Judicial Review and Courts Bill

(Part 2, Chapter 1 – Criminal Procedure)

Report Stage

Briefing

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Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible, and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.

2. JUSTICE has put together four separate briefings on different elements of the Judicial Review and Courts Bill (the "**Bill**") ahead of the Report Stage in the House of Commons.[1] This briefing addresses Part 2 of the Bill, which relates to the provisions concerning criminal procedure.

3. In 2017, the Government proposed the Prison and Courts Bill, which did not progress due to the general election that year, to make significant changes to the way the criminal courts operate through greater use of technology. At the time, JUSTICE briefed on its measures;[2] many of which have been revived in the current Bill and paves the way for a radical change to the criminal justice system. JUSTICE refers to five Clauses in particular:

    a. **Clause 3:** the introduction of an Automatic Online Conviction and Standard Statutory Penalty ("**AOCSSP**") procedure, whereby an individual could plead guilty without the need for a hearing in the Magistrates' Court;

    b. **Clause 4**: the Bill would extend the existing 'pleading guilty by post' scheme, by enabling it to apply to defendants, aged 16 and above, who have been charged with a summary offence at a police station. This would allow a Magistrates' Court to try the case as if the defendant had plead guilty in court, without the need for the defendant or the prosecution to be present;

    c. **Clauses 6 and 8**: the Bill would extend arrangements for defendants to provide information in writing, without the need for a physical hearing, including for an indication of plea. It also creates a New Pre-Trial Allocation Procedure (the "**New Allocation Procedure**") which enables matters such as

[1] For JUSTICE's briefings on the Bill, see our website here.

[2] JUSTICE, 'Prisons and Courts Bill, House of Commons, Second Reading Briefing', (March 2017).

the mode of trial (allocation hearings) for either-way offences and sending cases to the Crown Court to be dealt with in writing; and

d. **Clause 9**: the Bill would introduce additional circumstances in which the Magistrates' Court could continue with the proceedings in a defendant's absence in triable either way cases. This applies to adults, and it has similar provisions for children.[3]

4. JUSTICE welcomes the increased use of technology as part of the solution to dealing with a number of issues which currently plague the system, including the court backlog, ageing court estate, and slow processes that result in hearing dates taking place sometimes years after a defendant is charged.[4] The status quo is unsustainable, and requires urgent redress. In our report, '*What is a Court?*', we emphasised the importance of technology and its potential to meet user needs and to maximise access to justice.[5] In many instances, the needs of court users can be met – and their participation in proceedings facilitated – by technical solutions which do not require their physical presence. Nor is it always in the best interests of the parties to be brought together for a physical hearing and the extended timescale for resolution that it creates.

5. Digitisation can offer improvements in access to justice. For many people, the court system can be distant, daunting, and costly.[6] Properly designed, a digital system can be more intuitive and provide access for emerging generations of court and tribunal users, for example, by allowing them to engage with the justice system through a mobile phone application or an online programme. Online facilities can enable individuals who would

[3] Clause 9, new s. 24BA, Judicial Review and Courts Bill.

[4] *See*, for example, a number of JUSTICE working parties in which our members recommended greater recourse to greater use of technology across the justice system. For example, for civil procedures in 'Delivering Justice in Times of Austerity' (2015) and criminal procedures in 'Complex and Lengthy Criminal Trials' (2016), and across justice spaces in 'What is a Court?' (2016). Using more flexible processes can bring important efficiencies that reduce the length of time waiting for a case to be decided and improve access to justice for those who find getting to and being at court a difficult and stressful process.

[5] JUSTICE, 'What is a Court?', (May 2016).

[6] Ipsos MORI, conducting interviews with 508 legal professionals, found that "88% of legal professionals agreed that 'The court process is intimidating to the general public'", see Hodge Jones & Allen, 'Innovation in Law Report 2014', p.16. This tallies with the findings of a recent report, based on interviews with professional and lay court users, that the Crown Court experience has "many distressing, stressful and perplexing aspects" for court users, which "extend far beyond…readily definable vulnerabilities", *see* J Jacobson, G Hunter & A Kirby on behalf of the Criminal Justice Alliance, 'Structured Mayhem: Personal Experiences of the Crown Court' (2015), pp.3 and 5, which draws upon research from J. Jacboson, G. Hunter and A. Kirby, Inside Crown Court: Personal experiences and questions of legitimacy (Policy Press, 2015)

find it difficult to travel to a physical courtroom, and engage with a traditional adversarial process, to access justice.

6. Therefore, whilst JUSTICE would welcome the spirit of some of these measures, they must be introduced with sufficient safeguards and financial resources and accompanied by an independent pilot before their wider application. This briefing reiterates a number of our concerns with the proposals as set out in our briefings for Second Reading and Report stage.[7]

Clause 3 - Automatic Online Conviction and Standard Statutory Penalty Procedure

7. Clause 3 of the Bill would create an AOCSSP procedure. This would enable all summary and non-imprisonable offences to be automated through an online plea, conviction, and penalty website.[8] This means that a defendant could opt to plead guilty online which would result in an automatic conviction without the need for a hearing. Upon introduction, the Government claims that the provision will only apply to offences involving "*travelling on a train or tram without a ticket and fishing with an unlicensed rod and line*".[9] The offences will be set out in secondary legislation (approved by the affirmative procedure). As such, further eligible offences would be included at a later date.

8. The AOCSSP procedure would be optional for defendants, who would need to actively opt into the process and could request a physical hearing instead. In order to use the procedure, defendants must be aged 18 or over and be provided with all the "*required documents*".[10]

[7] JUSTICE briefings for the Bill's Second Reading and Committee Stage in the House of Commons are here.

[8] Examples include offences involving motor vehicles, minor criminal damage, and being drunk and disorderly in a public place.

[9] Judicial Review and Courts Bill, 'Explanatory Notes', 21 July 2021, p.13.

