005) 153 University of Pennsylvania Law Review 1251; Stephan Landsman & Richard F. Rakos, 'A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation' (1994) 12(2) Behavioural Sciences & the Law 113. *Cf* the judges in Waye who believed that, 'as a result of their legal training, they were able to disregard irrelevant and/or inadmissible material': Waye (n 70) 441.

[171] See above at [2.62]–[2.69].

[172] See above at [2.22].

[173] See above at [2.37].

[174] Gu (n 25) 24; Hanlon (n 23)147–8.

[175] Gu (n 25) 24.

[176] J Jackson and S Doran, *Judge Without Jury: Diplock Trials in the Adversary System* (Oxford: Clarendon, 1995) 200–2.

[177] Gu (n 25) 25.

- Many of the studies comparing conviction rates for judge alone trials and jury trials are methodologically flawed. Very few studies employ tests of statistical significance or used matched samples, enabling the study to control for confounding variables which might explain differences between judge-alone and jury verdicts. Further, there are a wide range of reasons why defendants and lawyers with particularly strong or particularly weak cases might elect for particular modes of trial, which are unlikely to be captured in quantitative research and are likely to skew the comparisons. Ultimately, we would caution against assuming that higher rates of guilty verdicts indicate that judge-alone trials are unfair to defendants.

- Regardless, we note that the trends in existing research are not uniform. Some studies report higher conviction rates in judge alone trials,[178] some studies report higher acquittal rates in judge alone trials,[179] and some studies show largely similar rates of convictions in judge alone trials compared to jury trials.[180] From such findings, it is very difficult to make any assumptions about whether judge-alone trials are more likely to convict or acquit a defendant, or about the fairness of judge-alone trials.

3.30. Not every defendant experiences the criminal justice process equally. We are concerned about an absence of research exploring the fairness of judge-alone trials for different categories of defendants, particularly defendants from minority ethnicity backgrounds. For example, we are not aware of any research exploring the experiences of Aboriginal and Torres Strait Islander defendants in judge-alone trials in Australian courts, or the experiences of Māori defendants in judge-alone trials in New Zealand courts.

3.31. In 2017, the Lammy Review found that jury conviction rates were very similar across different ethnic groups,[181] but there were disparities in magistrates' verdicts, with BAME women more likely to be convicted than white women.[182] Further, the Review noted that a 'fundamental source of mistrust in the CJS among BAME communities is the lack of diversity among those who wield power within it,' with judges being significantly less diverse than the wider community.[183] It is reasonable to assume that BAME defendants might have particular concerns about the fairness of judge-alone trials. We are of the firm opinion that this is an area where more research is urgently needed.

Judge Alone Trials as Enhancing Fairness

3.32. While concerns are frequently raised about the potential unfairness of judge-alone trials, limited

[178] Krisenthal (n 50); McDonald (n 108).
[179] Gu (n 25); Krisenthal (n 50). High acquittal rates were also reported in the ACT: see Australian Capital Territory, Legislative Assembly, *Debates*, 17 February 2011, 256 (Corbell).
[180] Krisenthal (n 50); Willis (n 72).
[181] *The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System* (8 September 2017) <https://assets.publishing.service.gov.uk/media/5a82009040f0b62305b91f49/lammy-review-final-report.pdf> 31.
[182] ibid 32.
[183] ibid 37.

consideration is given to the ways in which judge-alone trials might be fairer for defendants. We see several avenues where judge-alone trials may enhance the fairness of the criminal justice process.

3.33. First, defendants have the right to be tried within a reasonable time.[184] To the extent that judge-alone trials may be more efficient than jury trials, and thus contribute to reducing the backlog in the criminal justice system, judge-alone trials may play a role in enhancing this aspect of fairness for defendants.

3.34. Second, in contrast to jury verdicts, judges in judge-alone trials are typically required to provide reasons. Though the ECtHR has not gone so far as to require reasoned verdicts from juries, it considers reasoned verdicts as an important safeguard under Article 6. [185] A written judgment may provide reassurance that the verdict is the result of sound reasoning using the (admissible) evidence, potentially enhancing perceptions of the legitimacy of the trial outcome and the criminal justice system more generally. Further, a judge's reasons for finding a defendant guilty can be subject to scrutiny through appeal, whereas a jury's reasons for finding a defendant guilty remain opaque and subject to speculation. A reasoned verdict may therefore be seen as fairer to defendants than an unreasoned jury verdict.

3.35. Third, comparative experience suggests that defendants typically opt for judge-alone trials in cases where there is a risk that a jury may be prejudiced against him or her, for example, because of pre-trial media publicity or the nature of the charges or evidence against the defendant.[186] While psychological research suggests that judges are no better than juries at disregarding prejudicial information,[187] it nonetheless appears that, in these cases, defendants perceive that they are more likely to receive a fair trial from a judge as compared to a jury.

C. The necessary enabling processes to ensure the most effective implementation of the options, for example the allocations process

3.36. In jurisdictions where a defendant can elect a judge-alone trial, it appears preferrable that this election occurs early in the criminal justice process. Different jurisdictions have adopted different approaches as to when this election should occur.[188]

3.37. As a matter of fairness, it seems reasonable to allow a defendant to change his or her election

[184] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) art 6(1).

[185] *Taxquet v Belgium* Application No 926/05, Judgment, 16 November 2010; Paul Roberts, 'Does Article 6 of the European Convention on Human Rights Require Reasoned Verdicts in Criminal Trials?' (2011) 11 Human Rights Law Review 213.

[186] Gu (n 25) 26.

[187] Rebecca McEwen, John Eldridge and David Caruso, 'Differential or deferential to media? The effect of prejudicial publicity on judge or jury' (2018) 22(2) International Journal of Evidence and Proof 124, 135–140.

[188] Supreme Court Act 1933 (ACT) s. 68B(1)(c); Criminal Procedure Act 1986 (NSW) s. 132A(1); South Australia, Joint Criminal Rules 2022, rr. 94.4(1), 94.1(2); Criminal Code (Can) RSC, 1985, c. C-46, ss. 536(2), 536(2.1); Criminal Procedure Act 2011 (NZ) s. 51.

in response to new developments in the case (e.g. increasing pre-trial publicity which may lead the defendant to reconsider their initial choice of a jury trial, learning that the trial will feature technical or complex evidence that might be better understood by a judge). However, to avoid such an avenue being abused, it may be appropriate to only permit such changes with the leave of the Court and/or to limit the number of times a defendant is able to change his or her election. Limits may also be necessary in order to prevent defendants from 'playing the system' and causing delays, which would have significant negative consequences for complainants and witnesses who also have a stake in justice being done as soon as possible.

3.38. We are unaware of how the above jurisdictions deal with requests to change from a jury to judge-alone trial once the trial has commenced. In England and Wales, s. 46 of the Criminal Justice Act permits a judge to decide mid-trial to discharge a jury and order that the trial continue as a judge-alone trial where jury tampering appears to have taken place. If judge-alone trials were introduced more widely in England and Wales, we believe it would be reasonable for a similar provision to exist, permitting a judge to make an order mid-trial to discharge the jury and continue as a judge alone. We expect that this issue would only arise in exceptional circumstances (e.g. where there is significant prejudicial publicity that occurs after a trial has commenced), and any change to the identity of the factfinder should only occur where the change would be in the interests of justice and continuing without a jury would not be unfair to the defendant.[189] The parties should be permitted to make representations to the prior to any order being made.[190]

D. The implications for appeal routes of the various options

3.39. Depending on the criteria adopted for determining whether a judge-alone trial should be held, it may be sensible to make the decision to order or not order a judge-alone trial capable of appeal.

3.40. The verdict of a judge-alone trial should be capable of appeal on the same basis as verdicts from jury trials.

3.41. To the extent that judge-alone trials are more efficient than jury trials, any efficiency gains may be lessened if judge alone trials are appealed at significantly higher rates than jury trials. It is likely that, at least initially, there will be higher rates of appeals in judge-alone trials due to the novelty of the innovation and the need to test and develop case law on this form of trial. However, over time, we would expect the situation would stabilise and, similarly to NSW, for there to be largely similar rates of appeal for judge-alone verdicts and jury verdicts.

E. Necessary changes to thresholds and mode of trial within relevant offence types

[189] That is, similar to the criteria in ss. 46(3), 46(4) of the Criminal Justice Act 2003.
[190] See similarly s. 46(2) of the Criminal Justice Act 2003.

Offences Eligible for Judge-Alone Trials

3.42. Different jurisdictions take different approaches to determining which offences are eligible for trial by judge alone (see Table 3).

Table 33. Indictable Offences Eligible for Judge-Alone Trial by Jurisdiction

	ACT	NSW	SA	Can	NZ	NI	RoI
All indictable offences eligible for judge-alone trial		✓	✓	✓[1]			
All indictable offences EXCEPT certain offences eligible for judge-alone trial	✓[2]				✓[3]		
ONLY certain indictable offences eligible for judge-alone trial						✓[4]	✓[4]

1. While all indictable offences are eligible for judge-alone trial, some offences require the Attorney General's consent to trial by judge alone.
2. Excluded offences include murder, manslaughter, and a range of sexual offences
3. Category 3 offences can be tried by judge alone. Category 4 offences can only be tried by judge alone: (1) where there is a risk of jury tampering, or (2) for offences with a maximum penalty of less than 14 years imprisonment, where they are likely to be 'long and complex'.
4. The offence requires a connection with terrorism.

3.43. In some common law jurisdictions, judge-alone trials are available as an option for all indictable offences. If this approach was adopted in England and Wales, then there would be no need to alter any offence categorisations.

3.44. There may be principled reasons for legislating to make judge-alone trials available for certain offences but not others. Offences which involve consideration of community standards (e.g. offences of dishonesty, reasonableness, etc.) might appropriately be restricted to trial by jury only, ensuring that a diverse range of perspectives are involved in the adjudication of these offences. In NSW, this is achieved by directing prosecutors and judges to consider, as part of their respective interests of justice tests, whether the trial will involve an issue that requires the application of community standards.

3.45. The ACT and New Zealand provide that the most serious offences, such as murder, can only be tried by jury trial. Somewhat similarly, Canada only permits the most serious offences, such as murder, to be tried by judge alone if the Attorney General consents.

3.46. In the ACT, sexual offences are also among the category of offences that are excluded from judge-alone trials. This contrasts with the current debate in England and Wales, where the Law Commission is exploring whether sexual offences should be subject to compulsory trial by judge-alone, in order to address to the issue of jurors drawing on 'rape myths' during their deliberations.[191]

[191] See Law Commission (n 3) 600-616. See further Scottish Courts and Tribunals Service, *Improving the management of sexual offence cases: final report from the Lord Justice Clerk's Review Group* (March 2021) <https://www.scotcourts.gov.uk/media/gmrbrw5p/improving-the-management-of-sexual-offence-cases-march-2021.pdf> 89–108 (the 'Dorrian Review'); *Gillen Review: Report into the law and procedures in*

3.47. In sum, the simplest approach would be to make judge-alone trials available for *all* indictable offences. However, our survey of the above common law jurisdictions reveals that certain principled distinctions can be made for some offences to be tried only by jury (either legislated by statute or achieved through the application of an interests of justice test). If this approach were to be adopted, it would be necessary for any such distinction to be reasoned and defensible in light of criminal justice principles and community interests.

Either Way Offences

3.48. Were judge-alone trials to be introduced in England and Wales for (some or all) indictable offences, this would generate some significant consequential problems regarding either way offences. Many potential problems will depend on the allocation process (i.e. whether judge-alone trials are determined by a defendant's election, a statutory test such as an interests of justice test, or a combination of the two). For this sub-section, we use the language of a defendant 'choosing' a judge-alone trial to include all allocation processes where the defendant has a say in whether a judge-alone trial is ordered.

3.49. Where a defendant is tried in Magistrates' Court (whether for a summary offence or minor either way offence), he or she currently has no choice, and no say, as to whether the trial is by a panel of lay magistrates or by a single District Judge. In principle, if the defendant is charged with an either way offence and given the option of a judge-alone trial at Crown Court, it would appear to be inconsistent to not offer the same option (i.e. trial by District Judge) at Magistrates' Court. Providing this option at Magistrates' Court may lead to efficiency savings in keeping trials at Magistrates' Court rather than Crown Court but would also generate not-insignificant resource implications regarding District Judges.

3.50. Not providing an equivalent option at Magistrate level may generate other complex problems. If a defendant is provided a right to elect a judge-alone trial only at Crown Court, then it is possible that some business which would have otherwise been dealt with at Magistrates' Court would be diverted to Crown Court and therefore exacerbate delays in the system. Currently, a defendant is able to demand a jury trial for an either way offence; assuming that a defendant would have some power to change (or, at least, to request a change to) that decision, a defendant who wished to be tried by judge alone and could not secure that preference through election at Magistrates' Court would have to first exercise his or her right to jury trial and then later request a change to judge-alone trial. If a defendant wants a judge-alone trial, it seems bizarre to forcibly require a Crown Court trial (where the sentencing powers are higher) when the preferred factfinder is also available at Magistrates' Court.

3.51. However, allowing a defendant to choose a judge-alone (i.e. District Judge) trial at Magistrates' Court raises the question as to how many tribunals a defendant should be permitted to choose between. Where a defendant is charged with a low-level either way offence within the

serious sexual offences in Northern Ireland (May 2019) < https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf> ch. 16.

Magistrates' Court's jurisdiction, should he or she be able to choose between magistrate panel, District Judge, Crown Court judge, and jury trial, or only between magistrate panel and District Judge (with no possibility of electing any form of trial at Crown Court)? The former option would maximise choice and defendant autonomy, though perhaps is open to risks of tribunal shopping and inefficiencies. The latter option would maximise efficiency, at the expense of effectively removing a defendant's 'right to trial by jury' for either way offences, to be reconceptualised as a 'right to trial by a lay panel', which would be constituted differently at the two different levels of criminal court (magistrates and juries). The allocation of cases between the two courts would then be determined solely by seriousness of the offence.

3.52. The idiosyncratic nature of the English and Welsh criminal justice system, and how either way offences interact with both tiers of criminal court, makes it difficult – if not impossible – to draw valid comparisons to how the jurisdictions we have examined have addressed this issue. As such, we would merely flag that the identified issues will require certain policy choices and trade-offs.

F. The sequencing of any changes – for example, whether they should be brought in via a phased approach

3.53. If judge-alone trials for indictable offences were to be introduced, it would likely be advisable to pilot it in a small number of court centres prior to national rollout. The rollout of pre-recorded cross-examination under s. 28 of the YJCEA 1999 may be a model for how this can be achieved, with respect to the rollout being phased across geographical areas (but not in terms of the timescale of any rollout).

3.54. During the Covid-19 pandemic, the Australian state of Victoria legislated to permit judge-alone trials where it was not possible to hold jury trials, and to help address the post-pandemic court backlog.[192] It appears that there were few applications for judge-alone trials during this period,[193] and these emergency provisions were subsequently repealed, with Victoria reverting to its pre-existing trial by jury model. The Victorian experience appears to suggest that judge-alone trials can be introduced and, if necessary, removed without causing significant disruption to the wider criminal justice system.

3.55. The Scottish experience provides some pause for thought. When judge-alone trials were proposed to be piloted for sex offence trials, the entire criminal Bar objected and threatened pre-emptive boycotts.[194] This was partly due to the suggestion that this reform was being

[192] COVID-19 Omnibus (Emergency Measures) Act 2020 (Vic) s. 32; Justice Legislation Amendment (Trial by Judge Alone and Other Matters) Act 2022 (Vic).