[10] Pursuant to clause 3, new s. 16H(6), these include (a) a written charge, (b) a single justice procedure notice, and (c) other documents as prescribed by the Criminal Procedure Rules. The Explanatory Notes further expand that "*Defendants (which throughout these Explanatory Notes with regards to criminal procedure, includes all 'accused persons') will be given full details of the prospective fixed fine, surcharge and other costs (for example, compensation and/or penalty points if relevant) before agreeing to accept the automatic conviction and penalty.*" - Judicial Review and Courts Bill, 'Explanatory Notes', 21 July 2021, p.26.

9. These measures represent an expansion of the Single Justice Procedure (the "**SJP**"), which was created pursuant to the Criminal Justice and Courts Act 2015.[11] Under the SJP, defendants receive a notice containing the charge by post, with a statement setting out the facts of the offence. The SJP then allows adult defendants to choose to enter a plea in writing or online for the same type of offences mentioned above (i.e., summary, and non-imprisonable). Those who plead guilty (and do not request a hearing) are convicted and sentenced by a single magistrate (aided by a legal advisor) 'on the papers', having had the opportunity to submit mitigating factors in writing. If a defendant fails to respond to the letter setting out the charge within the 21-day time limit, the single magistrate will hear the case without any input from the defendant or prosecutor.

10. The SJP is regularly used to prosecute so-called 'minor' offences, such as those involving the non-payment of TV licences, motoring offences, not having a valid ticket on public transport, and recently any breaches of the 'lockdown' restrictions imposed through the Coronavirus Act 2020.[12] However, an important difference between the SJP and the new AOCSSP procedure is that under the latter, cases could take place *"entirely online and without the involvement of a magistrate*".[13]

Concerns with the AOCSSP procedure

11. JUSTICE considers that the AOCSSP procedure would fail to operate in a way that is fair and compliant with the defendants' right to a fair trial, both at common law and pursuant to Article 6 of the European Convention on Human Rights. We note the following concerns which are relevant to the introduction of the AOCSSP procedure.

12. Removing the involvement of magistrates entirely removes this safeguard, as there will be no independent judicial, or indeed, human, oversight whatsoever. Moreover, defendants who use the AOCSSP procedure will face a binary choice between pleading guilty or not guilty, with no opportunity to submit mitigating factors if they plead guilty, unless they choose to decline the AOCSSP procedure (and go through the SJP or traditional in-person court procedure instead).

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[11] The SJP is regularly used to prosecute so-called 'minor' offences, such as those involving the non-payment of TV licences, motoring offences, not having a valid ticket on public transport, and recently any breaches of the 'lockdown' restrictions imposed through the Coronavirus Act 2020.

[12] The use of the SJP for coronavirus-related offences has not been without controversy, with hundreds wrongly charged and prosecuted. *See*, for example, Fair Trials, 'Single Justice Procedure: unlawful Coronavirus prosecutions and convictions behind closed doors', 1 June 2021.

[13] Judicial Review and Courts Bill, 'Explanatory Notes', 21 July 2021, p.13

13. The AOCSSP procedure automates the process completely and removes the involvement of magistrates entirely from the decision-making process. There would therefore be no independent judicial, or indeed human, oversight in the decision-making process whatsoever. This also therefore removes from defendants the opportunity to submit mitigating factors if they plead guilty as there is no magistrate to consider them. This would remove an important safeguard by which fairness, lawfulness, and proportionality in criminal justice proceedings can be guaranteed.

14. Moreover, it is likely that the AOCSSP procedure, as it currently stands, would act to incentivise individuals to plead guilty out of convenience, regardless of whether they have an arguable case. It risks becoming a tick box exercise for defendants, without any meaningful review process. This could result in guilty pleas and convictions for offences people may not have committed, in a process incentivised for defendants to sacrifice crucial safeguards in the name of efficiency and convenience. Without legal advice, this risk is all the more profound.

15. While the Bill would limit the procedure to summary and non-imprisonable offences, the consequences of conviction are still serious. Punishments that do not result in a custodial sentence can have significant consequences for an individual – not least a criminal record, consequences with travel, insurance, loss of employment or educational opportunities, and potential social stigma. It is concerning that those charged with a criminal offence may choose to take the 'easy option' of using the AOCSSP procedure without fully understanding the consequences of doing so.

16. Further, levels of engagement with the SJP are poor, with approximately 71% of people in 2020 not responding to the charge letter notifying them that they are being prosecuted (i.e., entering no plea).[14] Recently, in the case of offences prosecuted under the Coronavirus Act 2020, this rises to almost 90%.[15] Under the SJP, this results in defendants being sentenced by a magistrate 'on the papers' without ever having agreed to give up their right to a hearing. Defendants receive the judgement by post. However, if they were unaware of the original charge (which is sent by post), they may also be unaware of the subsequent postal judgement. This means they could be unaware that they have been found guilty and/or are required to pay a fine, putting them at risk of

[14] House of Commons, Question for Ministry of Justice, UIN 143756, tabled on 26 January 2021. It is important to note that no regular statistics are published with respect to the SJP. Any data that does exist is principally through parliamentary questions. JUSTICE is equally concerned that the AOCSSP procedure would suffer from a similar lack of transparency.

[15] *Ibid*.

imprisonment.[16] The Government has failed to explain how the issue with levels of engagement with the SJP will not simply translate over to the new AOCSSP procedure.