[193] Victoria Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (September 2021) <https://www.lawreform.vic.gov.au/wp-content/uploads/2023/08/VLRC_Improving_Justice_System_Response_to_Sex_Offences_Report_web.pdf> [20.10].

[194] 'Defence lawyers to boycott juryless trials pilot', *Scottish Legal News*, 23 January 2024 <https://www.scottishlegal.com/articles/defence-lawyers-to-boycott-juryless-trials-pilot>.

undertaken for the explicit purpose of increasing conviction rates in sexual offence cases. Practitioner objection was so strong that it (along with other political factors) led to the pilot's abandonment.

3.56. The importance of getting practitioners 'on side' is therefore not to be underestimated. Practitioners need to be consulted, and their concerns seriously engaged with and addressed.

3.57. One potential way of encouraging practitioner buy-in would be to adopt an element of the procedure used in many of jurisdictions detailed above, whereby judge-alone trials are only permissible if the defendant elects them (see discussion above at [3.13]–[3.21]). Some previous reviews in England and Wales have rejected the idea that defence consent should be required for the removal of a jury on the basis that mode of trial is a policy choice, and defendants should not be able to shop for the most sympathetic factfinder.[195] Others agreed that the defendant should have a say, but that the ultimate decision should be for the judge.[196] This may be a situation where certain principles have to give way to politics and pragmatism; having judge-alone trials available only where the defendant consents may go some way to minimise practitioner resistance. It would also enhance defendant autonomy in the criminal justice process, a value which is often underappreciated.[197]

3.58. If judge-alone trials were introduced, it would be desirable to provide training for judges and lawyers to support them to engage effectively with these new modes of trial (and, potentially, dispel any misconceptions about judge-alone trials). It is highly likely that such training materials already exist in comparator jurisdictions; for example, we believe that the training provided to New South Wales judges contains information on judge-alone trials. Rather than designing such materials from scratch, it would be advisable to draw on resources from other jurisdictions in developing training for professionals in England and Wales.

Other Matters Relevant to Efficiency

3.59. While we once again caution against decision-making that prioritises efficiency at the expense of fairness and legitimacy, it is perhaps worth noting that judge-alone trials are also likely to be cheaper to run than jury trials.

3.60. While we are not aware of any in-depth evaluation of the economic impact of judge-alone trials compared to jury trials, Hanlon notes that the most common estimate is that jury trials are at least twice as expensive as judge-alone trials.[198] Judge-alone trials would eliminate many of the direct costs associated with jury trials, including daily fees paid to jurors, sustenance and accommodation for the jury, and the salaries of court offices involved in jury management and supervision. There are likely to be further indirect and/or consequential savings.

[195] Roskill Committee (n 1) [8.54]; Royal Commission on Criminal Justice (n 4) [6-18].
[196] Auld (n 2) [5-16]; Leveson (n 5) [342].
[197] See discussion in Section 3.B above.
[198] Hanlon (n 23) 150.

4. Conclusion

4.1. Changing the factfinder in criminal procedure acts as a bombshell, the shockwave of which impacts the entire criminal justice process. Nowehere is this more obvious than in Jackson and Doran's research on Diplock Trials.

4.2. It must be remembered, however, that the choice of factfinder is not only about truth-finding and efficiency. There are significant symbolic and (public) educational values too.[199] Juries have immeasurable value in providing the criminal justice system with legitimacy. Though difficult to quantify and capture in public surveys, any change to the factfinder in a criminal trial must be done in a way to ensure that the criminal justice system does not lose legitimacy and public support. We suggest above two primary measures which could limit any real or perceived loss in legitimacy by introducing judges as factfinders: requiring the consent of the defendant, and written, reasoned verdicts.

4.3. We believe that it is time for England and Wales to give serious consideration to the prospect of introducing judge-alone trials for indictable offences. However, it is important that any such discussion about the merits and feasibility of judge-alone trials is properly informed. At present, there are significant research gaps which hamper our ability to say with confidence that judge-alone trials are a sufficiently fair and legitimate mode of criminal adjudication, or, indeed, that they would definitely generate efficiency gains in the system. While the experience of common law comparator jurisdictions which readily and routinely utilise these trials indicates that juryless trials do have a place in modern, adversarial criminal justice systems, the English and Welsh cultural and institutional context has proved highly resilient to judge-alone trials. If judge-alone trials are going to be introduced here, they should be introduced because they will enhance the quality of justice, and not (only) because they are likely to generate efficiency gains.

[199] Jackson and Doran (n 120) 77–79.

Appendix B. Key Legislation – Extracts

B1. Australia – Generally

Australian Constitution

80 Trial by jury

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

B2. Australian Capital Territory

Supreme Court Act 1933

68A Trial by jury in criminal proceedings

Criminal proceedings shall be tried by a jury, except as otherwise provided by this part.

68B Trial by judge alone in certain criminal proceedings

(1) A criminal proceeding against an accused person for an offence other than an excluded offence must be tried by a judge alone if—

(a) the person elects in writing to be tried by a judge alone; and

(b) the person produces a certificate signed by a legal practitioner stating that—

(i) the legal practitioner has advised the person in relation to the election; and

(ii) the person has made the election freely; and

(c) the election and certificate are filed in the court before—

(i) the person, or the person's legal representative, knows the identity of the judge for the person's trial; and

(ii) any time limit prescribed under the rules; and

(d) if there is more than 1 accused person in the proceeding—

(i) each other accused person also elects to be tried by a judge alone; and

(ii) each other accused person's election is made in relation to all offences for which that person is to be tried in the proceeding; and

(iii) none of the offences for which any other accused person is to be tried is an excluded offence.

(2) An accused person who elects to be tried by a judge alone may, at any time before the person is arraigned, elect to be tried by a jury.

(3) If an accused person makes and then withdraws an election, the person may not make another election.

(4) In this section:

excluded offence means an offence against a provision mentioned in an item in schedule 2 (Trial by judge alone—excluded offences), part 2.2, column 3 of an Act mentioned in the item, column 2.

68C Verdict of judge in criminal proceedings

(1) A judge who tries criminal proceedings without a jury may make any finding that could have been made by a jury as to the guilt of the accused person and any such finding has, for all purposes, the same effect as a verdict of a jury.

(2) The judgment in criminal proceedings tried by a judge alone must include the principles of law applied by the judge and the findings of fact on which the judge relied.

(3) In criminal proceedings tried by a judge alone, if a territory law requires a warning or direction to be given, or a comment to be made, to a jury in the proceedings, the judge must take the warning, direction or comment into account in considering his or her verdict.

B3. New South Wales

Criminal Procedure Act 1986 (NSW)

131 Trial by jury in criminal proceedings

Criminal proceedings in the Supreme Court or the District Court are to be tried by a jury, except as otherwise provided by this Part.

132 Orders for trial by Judge alone

(1) An accused person or the prosecutor in criminal proceedings in the Supreme Court or District Court may apply to the court for an order that the accused person be tried by a Judge alone (a ***trial by judge order***).

(2) The court must make a trial by judge order if both the accused person and the prosecutor agree to the accused person being tried by a Judge alone.

(3) If the accused person does not agree to being tried by a Judge alone, the court must not make a trial by judge order.

(4) If the prosecutor does not agree to the accused person being tried by a Judge alone, the court may make a trial by judge order if it considers it is in the interests of justice to do so.

(5) Without limiting subsection (4), the court may refuse to make an order if it considers that the trial will involve a factual issue that requires the application of objective community standards, including (but not limited to) an issue of reasonableness, negligence, indecency, obscenity or dangerousness.

(6) The court must not make a trial by judge order unless it is satisfied that the accused person has sought and received advice in relation to the effect of such an order from an Australian legal practitioner.

(7) The court may make a trial by judge order despite any other provision of this section or section 132A if the court is of the opinion that—

(a) there is a substantial risk that acts that may constitute an offence under Division 3 of Part 7 of the *Crimes Act 1900* are likely to be committed in respect of any jury or juror, and

(b) the risk of those acts occurring may not reasonably be mitigated by other means.

132A Applications for trial by judge alone in criminal proceedings

(1) An application for an order under section 132 that an accused person be tried by a Judge alone must be made not less than 28 days before the date fixed for the trial in the Supreme Court or District Court, except with the leave of the court.

(2) An application must not be made in a joint trial unless—

(a) all other accused person apply to be tried by a Judge alone, and

(b) each application is made in respect of all offences with which the accused persons in the trial are charged that are being proceeded with in the trial.

(3) An accused person or a prosecutor who applies for an order under section 132 may, at any time before the date fixed for the accused person's trial, subsequently apply for a trial by a jury.

(4) Rules of court may be made with respect to applications under section 132 or this section.

133 Verdict of single Judge

(1) A Judge who tries criminal proceedings without a jury may make any finding that could have been made by a jury on the question of the guilt of the accused person. Any such finding has, for all purposes, the same effect as a verdict of a jury.

(2) A judgment by a Judge in any such case must include the principles of law applied by the Judge and the findings of fact on which the Judge relied.

(3) If any Act or law requires a warning to be given to a jury in any such case, the Judge is to take the warning into account in dealing with the matter.

B4. South Australia

Juries Act 1927 (SA)

7—Trial without jury

(1) Subject to this section, where, in a criminal trial before the Supreme Court or the District Court—

(a) the accused elects, in accordance with the rules of court, to be tried by the judge alone; and

(b) the presiding judge is satisfied that the accused, before making the election, sought and received advice in relation to the election from a legal practitioner, the trial will proceed without a jury.

(2) No election may be made under subsection (1) where the accused is charged with a minor indictable offence and has elected to be tried in the District Court.

(3) Where two or more persons are jointly charged, no election may be made under subsection (1) unless all of those persons concur in the election.

(3a) Where an information is presented to the District Court or the Supreme Court under section 103 of the *Criminal Procedure Act 1921* and the information includes a charge of a serious and organised crime offence (within the meaning of the *Criminal Law Consolidation Act 1935*), the Director of Public Prosecutions may apply to the court for an order that the accused be tried by judge alone.

(3b) The court may make an order on an application under subsection (3a) if it considers it is in the interests of justice to do so (and may do so at any time before commencement of the trial of the matter, regardless of whether a jury has been constituted in accordance with this Act to try the issues on the trial).

(3c) Without limiting subsection (3b), the court may make an order on an application under subsection (3a) if it considers that there is a real possibility that acts that may constitute an offence under section 245 or 248 of the *Criminal Law Consolidation Act 1935* would be committed in relation to a member of a jury.

(3d) An order of a court on an application under subsection (3a) may be appealed against in the same manner as a decision on an issue antecedent to trial.

(4) If a criminal trial proceeds without a jury under this section, the judge may make any decision that could have been made by a jury and such a decision will, for all purposes, have the same effect as a verdict of a jury.

B5. Canada

Canadian Charter of Rights and Freedoms

Proceedings in criminal and penal matters

11 Any person charged with an offence has the right

[…]

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment; […]

Criminal Code

Court of criminal jurisdiction

469 Every court of criminal jurisdiction has jurisdiction to try an indictable offence other than

(a) an offence under any of the following sections:

(i) section 47 (treason),

(iii) section 51 (intimidating Parliament or a legislature),

(iv) section 53 (inciting to mutiny),

(v) section 61 (seditious offences),

(vi) section 74 (piracy),

(vii) section 75 (piratical acts), or

(viii) section 235 (murder);

Accessories

(b) the offence of being an accessory after the fact to high treason or treason or murder;

(c) an offence under section 119 (bribery) by the holder of a judicial office;

Crimes against humanity

(c.1) an offence under any of sections 4 to 7 of the Crimes Against Humanity and War Crimes Act;

Attempts

(d) the offence of attempting to commit any offence mentioned in subparagraphs (a)(i) to (vii); or

Conspiracy

(e) the offence of conspiring to commit any offence mentioned in paragraph (a).

Trial by jury compulsory

471 Except where otherwise expressly provided by law, every accused who is charged with an indictable offence shall be tried by a court composed of a judge and jury.

Trial without jury

473 (1) Notwithstanding anything in this Act, an accused charged with an offence listed in section 469 may, with the consent of the accused and the Attorney General, be tried without a jury by a judge of a superior court of criminal jurisdiction.

Joinder of other offences

(1.1) Where the consent of the accused and the Attorney General is given in accordance with subsection (1), the judge of the superior court of criminal jurisdiction may order that any offence be tried by that judge in conjunction with the offence listed in section 469.

Withdrawal of consent

(2) Notwithstanding anything in this Act, where the consent of an accused and the Attorney General is given in accordance with subsection (1), that consent shall not be withdrawn unless both the accused and the Attorney General agree to the withdrawal.

Remand by justice to provincial court judge in certain cases

536 (1) Where an accused is before a justice other than a provincial court judge charged with an offence over which a provincial court judge has absolute jurisdiction under section 553, the justice shall remand the accused to appear before a provincial court judge having jurisdiction in the territorial division in which the offence is alleged to have been committed.

Election before justice — 14 years or more of imprisonment

(2) If an accused is before a justice, charged with an indictable offence that is punishable by 14 years or more of imprisonment, other than an offence listed in section 469, the justice shall, after the information has been read to the accused, put the accused to an election in the following words:

> You have the option to elect to be tried by a provincial court judge without a jury and without having had a preliminary inquiry; or you may elect to be tried by a judge without a jury; or you may elect to be tried by a court composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. If you elect to be tried by a judge without a jury or by a court composed of a judge and jury or if you are deemed to have elected to be tried by a court composed of a judge and jury, you will have a preliminary inquiry only if you or the prosecutor requests one. How do you elect to be tried?

Election before justice — other indictable offences

(2.1) If an accused is before a justice, charged with an indictable offence — other than an offence that is punishable by 14 years or more of imprisonment, an offence listed in section 469 that is not punishable by 14 years or more of imprisonment or an offence over which a provincial court judge has absolute jurisdiction under section 553 —, the justice shall, after the information has been read to the accused, put the accused to an election in the following words:

> You have the option to elect to be tried by a provincial court judge without a jury; or you may elect to be tried by a judge without a jury; or you may elect to be tried by a court composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. How do you elect to be tried?

Trial by judge without a jury

558 If an accused who is charged with an indictable offence, other than an offence mentioned in section 469, elects under section 536 or 536.1 or re-elects under section 561 or 561.1 to be tried by a judge without a jury, the accused shall, subject to this Part, be tried by a judge without a jury.

Election

Duty of judge

560 (1) If an accused elects, under section 536 or 536.1, to be tried by a judge without a jury, a judge having jurisdiction shall

(a) on receiving a written notice from the sheriff or other person having custody of the accused stating that the accused is in custody and setting out the nature of the charge against him, or

(b) on being notified by the clerk of the court that the accused is not in custody and of the nature of the charge against him,

fix a time and place for the trial of the accused.

Right to re-elect

561 (1) An accused who elects or is deemed to have elected a mode of trial other than trial by a provincial court judge may re-elect,

(a) if the accused is charged with an offence for which a preliminary inquiry has been requested under subsection 536(4),

(i) at any time before or after the completion of the preliminary inquiry, with the written consent of the prosecutor, to be tried by a provincial court judge,

(ii) at any time before the completion of the preliminary inquiry or before the 60th day following the completion of the preliminary inquiry, as of right, another mode of trial other than trial by a provincial court judge, and

(iii) on or after the 60th day following the completion of the preliminary inquiry, any mode of trial with the written consent of the prosecutor; or

(b) if the accused is charged with an offence for which they are not entitled to request a preliminary inquiry or if they did not request a preliminary inquiry under subsection 536(4),

(i) as of right, not later than 60 days before the day first appointed for the trial, another mode of trial other than trial by a provincial court judge, or

(ii) any mode of trial with the written consent of the prosecutor.