17. In addition, the AOCSSP procedure may incur negative consequences for already-disadvantaged groups, such as:

    a. **Women**: the existing SJP regime disproportionately targets women. As APPEAL and the Women's Justice Initiative note, "*the vast majority of those being prosecuted and convicted of TV licence evasion are women*."[17] Their research and case studies exemplify what happens in the absence of sufficient safeguards, with women facing criminal records despite not having received a letter, or where the letter was sent to the wrong address. While these concerns apply to the SJP in general, the fact that women are more likely to commit certain so-called 'low-level' offences means they are impacted to a greater extent. The Government must ensure such disparities are not replicated for the AOCSSP procedure.

    b. **Ethnic minorities**: racial disparities permeate the criminal justice system. The Equalities Statement to the 2017 Prisons and Courts Bill (within which many of the current measures were first mooted) notes that "*such changes have the potential to have adverse effects on the basis of age, disability, and ethnicity (linked to socio-economic disadvantages) to the extent that some groups are less internet or digitally enabled than others.*"[18] The Government at the time appeared to accept, rather than seek to mitigate, these adverse outcomes. This is unacceptable. The new measures must not be introduced without addressing how the new procedures would avoid further entrenching discrimination into the criminal justice system. Moreover, we are concerned that there does not seem to be a fresh assessment of the potential equalities impact of the current Bill's measures. Further research must be done so as to ensure disproportionate numbers of ethnic minority individuals are not unduly criminalised through procedures that contain weaker safeguards than are presently provisioned under the SJP.

[16] Magistrates' Courts Act 1980, s. 82.

[17] T Casey and N Sakande, APPEAL and the Women's Justice Initiative, 'Decriminalising TV Licence Non Payment Consultation Response', (March 2020), p.5.

[18] Prisons and Courts Bill, 'Equalities Statement: Automatic online convictions and standard statutory penalty', (2017), p.2.

c. **Neurodivergent individuals and/or those with mental health or other conditions**: in our report '*Mental Health and Fair Trial*',[19] we note that criminal justice processes too often do not account for an individual's particular needs which may hamper their ability to understand what is happening.[20] This is a particular issue with the SJP where there is a lack of opportunity to screen for health conditions or vulnerabilities and assess whether the process is suitable. The issue will only be exacerbated by the AOCSSP procedure, with the removal of any form of human involvement.

18. Equally, there are palpable concerns with the potential for IT problems, as seen most recently this summer where the Information Commissioners' Office uncovered a glitch in HMCTS' systems which resulted in over 5000 defendants incorrectly entering a 'guilty' plea.[21]

19. We are not convinced that sufficient safeguards exist to mitigate against these issues. For this reason**, we recommend that Parliament vote in favour of removing clause 3 from the Bill.**

20. In addition, **we recommend that Parliament vote in favour of Amendment NC3, which would mandate a much-needed review of the SJP**. This would also serve to provide an evidence base to explore its existing problems, so as to ensure that they are not simply translated across to the AOCSSP procedure.

> Amendment NC3
>
> To move the following Clause—
>
> "**Review of the single justice procedure**
>
> (1) Within two months beginning with the day on which this Act is passed, the Secretary of State must commission a review of and publish a report on the effectiveness of the single justice procedure.
>
> (2) A review under subsection (1) must consider—
>
> (a) the transparency of the single justice procedure in line with the principle of open justice,

[19] JUSTICE, 'Mental Health and Fair Trial', (November 2017).

[20] *See* also, for example, Criminal Justice Joint Inspection, 'Neurodiversity in the criminal justice system: A review of evidence', 15 July 2021.

[21] T Kirk, Evening Standard, 'More than 5,000 handed criminal convictions in error after IT flaw goes unnoticed', 26 July 2021.

(b) the suitability of the use of the single justice procedure for Covid19 offences, and

(c) prosecution errors for Covid-19 offences under the single justice procedure and what redress victims of errors have.

(3) The Secretary of State must lay a copy of the report before Parliament."

Restricting the types of offences

21. If the AOCSSP procedure remains in the Bill, it is important that greater safeguards exist for its use. The Government has stated that the AOCSSP procedure will initially apply only to the offences of "*travelling on a train or tram without a ticket and fishing with an unlicensed rod and line*", both of which are non-recordable.[22] However, additional offences can be added to the procedure by the Government by way of statutory instrument. While the Bill would limit the procedure to summary and non-imprisonable offences, the consequences of conviction are still serious.

22. It is vital that the Government proceed with caution before expanding the measures to other offences. It must be clear and upfront in defining the scope of its powers to do so, and fully engage Parliament for their future expansion. Given the proposed incursion into the fundamental right to a fair trial, if included in the Bill, such powers should be limited in temporal scope by way of a sunset clause and be subject to Parliamentary review. Indeed, the inclusion of additional offences warrants careful scrutiny and assessment to ensure that such processes are appropriate and not conducive to unforeseen detrimental consequences.

23. **JUSTICE therefore recommends that Parliament vote in favour of Amendment 21 which would ensure that the procedure would only apply to non-recordable offences.** Examples of recordable offences, to which the AOCSSP procedure could currently apply, include a range of scenarios, which would impact parents,[23] pub-goers

[22] Non-recordable offences are generally held on local police records although, depending on local arrangements, some non-recordable offences may also be uploaded to the Police National Computer. *See* also National Police Records (Recordable Offences) Regulations 2000/1139.

[23] For example, s. 12 Children and Young Persons Act 1933 (offence of failing to provide for safety of children at entertainments); s. 11 Children and Young Persons Act 1933 (offence of exposing children under twelve to risk of burning).

and owners,[24] and those taking part in processions and assemblies, which would include activities such as vigils, community events, and demonstrations.[25]

> Amendment 21
>
> Clause 3, page 5, leave out lines 35 to 37 and insert—
>
> "(4) An offence may not be specified in regulations under subsection (3)(a) unless it is—
>
> (a) a summary offence that is not punishable with imprisonment; and
>
> (b) a non-recordable offence, which excludes any offence set out in the Schedule to the National Police Records (Recordable Offences) Regulations 2000/1139 (as amended)."
>
> ***Member's explanatory statement***
>
> *This amendment would exclude any offences which are recordable from the automatic online conviction option.*

Legal advice

24. The Government has refused to provide defendants with access to legal advice for the AOCSSP procedure on the basis that the procedure will only be used for "*non-imprisonable summary offences*" and that "*many defendants already proceed without legal representation for these types of offences*". However, JUSTICE considers this approach encourages defendants to plead guilty without a full understanding of their decision and downplays the implication of criminal convictions. As explained above, many will not fully appreciate the impact that a conviction could have on their lives and future prospects.