[…]

Notice of re-election under paragraph (1)(a)

(3) If an accused intends to re-elect under paragraph (1)(a) before the completion of the preliminary inquiry, they shall give notice in writing of their intention to re-elect, together with the written consent of the prosecutor, if that consent is required, to the justice presiding at the preliminary inquiry who shall on receipt of the notice,

(a) in the case of a re-election under subparagraph (1)(a)(ii), put the accused to their re-election in the manner set out in subsection (7); or

(b) if the accused intends to re-elect under subparagraph (1)(a)(i) and the justice is not a provincial court judge, notify a provincial court judge or clerk of the court of the accused's intention to re-elect and send to the provincial court judge or clerk any information, appearance notice, undertaking or release order given by or issued to

the accused and any evidence taken before a coroner that is in the possession of the justice.

Notice of re-election under paragraph (1)(b) or subsection (2)

(4) If an accused intends to re-elect under paragraph (1)(b) or subsection (2), they shall give notice in writing that they intend to re-elect together with the written consent of the prosecutor, if that consent is required, to the provincial court judge before whom the accused appeared and pleaded or to a clerk of the court.

B6. New Zealand

New Zealand Bill of Rights Act 1990 (NZ)

24 Rights of persons charged

Everyone who is charged with an offence—

[…]

(e) shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for 2 years or more; […]

Criminal Procedure Act 2011 (NZ)

4 Overview

(1) This Act provides for the following matters:

(a) for procedural purposes, there are 4 categories of offence (see section 6):

(b) there are 2 types of trial process—Judge-alone trials and jury trials (see Part 4):

Commencement of proceedings

(c) all proceedings begin in the District Court by the filing of a charging document (see Part 2):

Category 1 offences

(d) in general terms, a category 1 offence is an offence that is not punishable by imprisonment:

(e) an infringement offence is a category 1 offence if proceedings in relation to that infringement offence are commenced by filing a charging document under section 14, rather than by issuing an infringement notice:

(f) all stages of a proceeding for a category 1 offence are dealt with by the District Court:

(g) if the matter proceeds to trial, the trial will be a Judge-alone trial:

Category 2 offences

(h) in general terms, a category 2 offence is an offence punishable by a term of imprisonment of less than 2 years:

(i) a trial for a category 2 offence will be in the District Court unless an order is made transferring the proceeding to the High Court for trial (see sections 68, 68A, and 70):

(j) if the matter proceeds to trial, the trial will be a Judge-alone trial:

Category 3 offences

(k) in general terms, a category 3 offence is an offence punishable by a term of imprisonment of 2 years or more (other than a category 4 offence):

(l) a defendant charged with a category 3 offence has a choice about whether or not to elect a trial by jury (see section 50):

(m) a trial for a category 3 offence will be in the District Court unless an order is made transferring the proceeding to the High Court for trial (see sections 68, 68A, and 70):

(n) the procedure for a category 3 offence generally depends on whether the defendant elects trial by jury:

(o) if the defendant does not elect trial by jury, and the matter proceeds to trial, the trial will be a Judge-alone trial:

(p) if the defendant elects trial by jury, and the matter proceeds to trial, the trial will be a jury trial (unless a Judge-alone trial is ordered under section 102 or 103):

Category 4 offences

(q) category 4 offences are listed in Schedule 1:

(r) if the matter proceeds to trial, the trial will be a jury trial in the High Court (unless a Judge-alone trial is ordered under section 102 or 103):

6 Categories of offence defined

(1) In this Act,—

category 1 offence means—

(a) an offence that is not punishable by a term of imprisonment, other than—

(i) an infringement offence; or

(ii) an offence described in paragraph (b) of the definition of a category 2 offence; or

(iii) an offence described in paragraph (b) of the definition of a category 3 offence; or

(b) an infringement offence, if proceedings in relation to that offence are commenced by filing a charging document under section 14, not by the issuing of an infringement notice

category 2 offence means—

(a) an offence punishable by a term of imprisonment of less than 2 years; or

(b) an offence that, if committed by a body corporate, is punishable by only a fine, but that would be punishable by a term of imprisonment of less than 2 years if committed by an individual

(c) [Repealed]

category 3 offence means an offence, other than an offence listed in Schedule 1,—

(a) that is punishable by imprisonment for life or by imprisonment for 2 years or more; or

(b) that, if committed by a body corporate, is punishable by only a fine, but that would be punishable by imprisonment for life or by imprisonment for 2 years or more if committed by an individual

category 4 offence means an offence listed in Schedule 1.

(2) If an offence is in a given category, then the following is also an offence in that category:

(a) conspiring to commit that offence:

(b) attempting to commit that offence, or inciting or procuring or attempting to procure any person to commit an offence of that kind that is not committed:

(c) being an accessory after the fact to that offence.

(3) If an offence is punishable by a greater penalty where the defendant has previously been convicted of that offence or of some other offence, the offence is an offence in the category that applies to offences punishable by that greater penalty only if the charge alleges that the defendant has such a previous conviction.

50 Defendant charged with category 3 offence may elect trial by jury

A defendant who is charged with a category 3 offence, and who pleads not guilty to that offence, may elect to be tried by a jury.

51 Timing of election

(1) An election under section 50 must be made at the time of entering a not guilty plea, unless the defendant obtains the leave of the court under subsection (2).

(2) The court may grant leave to make an election at a later time, but only if the court is satisfied that there has been a change in circumstances that might reasonably affect the defendant's decision whether to elect a trial by jury.

(3) The court must not grant leave under subsection (2) after a Judge-alone trial has commenced.

52 Judicial officer or Registrar may receive elections

A judicial officer or Registrar may receive an election under section 50 to be tried by a jury.

53 Withdrawal of election

(1) A defendant may not withdraw his or her election to be tried by a jury unless the defendant obtains the leave of the court under subsection (2).

(2) A court may grant leave to a defendant to withdraw the defendant's election to be tried by a jury, but only if—

(a) the court is satisfied that there has been a change in circumstances that might reasonably affect the defendant's decision to elect a trial by jury; or

(b) the court is satisfied that the withdrawal of the defendant's election is unlikely to cause a delay in the defendant's trial being concluded; or

(c) in the case of a defendant who is to be tried by a jury under section 139(2)(a), the defendant's co-defendant is, or co-defendants are, no longer to be tried by a jury.

(3) The court must not grant leave under subsection (2) after the jury trial has commenced.

71 Category 1 offences

(1) This section applies to a proceeding for a category 1 offence.

(2) The applicable procedure for trial is the Judge-alone trial procedure.

(3) The trial court is the District Court at the place where the proceeding is being dealt with in accordance with section 35.

(4) This section is subject to—

(a) any order made under section 72 of the District Court Act 2016 or section 157 of this Act; and

(b) section 139.

72 Category 2 offences

(1) This section applies to a proceeding for a category 2 offence.

(2) The applicable procedure for trial is the Judge-alone trial procedure.

(3) The level of trial court is the District Court unless an order is made under section 68 or 70 that the proceeding be tried in the High Court.

(4) The place of trial is, —

(a) if the trial court is the High Court, the High Court at the place nearest to the court that is dealing with the proceeding under subpart 3 of this Part:

(b) if the trial court is the District Court, the court that is dealing with the proceeding under subpart 3 of this Part.

(5) This section is subject to—

(a) any order made under section 72 of the District Court Act 2016 or section 157 of this Act; and

(b) section 139.

73 Category 3 offences

(1) This section applies to a proceeding for a category 3 offence.

(2) The applicable procedure for trial is—

(a) the Judge-alone trial procedure if—

(i) the defendant does not elect trial by jury under section 50 (or withdraws his or her election under section 53); or

(ii) an order is made under section 102 or 103; or

(b) the jury trial procedure in any other case.

(3) The level of trial court is the District Court unless an order is made under section 68 or 70 that the proceeding be tried in the High Court.