25. Moreover, this stance by the Government implies that because the offences are not as 'serious' as others, it is not necessary for defendants to access legal advice. This approach risks trivialising summary offences as standardised, administrative matters. In reality, there can be numerous long-term and potentially serious implications of a

[24] For example, s. 91 of the Criminal Justice Act 1967 (offence of drunkenness in a public place); s. 141(1) of the Licensing Act 2003 (offence of selling alcohol to a person who is drunk).

[25] For example, s. 12(5) Public Order Act 1986 (offence of failing to comply with conditions imposed on a public procession); s. 14(5) Public Order Act 1986 (offence of failing to comply with conditions imposed on a public assembly). The threshold for committing these offences would become significant upon the introduction of Part 3 of the Police, Crime, Sentencing and Courts Bill, where individuals could inadvertently commit an offence by causing 'serious unease' or 'noise'. For more information, *see* our briefing on the Police, Crime, Sentencing and Courts Bill here.

conviction. A criminal record can have far-reaching adverse consequences with travel, insurance, credit ratings and job opportunities.

26. A Government consultation of the AOCSSP proposal, which included legal practitioners, charities, the judiciary, and members of the public, found that only 40% of respondents agreed that the proposed safeguards were adequate, with access to legal advice a key concern.[26]

27. JUSTICE shares these concerns and calls on the Government to ensure that defendants clearly understand their right to legal assistance prior to making a decision and that this will be made available in a user-friendly way. We also recommend that defendants should be required to prove that they have understood the implications of pleading guilty. While the Government has suggested that defendants will be provided with a "*decision tree*", more information is needed as to what this will look like in practice.

Introducing greater safeguards for vulnerable individuals

28. The Bill's only criterion with respect to which defendants are appropriate for the AOCSSP procedure is that they must be aged 18 or over when charged (*See* Clause 3, new Section 16H(3)(b)). Vulnerable individuals, especially those who may not understand the charge, any documents which are sent to them, or the consequences of pleading guilty, are placed at a disadvantage by this process.

29. This may be the case for many within the criminal justice system due to a multitude of reasons. Some are battling alcohol and drug addiction, others are partially or wholly illiterate, many suffer from health conditions or disabilities. We are therefore concerned that people could chose the AOCSSP procedure out of convenience or a lack of understanding rather than what might be in their best interests, such as waiting for an in-person hearing or receiving legal advice. The Government must be clear as to how it would eliminate the risk of these measures' evident potential for further compounding disparities across these vulnerable groups.

30. **JUSTICE therefore urges Parliamentarians to vote for Amendment 20 which would make it incumbent on prosecutors to consider the appropriateness of the procedure for defendants, taking into account any potential vulnerabilities.** We call

[26] Ministry of Justice, 'Transforming our justice system: assisted digital strategy, automatic online conviction and statutory standard penalty, and panel composition in tribunals: Government response', February 2017, para 28, *see* also House of Commons, 'Judicial Review and Courts Bill 2021-22', 12 October 2021.

for an additional "*required document*", which sets out the consequences of agreeing to a guilty plea under the AOCSSP procedure, as well as signposting them to high quality legal advice and information to help ensure that defendants fully understand the process and appreciate the consequences of pleading guilty.

> Amendment 20
>
> Clause 3, page 5, line 34, at end insert—
>
> "(e) the prosecutor is satisfied that the accused does not have any vulnerabilities and disabilities that impede the ability of the accused to understand or effectively participate in proceedings, having undertaken a physical and mental health assessment."
>
> ***Member's Explanatory Statement***
>
> *This amendment would require that all accused persons considered for automatic online convictions are subject to a health assessment, and that only those who do not have any vulnerabilities or disabilities are given the option of being convicted online.*

31. JUSTICE has also recommended the Government to publish guidance for prosecutors on how they should provide and explain the information which they provide to defendants. This would ensure that the necessary information is provided in clear and accessible language and formats to defendants.

Ensuring the AOCSSP procedure is well evidenced

32. The Government refers to three reviews – Sir Robin Auld's 'Review of the Criminal Courts' (2001);[27] Sir Brian Leveson's 'Review of Efficiency in Criminal Proceedings' (2015),[28] and the Government's consultation 'Transforming our Justice System' (2016).[29] In the last of these, the Government mooted making "*the processing of summary non-imprisonable offences where there is no clear identifiable victim – such as rail ticket and TV licence evasion, speeding, insurance, and fly-tipping – even more efficient by allowing defendants to plead online, saving valuable court time*".[30]

[27] Sir Robin Auld, 'Review of the Criminal Courts of England and Wales', (2001).

[28] Sir Brian Leveson, 'Review of Efficiency in Criminal Proceedings', (2015).

[29] Ministry of Justice, 'Transforming our Justice System', (September 2016).

[30] *Ibid*, p.9.

33. JUSTICE agrees that it is important to explore better ways of deploying technology in the criminal justice system. However, the evidence base of the AOCSSP procedure is poor, and none of these reports explore the real-world consequences and risks inherent to the AOCSSP procedure. Indeed, the SJP (upon which the AOCSSP procedure builds) was barely a year old at the time of the Government consultation. Since then, the Government has not undertaken or published any comprehensive analysis of the problems with the SJP. Moreover, the Government has not explained how the issues that exist with the SJP would not simply translate across to the AOCSSP procedure. This risk is all the more palpable where this new process would remove any judicial oversight in the form of a magistrate. Furthermore, we are not aware of any similar system deployed in other jurisdictions from which any advantages or disadvantages could be studied.

34. As such, we are not convinced that sufficient safeguards exist to mitigate against the risk of convictions that should never have been entered. As a result, the Bill may inadvertently place an even greater burden on the courts to ensure that there are no miscarriages of justice. This risk is not hypothetical, as is clear from the numerous issues with the SJP. Levels of engagement with the SJP is poor, with approximately 71% of people in 2020 not responding to the charge letter notifying them that they are being prosecuted (i.e., entering no plea).[31] JUSTICE is concerned that in six years of running the SJP, the Government has not sought to find out why the defendants charged under the SJP do not respond to the postal charge.[32] Nor has the Government explained how this issue will not simply translate over to the new AOCSSP procedure.

35. **JUSTICE has therefore recommended Parliament to mandate a review of the AOCSSP procedure before it is introduced**. A review would also assist in establishing an evidence base for the proposal and ensure that any potential negative consequences for vulnerable individuals and those with a protected characteristic are fully understood and mitigated against before the Government is able to implement the AOCSSP procedure.

Amendment 36

Clause 3, page 4, line 28, at end insert—

[31] House of Commons, Question for Ministry of Justice, UIN 143756, tabled on 26 January 2021. It is important to note that no regular statistics are published with respect to the SJP. Any data that does exist is principally through parliamentary questions. JUSTICE is equally concerned that the AOCSSP procedure would suffer from a similar lack of transparency.

[32] Transform Justice, 'Computer says yes – you will pay a fine and get a criminal record', (2021).

"(1) Before this section may come into force, the Secretary of State must—

(a) commission an independent review of the potential impact, efficacy, and operational issues on defendants and the criminal justice system of the automatic online conviction and penalty for certain summary offences;

(b) lay before Parliament the report and findings of this independent review; and

(c) provide a response explaining whether and how such issues which have been identified will be mitigated."

Members' explanatory statement

This amendment would require a review of clause 3 before it can come into force.

Clause 4 - Pleading guilty in writing

36. A defendant charged with a criminal offence must indicate their plea in court. However, there are two exceptions to this rule whereby the defendant can plea in writing. The first, under the SJP, which is available only for summary, non-imprisonable offences; and the second, by "*pleading guilty by post*", which is available for summary only offences, where you receive the charge outside of a police station (i.e., at home).[33]

37. Under the current framework, cases are initiated against a defendant by way of a written charge, either a postal requisition or a summons, and away from a police station. The only requirement for prosecutors to consider cases for the "*pleading guilty by post*" scheme is that the defendant is aged 16 or over and is charged with a summary only offence.[34] If a defendant decides to opt for this procedure, they would indicate a guilty plea in writing, either by responding to the charge letter through post or via an online plea website, and opt that a Magistrates' Court proceed to try, convict, and sentence them at a court hearing in their absence. While the defendant can submit a mitigating statement for the Magistrates consideration when sentencing, it removes the need for the defendant or other parties in the case to make a court appearance at any stage of the proceedings.

[33] S. 12 of the Magistrates Courts Act 1980.

[34] *Ibid*.

38. Clause 4 would expand the existing this procedure to now allow a defendant to plead guilty in cases where the defendant has been charged in person at a police station and bailed to appear at the Magistrates Court for a first hearing.

Concerns

39. The pleading guilty by post procedure, both in its current form and if it were to be expanded by the Bill allows children aged 16 and above to plead guilty by post. This contrasts with both the existing SJP and the proposed AOCSSP procedure, which both require a defendant to be aged 18 and over. Children are inherently vulnerable in nature and possess a well-evidenced propensity to plead guilty notwithstanding the evidence or potential defences.[35] It is right that the law recognises this and provides specific procedures within the framework of the youth justice system to ensure that their rights are appropriately safeguarded.

40. JUSTICE agrees with Sir Robert Neill MP, who in the second reading debate commented "*What is the logic in using the age of 18 in one provision and 16 in a provision that covers broadly similar grounds? We need particular safeguards for dealing with young offenders, to ensure that they do not enter a plea that is not fully informed, either through immaturity or a lack of good advice, as that could have permanent consequences for their future*".[36] In sum, the Bill fails to recognise the increased vulnerability and additional requirements that children have, and it has not specified how their rights will be appropriately safeguarded.

41. We therefore have recommended Parliament to remove children from the scope of the existing pleading guilty in writing procedure, as well as in the new provision.

Clause 6 and 8 - The New Allocation Procedure

42. There are three categories of criminal offence, all of which start in a Magistrates Court. An offence's classification determines how a case proceeds through the criminal justice system:[37]

    a. **Summary offences:** are normally heard in the Magistrates Court.

[35] *See* R Helm, 'Guilty pleas in children: legitimacy, vulnerability, and the need for increased protection', Journal of Law and Society, Volume 48, Issue 2, pp. 179-201.

[36] Sir Robert Neill MP, in HC Deb (26 October 2021). Vol 702. Col 206.

[37] Pursuant to the Magistrates' Courts Act 1980 and the Crime and Disorder Act 1998.

b. **Indictable-only offences**: must be tried in the Crown Court.

c. **Triable either-way**: the case can be heard either in a Magistrates' Court or the Crown Court, depending on factors such as complexity, severity, the defendant's right to opt for a jury trial, and the sentencing powers available to the Magistrates' Court.

43. The procedures which govern such proceedings are set out in the Criminal Procedure Rules, which are issued pursuant to the Criminal Procedure Rule Committee by way of secondary legislation. At present, defendants must first attend in person a hearing in the Magistrates' Court to indicate if they wish to plead guilty or not guilty (a 'plea before venue'). Thereafter, if the defendant pleads not guilty or refused to state a plea, for either way offences, the case proceeds to the 'allocation hearing' where it is decided whether the case should be heard in the Magistrates' Court or Crown Court.