(4) The place of trial is,—

(a) if the trial court is the High Court, the High Court at the place nearest to the court that is dealing with the proceeding under subpart 3 of this Part:

(b) if the trial court is the District Court,—

(i) the court that is dealing with the proceeding under subpart 3 of this Part; or

(ii) if the trial procedure is jury trial, and the court that is dealing with the proceeding under subpart 3 of this Part does not have jury trial jurisdiction, the District Court with jury trial jurisdiction that is nearest to that court.

(5) In this section, jury trial jurisdiction, when used in relation to the District Court, means the District Court at the place where the court has jurisdiction in accordance with section 354(2) and (3) to conduct jury trials.

(6) This section is subject to—

(a) any order made under section 72 of the District Court Act 2016 or section 157 of this Act; and

(b) section 139; and

(c) any regulations made under section 387 that prescribe a different or an alternative place of trial.

74 Category 4 offences

(1) This section applies to a proceeding for a category 4 offence.

(2) The applicable procedure for trial is—

(a) the jury trial procedure; or

(b) the Judge-alone trial procedure if an order is made under section 102 or 103.

(3) The level of trial court is the High Court.

(4) The trial court is the High Court at the place that is nearest to the District Court at the place where the court is dealing with the proceeding immediately before it is transferred under section 36.

(5) This section is subject to—

(a) any order made under section 157; and

(b) section 139; and

(c) any regulations made under section 387 that prescribe a different or an alternative place of trial.

102 Judge may order Judge-alone trial in cases likely to be long and complex

(1) This section applies if the defendant is charged with an offence that is not—

(a) an offence for which the maximum penalty is imprisonment for life or imprisonment for 14 years or more; or

(b) an offence of attempting or conspiring to commit, or of being a party to the commission of, or of being an accessory after the fact to, an offence referred to in paragraph (a).

(2) The court may, on the application of the prosecutor, or of its own motion, order that the defendant be tried for the offence before a Judge without a jury.

(3) An application by the prosecutor under subsection (2) must be made before the trial within the time prescribed by rules of court.

(4) The court must not make an order under subsection (2) unless the prosecutor and the defendant have been given an opportunity to be heard in relation to the application and, following such hearing, the court is satisfied—

(a) that all reasonable procedural orders (if any), and all other reasonable arrangements (if any), to facilitate the shortening of the trial have been made, but the duration of the trial still seems likely to exceed 20 sitting days; and

(b) that, in the circumstances of the case, the defendant's right to trial by jury is outweighed by the likelihood that potential jurors will not be able to perform their duties effectively.

(5) For the purposes of subsection (4)(b) the court must consider the following matters:

(a) the number and nature of the offences with which the defendant is charged:

(b) the nature of the issues likely to be involved:

(c) the volume of evidence likely to be presented:

(d) the imposition on potential jurors of sitting for the likely duration of the trial:

(e) any other matters the court considers relevant.

(6) If the defendant is one of 2 or more co-defendants to be tried together, all of them must be tried before a Judge with a jury unless an order under subsection (2) for all of them to be tried by a Judge without a jury is applied for and made.

(7) This section does not limit section 103.

103 Judge may order Judge-alone trial in cases involving intimidation of juror or jurors

(1) The court may, on the application of the prosecutor, order that the defendant be tried before a Judge without a jury.

(2) An application under subsection (1) must be made before the trial and within the time prescribed by rules of court.

(3) The court must not make an order under subsection (1) unless the court is satisfied that there are reasonable grounds to believe—

(a) that intimidation of any person or persons who may be selected as a juror or jurors has occurred, is occurring, or may occur; and

(b) that the effects of that intimidation can be avoided effectively only by making an order under subsection (1).

(4) If the defendant is one of 2 or more co-defendants to be tried together, all of them must be tried before a Judge with a jury unless an order under subsection (1) for all of them to be tried by a Judge without a jury is applied for and made.

(5) This section does not limit section 102.

104 Procedure for trial ordered under section 102 or 103

If an order is made under section 102 or 103 that 1 or more defendants be tried before a Judge without a jury,—

(a) the provisions of this subpart apply before the trial, with any necessary modifications; and

(b) subpart 1 of Part 4 applies to the conduct of the trial.

105 Conduct of Judge-alone trial

(1) Unless the court directs otherwise, neither the prosecutor nor the defendant may make an opening statement other than,—

(a) in the case of the prosecutor, a short outline of the charge or charges the defendant faces; and

(b) in the case of the defendant, a short outline of the issue or issues at the trial.

(2) Unless the court directs otherwise, the prosecutor and the defendant must call evidence in the following sequence:

(a) the prosecutor may adduce the evidence in support of the prosecution case:

(b) the defendant may adduce any evidence that he or she wishes to present:

(c) subject to section 98 of the Evidence Act 2006, the prosecutor may adduce evidence in rebuttal of evidence given by or on behalf of the defendant.

(3) Without limiting subsection (2), the court may give the defendant leave to call 1 or more witnesses (for example, an expert witness) immediately after the prosecutor has called a particular witness or witnesses.

(4) Unless the court directs otherwise, neither party may—

(a) make submissions on the facts; or

(b) address the court on the evidence given by either party.

(5) Despite subsection (4), the defendant, whether or not he or she intends to call evidence, may address the court at the end of the prosecutor's case to submit that the charge should be dismissed.

106 Decision of court

(1) The court, having heard what each party has to say and the evidence adduced by each, must consider the matter and may find the defendant guilty or not guilty.

(2) The court must give reasons for its decision under subsection (1).

(3) The court may, if it thinks fit, reserve its decision under subsection (1).

(4) If the court reserves its decision, the court must—

(a) give it at any adjourned or subsequent sitting of the court; or

(b) record the decision, authenticate it, and send it to the Registrar.

(5) If a decision is sent to the Registrar under subsection (4), the Registrar must deliver it at a time and place appointed by the Registrar.

(6) A reserved decision delivered by the Registrar has the same force and effect as if given by the court on that date.

(7) The reasons for the court's decision may accompany the court's decision, or be given later.

B7. Northern Ireland

Northern Ireland (Emergency Provisions) Act 1973

2 Mode of trial on indictment of scheduled offences

(1) A trial on indictment of a scheduled offence shall be conducted by the court without a jury.

(2) The court trying a scheduled offence on indictment under this section shall have all the powers, authorities and jurisdiction which the court would have had if they had been sitting with a jury, including power to determine any question and to make any finding which would, apart from this section, be required to be determined or made by a jury, and references in any enactment to a jury or the verdict or finding of a jury shall be construed accordingly in relation to a trial under this section.

(3) Where an indictment contains a count alleging a scheduled offence and another count alleging an offence which at the time the indictment is presented is not a scheduled offence, the other count shall be disregarded.

(4) Without prejudice to subsection (2) above, where the court trying a scheduled offence on indictment are not satisfied that the accused is guilty of that offence, but are satisfied that he is guilty of some other offence which is not a scheduled offence, but of which a jury could have found him guilty on a trial for the scheduled offence, the court may convict him of that other offence.

(5) Where the court trying a scheduled offence convict the accused of that or some other offence, then, without prejudice to their power apart from this subsection to give a judgment, they shall, at the time of conviction or as soon as practicable thereafter, give a judgement stating the reasons for the conviction.

(6) A person convicted of any offence on a trial under this section without a jury may, notwithstanding anything in section 8 of the [1968 c. 21.] Criminal Appeal (Northern Ireland) Act 1968, appeal to the Court of Criminal Appeal under that section—

(a) against his conviction, on any ground, without the leave of the Court of Criminal Appeal or a certificate of the judge of the court of trial; and

(b) against sentence passed on conviction, without such leave, unless the sentence is one fixed by law.

(7) Where a person is so convicted, the time for giving notice of appeal under section 20(1) of the said Act of 1968 shall run from the date of judgement, if later than the date from which it would run under that subsection.