44. The Bill, at Clause 6 (for adults) and Clause 8 (for children), creates a new pre-trial allocation procedure (the "**New Allocation Procedure**"), whereby an individual would be able to indicate a plea in writing for all summary-only, indictable only, and triable either way cases. This would also remove the need for a defendant to attend an allocation hearing in person as is currently the case. However, the provisions are not mandatory, and a defendant could attend a physical hearing if they wished.

45. Deciding how to plea, and where a case should be tried, can have important consequences for a defendant. For example, choosing to proceed to the Crown Court in a triable either-way offence could result in a harsher penalty, than in the Magistrates' Court, due to the Crown Court's greater sentencing powers.

Legal Representation

46. JUSTICE considers that defendants must have the opportunity to receive legal advice and assistance prior to indicating a plea or trial venue. At present, allocation decisions can be taken at court with the assistance of the duty solicitor. As we explained in our 2016 response to the consultation '*Transforming Our Justice System*',[38] a network of informal assistance is available to people at court that explains the court procedure and guides defendants towards legal assistance where necessary - from the usher to the

[38] JUSTICE, 'Response to Consultation on Transforming our Justice System', (November 2016), pp. 16-17.

justice's clerk, to the barrister waiting for their case to be called to the magistrate that the case appears before.

47. We therefore welcome the Government's statement that defendants will "*not be able to access the online procedure for indication of plea or trial venue allocation decision directly".* This is because submissions would have to be made through the Common Platform,[39] for which defendants *"will need to instruct a legal representative to act on their behalf who will of course ensure they fully understand the process and will be able to identify any vulnerabilities*".[40] This is crucial for decisions concerning a plea before venue hearing and deciding where the case should be heard, either in a Magistrates' Court or the Crown court since this can impact whether they have a jury trial, as well as the severity of the potential punishment. However, the Bill itself does not provide any such guarantees of access to legal advice – this should be set out in primary legislation.

48. JUSTICE therefore calls on the Government to fulfil its promise and make it clear on the face of the Bill that defendants will benefit from legal advice when using the New Allocation Procedure. of the Bill.

Children

49. The Bill, at Clause 8, would allow children to use the New Allocation Procedure. This is despite the fact that the law rightly affords children with additional protections and safeguards to reflect their inherently vulnerable nature and well-evidenced propensity to plead guilty notwithstanding the evidence or potential defences, as explained above.[41]

50. While the Bill provides that a parent or guardian would be made aware of the proceedings where they take place online, we are not convinced that this is sufficient to mitigate against the risks that are posed to children. It is not appropriate that the important safeguards that exist for children should be watered down through this provision. As such, we call on Parliament to remove children from the Bill's scope.

[39] The Common Platform is HM Courts and Tribunal Service's digital case management system. It allows those involved in criminal proceedings (judges, barristers, prosecutors, and court staff) to access case information. It is currently in the process of being rolled out across England and Wales. For more information, *see* – UK Government, 'HMCTS services: Common Platform', 14 May 2021.

[40] Judicial Review and Courts Bill, 'Fact Sheet (Courts)', 21 July 2021, p.3.

[41] *See* R Helm, 'Guilty pleas in children: legitimacy, vulnerability, and the need for increased protection', Journal of Law and Society, Volume 48, Issue 2, pp. 179-201.

Clause 9 - Procedure for the 'Plea before venue' hearing and 'Allocation' hearing

51. The Bill, at Clause 9, would introduce additional circumstances in which the Magistrates' Court could continue with the proceedings in a defendant's absence in triable either way cases. This applies to adults, and it has similar provisions for children.[42]

52. At present, a defendant is required to be present for both the plea before venue hearing and the allocation hearing.[43] However, in both scenarios there are two circumstances where the court can proceed in the defendant's absence:

    a. where the defendant has legal representation, and the court considers that by reason of the defendant's disorderly behaviour it is not practicable for the proceedings to be conducted in their presence (the legal representative may then act on the defendant's behalf);[44] or

    b. where the defendant gives consent via their legal representative for proceedings to take place in their absence.[45]

53. The Bill, as amended in Committee, would now allow a Magistrates' Court to continue with both the plea before venue and/or allocation hearing in the absence of the defendant in a much broader range of circumstances including:

    a. The hearings would be able to continue without the defendant where the *"court considers that by reason of the accused's disorderly conduct before the court it is not practicable for the hearing to be conducted in the accused's presence",* even where the defendant has no legal representative present.

    b. Where the court does not consider that there is "*an acceptable reason*" for the accused's failure to attended and one of the following applies:

        i. the defendant's legal representative is present;

[42] Clause 9, new s. 24BA, Judicial Review and Courts Bill.

[43] s. 17A(2) and s. 18(2) Magistrates' Court Act 1980.

[44] s. 17B(1) and s. 18(3) Magistrates' Court Act 1980.

[45] s. 17B(2) and s. 23 Magistrates' Court Act 1980.

ii. the court is satisfied that notice of the hearing was served within a reasonable time; or

iii. the accused has appeared on a previous occasion to answer the charge.

54. In respect of ii. and iii. there is no requirement for the defendant to have a legal representative present in order for the court to either proceed to allocation hearing (if at plea before venue) to allocate the case.

55. Where a legal representative is not present at the plea before venue stage, then the defendant is taken to have plead not guilty. Where a legal representative is not present for the allocation hearing, the allocation decision would be made on the basis of an assumed not guilty plea and the court would proceed to allocate the case to the Magistrates' Court or the Crown Court.

56. These amendments represent a significant alteration of the status quo, which only permits plea before venue hearings and allocation hearings in the absence of the defendant for reasons relating to the defendant's disorderly conduct so long as the defendant's legal representative is present, or where the defendant gives consent via their legal representative for proceedings to take place in their absence.[46] JUSTICE is therefore concerned that Clause 9 would remove the essential safeguards put in place for an accused's effective participation in the proceedings and instead prioritises alleged court efficiency over a defendant's right to a fair trial. We consider the proposals to be problematic for the following reasons.