Northern Ireland (Emergency Provisions) Act 1978

6 Court for trial on indictment of scheduled offences

(1) A trial on indictment of a scheduled offence shall be held only at the Belfast City Commission.

(2) A magistrates' court which commits a person for trial on indictment for a scheduled offence or two or more offences which are or include scheduled offences shall commit him for trial to the Belfast City Commission and section 47 of the [1964 c. 21 (N.I.).] Magistrates' Courts Act (Northern Ireland) 1964 (committal to assize or county court) shall have effect accordingly.

(3) A county court judge may at any time, at the request of the Lord Chief Justice of Northern Ireland, sit and act as a judge at the Belfast City Commission for the trial on indictment of a scheduled offence, or for two or more such trials, and while so sitting and acting shall

have all the jurisdiction, powers and privileges of a High Court judge included in the Commission, so far as concerns any such trial.

(4) A county court judge requested to sit and act as aforesaid for a period of time may, notwithstanding the expiry of that period, attend at the Belfast City Commission for the purpose of continuing to deal with, giving judgment in or dealing with any ancillary matter relating to, any case which may have begun before him when sitting as a judge at the Commission and shall have the same jurisdiction, powers and privileges as under subsection (3) above.

7 Mode of trial on indictment of scheduled offences

(1) A trial on indictment of a scheduled offence shall be conducted by the court without a jury.

(2) The court trying a scheduled offence on indictment under this section shall have all the powers, authorities and jurisdiction which the court would have had if it had been sitting with a jury, including power to determine any question and to make any finding which would, apart from this section, be required to be determined or made by a jury, and references in any enactment to a jury or the verdict or finding of a jury shall be construed accordingly in relation to a trial under this section.

(3) Where separate counts of an indictment allege a scheduled offence and an offence which is not a scheduled offence, the trial on indictment shall, without prejudice to section 5 of the [1945 c. 16 (N.I.).] Indictments Act (Northern Ireland) 1945 (orders for amendment of indictment, separate trial and postponement of trial), be conducted as if all the offences alleged in the indictment were scheduled offences.

(4) Without prejudice to subsection (2) above, where the court trying a scheduled offence on indictment—

(a) is not satisfied that the accused is guilty of that offence, but

(b) is satisfied that he is guilty of some other offence which is not a scheduled offence, but of which a jury could have found him guilty on a trial for the scheduled offence,

the court may convict him of that other offence.

(5) Where the court trying a scheduled offence convicts the accused of that or some other offence, then, without prejudice to its power apart from this subsection to give a judgment, it shall, at the time of conviction or as soon as practicable thereafter, give a judgment stating the reasons for the conviction.

(6) A person convicted of any offence on a trial under this section without a jury may, notwithstanding anything in section 8 of the [1968 c. 21.] Criminal Appeal (Northern Ireland) Act 1968, appeal to the Court of Criminal Appeal under that section—

(a) against his conviction, on any ground, without the leave of the Court of Criminal Appeal or a certificate of the judge of the court of trial; and

(b) against sentence passed on conviction, without that leave, unless the sentence is one fixed by law.

(7) Where a person is so convicted, the time for giving notice of appeal under subsection (1) of section 20 of that Act of 1968 shall run from the date of judgment, if later than the date from which it would run under that subsection.

Northern Ireland (Emergency Provisions) Act 1991

9 Court for trial of scheduled offences

(1) A trial on indictment of a scheduled offence shall be held only at the Crown Court sitting in Belfast, unless the Lord Chancellor after consultation with the Lord Chief Justice of Northern Ireland directs in any particular case that such a trial shall be held at the Crown Court sitting elsewhere.

(2) A person committed for trial for a scheduled offence, or for two or more offences at least one of which is a scheduled offence, shall be committed—

(a) to the Crown Court sitting in Belfast, or

(b) where the Lord Chancellor has given a direction under subsection (1) above with respect to the trial, to the Crown Court sitting at the place specified in the direction;

and section 48 of the [1978 c. 23.] Judicature (Northern Ireland) Act 1978 (committal for trial on indictment) shall have effect accordingly.

(3) Where—

(a) in accordance with subsection (2) above any person is committed for trial to the Crown Court sitting in Belfast, and

(b) a direction is subsequently given by the Lord Chancellor under subsection (1) above altering the place of trial,

that person shall be treated as having been committed for trial to the Crown Court sitting at the place specified in the direction.

10 Mode of trial on indictment of scheduled offences

(1) A trial on indictment of a scheduled offence shall be conducted by the court without a jury.

(2) The court trying a scheduled offence on indictment under this section shall have all the powers, authorities and jurisdiction which the court would have had if it had been sitting with a jury, including power to determine any question and to make any finding which would, apart from this section, be required to be determined or made by a jury, and references in any enactment to a jury or the verdict or finding of a jury shall be construed accordingly in relation to a trial under this section.

(3) Where separate counts of an indictment allege a scheduled offence and an offence which is not a scheduled offence, the trial on indictment shall, without prejudice to section 5 of the [1945 c. 16 (N.I.).] Indictments Act (Northern Ireland) 1945 (orders for amendment of indictment, separate trial and postponement of trial), be conducted as if all the offences alleged in the indictment were scheduled offences.

(4) Without prejudice to subsection (2) above, where the court trying a scheduled offence on indictment—

(a) is not satisfied that the accused is guilty of that offence, but

(b) is satisfied that he is guilty of some other offence which is not a scheduled offence, but of which a jury could have found him guilty on a trial for the scheduled offence,

the court may convict him of that other offence.

(5) Where the court trying a scheduled offence convicts the accused of that or some other offence, then, without prejudice to its power apart from this subsection to give a judgment, it shall, at the time of conviction or as soon as practicable thereafter, give a judgment stating the reasons for the conviction.

(6) A person convicted of any offence on a trial under this section without a jury may, notwithstanding anything in sections 1 and 10(1) of the [1980 c. 47.] Criminal Appeal (Northern Ireland) Act 1980, appeal to the Court of Appeal under Part I of that Act—

(a) against his conviction, on any ground, without the leave of the Court of Appeal or a certificate of the judge of the court of trial; and

(b) against sentence passed on conviction, without that leave, unless the sentence is one fixed by law.

(7) Where a person is so convicted, the time for giving notice of appeal under subsection (1) of section 16 of that Act of 1980 shall run from the date of judgment if later than the date from which it would run under that subsection.

Northern Ireland (Emergency Provisions) Act 1996

10 Court for trial of scheduled offences

(1) A trial on indictment of a scheduled offence shall be held only at the Crown Court sitting in Belfast, unless—

(a) the Lord Chancellor after consultation with the Lord Chief Justice of Northern Ireland directs that the trial, or a class of trials within which it falls, shall be held at the Crown Court sitting elsewhere; or

(b) the Lord Chief Justice of Northern Ireland directs that the trial, or part of it, shall be held at the Crown Court sitting elsewhere.

(2) A person committed for trial for a scheduled offence, or for two or more offences at least one of which is a scheduled offence, shall be committed—

(a) to the Crown Court sitting in Belfast, or

(b) where a direction has been given under subsection (1) which concerns the trial, to the Crown Court sitting at the place specified in the direction;

and section 48 of the [1978 c. 23.] Judicature (Northern Ireland) Act 1978 (committal for trial on indictment) shall have effect accordingly.

(3) Where—

(a) in accordance with subsection (2) any person is committed for trial to the Crown Court sitting in Belfast, and

(b) a direction is subsequently given under subsection (1), before the commencement of the trial, altering the place of trial,

that person shall be treated as having been committed for trial to the Crown Court sitting at the place specified in the direction.

11 Mode of trial on indictment of scheduled offences

(1) A trial on indictment of a scheduled offence shall be conducted by the court without a jury.

(2) The court trying a scheduled offence on indictment under this section shall have all the powers, authorities and jurisdiction which the court would have had if it had been sitting with a jury, including power to determine any question and to make any finding which would, apart from this section, be required to be determined or made by a jury, and references in any enactment to a jury or the verdict or finding of a jury shall be construed accordingly in relation to a trial under this section.