Concerns

57. First, the measures would significantly impair the ability of defendants to engage in their proceedings. Clause 9 would empower the Magistrates to proceed in the absence of the defendant at the plea stage, and then subsequently determine the trial venue in cases of triable either way offences in the defendant's absence at the allocation hearing, where the defendant does not appear at their hearing without an "*acceptable reason*", for which no definition is provided in the Bill or in the Explanatory Notes.

58. It is therefore difficult to assess how this would operate in practice, where Magistrates would be given a wide discretion to proceed through the plea stage and thereafter

[46] S. 17B Magistrates Courts Act 1980.

allocate the case in the defendant's absence. Indeed, if a defendant has not appeared at either hearing and has not been able to instruct or inform their counsel as to the reasons for their non-appearance, it would be impossible for the Magistrates to know whether an "*acceptable reason*" exists or not. This is particularly problematic as it would allow the magistrates to continue in the defendants' absence where the court is satisfied that notice of the hearing was served, or that the defendant appeared on a previous occasion to answer a charge. Neither scenario would allow a court to infer anything, let alone an acceptable reason, from the absence of the defendant or their legal representative. Indeed, this would instead build in speculation to the process.

59. If the court decides that the defendant's case should be tried in the Magistrates' Court, the defendant will only subsequently be able to elect a jury trial if the court agrees that it would be in the interests of justice to reopen the question of the mode of trial. This would effectively result in the defendant losing their right to a jury trial without their consent. The importance of trial by jury is something the Government recognises, noting that it is a "*quintessentially UK*" right and part of our "*constitutional heritage*".[47] We agree, and consider that a defendant should only lose the right to elect a jury trial if they have expressly waived that right.

60. Moreover, should the Magistrates assume a plea, or allocate the case to a court which is different from the one the defendant wants, it could result in the case returning to the allocation stage. This is because the defendant could make a statutory declaration under the Magistrates Courts Act 1980 stating that they did not know of the summons or the subsequent proceedings. This would result in both being void.[48] This will cause delays and additional expenditure of resources, contrary to the aim of this provision, which is to *"provide the court with an important means of progressing cases which would otherwise stall creating uncertainty and lengthy waiting times".*[49]

61. It is important to note that the Government's amendments expand the scenarios in which the court could proceed in the absence of a defendant's legal representative at both the plea before venue stage and at the allocation stage. This is unacceptable. Plea and allocation decisions can have significant consequences for an individual and their liberty. It is right that every effort be made to ensure that defendants are properly engaged in their proceedings. The Government must not create loopholes which would provide the

[47] Ministry of Justice, 'Human Rights Act Reform: A Modern Bill of Rights', December 2021, p.,3, 61.

[48] S. 14 Magistrates Courts Act 1980.

[49] Judicial Review and Courts Bill, 'Explanatory Notes', 21 July 2021, p.12.

court with powers that can be invoked according to an uncertain test (i.e., a lack of an "*acceptable reason*") to the clear detriment of defendants and due process.

62. Second, the Bill and subsequent amendments could remove the potential for any credit, and/or reduction in sentence, to which the defendant would have been entitled to for pleading guilty. This is because Magistrates would be able to proceed to allocate the case on the basis of an assumption that the individual wishes to plead a not guilty plea.

63. Currently, courts have the power to reduce a sentence if a defendant pleads guilty. A defendant who pleads guilty at the 'first stage of proceedings' (defined as up to and including the allocation hearing), can benefit from a maximum reduction of one-third off the sentence, which would have been imposed if the case had progressed to a trial. It is therefore beneficial to seek engagement from the defendant as to how they would like to plea rather than to make it easier for Magistrates to proceed on the basis of an assumed not guilty plea on the uncertain criterion of an "*unacceptable reason*".

64. Proceeding on the basis of an assumed not guilty play may also result in cases progressing whereas they otherwise may not have as the defendant would have plead guilty. This is counterproductive and may in fact result in cases being disposed of in a less efficient manner. This would therefore represent a significant disadvantage to both defendants and the criminal justice system.

Children

65. Clause 9(4) of the Bill, would also introduce similar procedures for child defendants. It introduces a power for the court to proceed with allocation proceedings in their absence. Children are considered inherently vulnerable. While the Bill recognises the increased vulnerability and additional requirements that children have, it has not specified how their rights will be appropriately safeguarded. We therefore consider that the existing youth justice provisions should apply, and as such children should be removed from the scope of this provision.

66. In sum, we are not convinced that the supposed merits of Clause 9 outweigh the manifest risks, disadvantages, and lack of safeguards detailed above. We have therefore recommended Parliament to remove this Clause in its entirety.

67. Should clause 9 remain in the Bill, we urge Parliamentarians to vote for Amendment 22 to remove children from the scope of this clause.

Amendment 22

Clause 9, page 26, line 1, leave out subsection (5).

Member's Explanatory Statement

This amendment would remove cases involving children and young people from the provisions of Clause 9.

Overarching Risk of Digital Exclusion

68. The measures proposed in this Bill must not lead to greater digital exclusion on the part of court users. The Government rightly recognises the fact that digital exclusion continues to permeate society, and especially for those who enter the criminal justice system. There is, for example, a continued lack of broadband provision in some parts of the country. Only 84% of rural households in the UK have standard broadband availability, compared to 98% of urban households.[50] Studies have also shown significant levels of digital illiteracy that pervade society,[51] especially those from lower socio-economic backgrounds. Indeed, one report noted that in 2019, a striking 22% of the UK's population lack even basic digital skills.[52] This would, therefore, present a significant challenge to access justice where such processes are increasingly facilitated online.