(3) Where separate counts of an indictment allege a scheduled offence and an offence which is not a scheduled offence, the trial on indictment shall, without prejudice to section 5 of the [1945 c. 16 (N.I.)] Indictments Act (Northern Ireland) 1945 (orders for amendment of indictment, separate trial and postponement of trial), be conducted as if all the offences alleged in the indictment were scheduled offences.

(4) Without prejudice to subsection (2), where the court trying a scheduled offence on indictment—

(a) is not satisfied that the accused is guilty of that offence, but

(b) is satisfied that he is guilty of some other offence which is not a scheduled offence, but of which a jury could have found him guilty on a trial for the scheduled offence,

the court may convict him of that other offence.

(5) Where the court trying a scheduled offence convicts the accused of that or some other offence, then, without prejudice to its power apart from this subsection to give a judgment, it shall, at the time of conviction or as soon as practicable thereafter, give a judgment stating the reasons for the conviction.

(6) A person convicted of any offence on a trial under this section without a jury may, notwithstanding anything in sections 1 and 10(1) of the [1980 c. 47.] Criminal Appeal (Northern Ireland) Act 1980, appeal to the Court of Appeal under Part I of that Act—

(a) against his conviction, on any ground, without the leave of the Court of Appeal or a certificate of the judge of the court of trial; and

(b) against sentence passed on conviction, without that leave, unless the sentence is one fixed by law.

(7) Where a person is so convicted, the time for giving notice of appeal under subsection (1) of section 16 of that Act of 1980 shall run from the date of judgment if later than the date from which it would run under that subsection.

Justice and Security (Northern Ireland) Act 2007

1 Issue of certificate

(1) This section applies in relation to a person charged with one or more indictable offences ("the defendant").

(2) The Director of Public Prosecutions for Northern Ireland may issue a certificate that any trial on indictment of the defendant (and of any person committed for trial with the defendant) is to be conducted without a jury if—

(a) he suspects that any of the following conditions is met, and

(b) he is satisfied that in view of this there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury.

(3) Condition 1 is that the defendant is, or is an associate (see subsection (9)) of, a person who—

(a) is a member of a proscribed organisation (see subsection (10)), or

(b) has at any time been a member of an organisation that was, at that time, a proscribed organisation.

(4) Condition 2 is that—

(a) the offence or any of the offences was committed on behalf of a proscribed organisation, or

(b) a proscribed organisation was otherwise involved with, or assisted in, the carrying out of the offence or any of the offences.

(5) Condition 3 is that an attempt has been made to prejudice the investigation or prosecution of the offence or any of the offences and—

(a) the attempt was made on behalf of a proscribed organisation, or

(b) a proscribed organisation was otherwise involved with, or assisted in, the attempt.

(6) 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.

(6A) The Director of Public Prosecutions for Northern Ireland may not issue a certificate under subsection (2) if—

(a) the proceedings are taken in Northern Ireland only by virtue of section 28 of the Counter-Terrorism Act 2008, and

(b) it appears to the Director that the only condition that is met is condition 4.]

(7) In subsection (6) "religious or political hostility" means hostility based to any extent on—

(a) religious belief or political opinion,

(b) supposed religious belief or political opinion, or

(c) the absence or supposed absence of any, or any particular, religious belief or political opinion.

(8) In subsection (6) the references to persons and groups of persons need not include a reference to the defendant or to any victim of the offence or offences.

(9) For the purposes of this section a person (A) is the associate of another person (B) if—

(a) A is the spouse or a former spouse of B,

(b) A is the civil partner or a former civil partner of B,

(c) A and B (whether of different sexes or the same sex) live as partners, or have lived as partners, in an enduring family relationship,

(d) A is a friend of B, or

(e) A is a relative of B.

(10) For the purposes of this section an organisation is a proscribed organisation, in relation to any time, if at that time—

(a) it is (or was) proscribed (within the meaning given by section 11(4) of the Terrorism Act 2000 (c. 11)), and

(b) its activities are (or were) connected with the affairs of Northern Ireland.

5 Mode of trial on indictment

(1) The effect of a certificate issued under section 1 is that the trial on indictment of—

(a) the person to whom the certificate relates, and

(b) any person committed for trial with that person,

is to be conducted without a jury.

(2) Where a trial is conducted without a jury under this section, the court is to have all the powers, authorities and jurisdiction which the court would have had if the trial had been conducted with a jury (including power to determine any question and to make any finding which would be required to be determined or made by a jury).

(3) Except where the context otherwise requires, any reference in an enactment (including a provision of Northern Ireland legislation) to a jury, the verdict of a jury or the finding of a jury is to be read, in relation to a trial conducted without a jury under this section, as a reference to the court, the verdict of the court or the finding of the court.

(4) No inference may be drawn by the court from the fact that the certificate has been issued in relation to the trial.

(5) Without prejudice to subsection (2), where the court conducting a trial under this section—

(a) is not satisfied that a defendant is guilty of an offence for which he is being tried ("the offence charged"), but

(b) is satisfied that he is guilty of another offence of which a jury could have found him guilty on a trial for the offence charged,

the court may convict him of the other offence.

(6) Where a trial is conducted without a jury under this section and the court convicts a defendant (whether or not by virtue of subsection (5)), the court must give a judgment which states the reasons for the conviction at, or as soon as reasonably practicable after, the time of the conviction.

(7) A person convicted of an offence on a trial under this section may, notwithstanding anything in sections 1 and 10(1) of the Criminal Appeal (Northern Ireland) Act 1980 (c. 47), appeal to the Court of Appeal under Part 1 of that Act—

(a) against his conviction, on any ground, without the leave of the Court of Appeal or a certificate of the judge of the court of trial;

(b) against sentence passed on conviction, without that leave, unless the sentence is fixed by law.

(8) Where a person is convicted of an offence on a trial under this section, the time for giving notice of appeal under section 16(1) of that Act is to run from the date of judgment (if later than the date from which it would run under that subsection).

(9) Article 16(4) of the Criminal Justice (Northern Ireland) Order 2004 (S.I. 2004/1500 (N.I. 9)) (leave of judge or Court of Appeal required for prosecution appeal under Part IV of that Order) does not apply in relation to a trial conducted under this section.

B8. Republic of Ireland

Irish Constitution

ARTICLE 38

1 No person shall be tried on any criminal charge save in due course of law.

2 Minor offences may be tried by courts of summary jurisdiction.

3

1° Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order.

2° The constitution, powers, jurisdiction and procedure of such special courts shall be prescribed by law.

4

1° Military tribunals may be established for the trial of offences against military law alleged to have been committed by persons while subject to military law and also to deal with a state of war or armed rebellion.

2° A member of the Defence Forces not on active service shall not be tried by any courtmartial or other military tribunal for an offence cognisable by the civil courts unless such offence is within the jurisdiction of any courtmartial or other military tribunal under any law for the enforcement of military discipline.

5 Save in the case of the trial of offences under section 2, section 3 or section 4 of this Article no person shall be tried on any criminal charge without a jury.

6 The provisions of Articles 34 and 35 of this Constitution shall not apply to any court or tribunal set up under section 3 or section 4 of this Article.

Offences Against the State Act, 1939

Section 38

(1) As soon as may be after the coming into force of this Part of this Act, there shall be established for the purposes of this Part of this Act, a court which shall be styled and known and is in this Act referred to as a Special Criminal Court.

(2) The Government may, whenever they consider it necessary or desirable so to do, establish such additional number of courts for the purposes of this Part of this Act as they think fit, and each court so established shall also be styled and known and is in this Act referred to as a Special Criminal Court.

(3) Whenever two or more Special Criminal Courts are in existence under this Act, the Government may, if and so often as they so think fit, reduce the number of such Courts and for that purpose abolish such of those existing Courts as appear to the Government to be redundant.

See also **Special Criminal Court No. 2 Rules 2016**