69. The Government claims that this issue will be mitigated through providing *"an assisted digital support service for those defendants who may struggle or would otherwise not be able to use the new online procedures*".[53] A Digital Support service has been piloted by HMCTS in conjunction with Good Things Foundation since 2017. The service includes access to digital assistance in relation to the SJP. Organisations are funded to provide digital assistance only, however, the Administrative Justice Council, [54] PLP[55] and the Good Things Foundation itself, [56] have all highlighted the issue with attempting to

[50] Ofcom, 'Connected Nations 2020 England Report', 17 December 2020, p.4.

[51] H Holmes and G Burgess, University of Cambridge, '"Pay the wi-fi or feed the children"'.

[52]Lloyds Bank, 'UK Consumer Digital Index 2019', p.10.

[53] Judicial Review and Courts Bill, 'Fact Sheet (Courts)', 21 July 2021, p.3.

[54] D. Sechi, *Digitisation and accessing justice in the community,* (Administrative Justice Council, April 2020).

[55] Jo Hynes, *Digital Support for HMCTS Reformed Services: what we know and what we need to know,* May 2021.

[56] Good Things Foundation, *HMCTS Digital Support Service: Implementation Review ,* September 2020, p.16.

separate digital assistance from a broader range of support, in particular legal advice, often required to facilitate access to justice services online.

70. JUSTICE considers that the Digital Support currently places an unreasonable onus on vulnerable defendants to identify their own need for special assistance, and to actively seek it. We have previously highlighted the need to ensure that Digital Support is available to those most in need of it, and that it has sufficient geographic coverage, including in areas where internet access is still difficult.[57] Digital Support must accommodate those who do not have the necessary IT equipment, those with language barriers, those who lack proficiency in IT, and those whose health or other circumstances make it more difficult for them to engage with services in an online context. These issues must be addressed to ensure that the digital assistance is effective and the measures in the Bill do not result in further digital exclusion.

Increased Magistrates' Sentencing Powers and the 'Off Switch'

71. The Government has announced that it intends to increase the maximum custodial sentence that the Magistrates' Court can impose from six to 12 months.[58] The Government has tabled further amendments to the Bill which would introduce an 'off switch' so that the new powers can be removed quickly if needed.[59] The increase is justified on the grounds that they will "*provide vital additional capacity to drive down the backlog of cases in the Crown Courts over the coming years*".[60]

72. JUSTICE is concerned by the proposed increase in sentencing powers, and we doubt their purported efficacy. First, according to the Government, the measures could "*save 1,700 sitting days in Crown Courts by enabling 500 jury trials to be switched to magistrates*".[61] However, this estimate would only represent a saving of only 1.6% according to recent HMCTS estimates.[62] Second, the saving presumes that defendants

[57] JUSTICE, *Preventing Digital Exclusion from Online Justice,* (2018).

[58] Pursuant to paragraph 24, Schedule 22 of the Sentencing Act 2020, upon an order made by the Secretary of State for Justice under section 417 of the same Act.

[59] Amendment NC1.

[60] https://www.gov.uk/government/news/magistrates-courts-given-more-power-to-tackle-backlog

[61] C Hymas, 'Tougher powers for magistrates to jail criminals and clear courts backlog', (The Telegraph), 18 January 2022.

[62] "*Our plans should increase overall Crown Court sitting day capacity. In 2020-21, 67,209 days were sat. We are looking to sit at least 105,000 in 2021-22, subject to social distancing requirements.*" – HMCTS, 'Annual Report and Accounts 2020-21', 15 July 2021, p.23.

will not exercise their right to opt for a jury trial. One of the main reasons for not currently doing so is the lesser sentencing powers of the Magistrates' Courts. Increasing Magistrates' sentencing powers will, in a number of cases, shift the balance when considering this and many cases will end up in the Crown Court in any event. Third, we are concerned by the lack of appropriate training available to magistrates that would be commensurate with such serious sentencing powers. The Government has admitted that the proposals will need to be accompanied by the necessary training,[63] they should be confident that proceedings will take place in a fair and professional manner before announcing the imposition of new powers.

73. Moreover, when viewing the proposal in the context the New Allocation Procedure, there is a risk that more serious cases could proceed without defendants being physically present for a hearing, and as such without their considered and well-informed input as to where it should be heard (i.e., Magistrates' or Crown Court). As noted above, a network of informal assistance is available to people who physically attend a court, which can help to explain relevant procedure and guide defendants towards legal assistance where necessary - from the usher to the justice's clerk, to the barrister waiting for their case to be called to the magistrate that the case appears before.

74. The lack of clarification on the face of the Bill as to defendants' access to informal guidance, as well as access to legal advice heightens our concerns and the risk of inappropriate decisions being made. Likewise, clause 9 would allow hearings to take place in the absence of the defendant in a great range of circumstances. Given the proposed expansion of magistrates' sentencing powers, it is all the more important that defendants are engaged at every step of the process and that hearings are not expedited to the detriment of the defendant.

75. Given these reasons, it is not surprising that no Government has attempted to increase magistrates' powers since the proposal was first mooted almost twenty years ago.[64] Indeed, the fact that the Government intends to introduce an 'off switch' into the Bill to halt them on an emergency basis suggests that they too are not confident that the measures will operate consistently in a smooth, effective, and lawful manner. Given the obvious limited benefit, and the heightened risk of potential miscarriages of justice, we

[63] "Proper training will need to be completed by magistrates before this change can come into effect. This will be provided by the Judicial College." - https://www.gov.uk/government/news/magistrates-courts-given-more-power-to-tackle-backlog

[64] Section 154 of the Criminal Justice Act 2003 (replaced by the Sentencing Act 2020).

consider that it would be prudent to pause any attempt at increasing magistrates' sentencing powers at this time.

JUSTICE

24 January 2022