



Judicial Review and Courts Bill
(Part 2, Chapter 1 – Criminal Procedure)

House of Lords

Committee 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 three separate briefings on different elements of the Judicial Review and Courts Bill (the "**Bill**") ahead of the Committee Stage in the House of Lords.¹ This briefing addresses Part 2 of the Bill, which relates to the provisions concerning criminal procedure. 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) **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 the mode of trial (allocation hearings) for either-way offences and sending cases to the Crown Court to be dealt with in writing; and
 - (c) **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.²
 - (d) **Clause 13**: the Government has announced that it intends to increase the maximum custodial sentence that the Magistrates' Court can impose from six to 12 months. Clause 13 would introduce an 'off switch' so that the new powers can be removed quickly if needed.

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

² Clause 9, new s. 24BA, Judicial Review and Courts Bill.

Clause 3 - Automatic Online Conviction and Standard Statutory Penalty Procedure

3. 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.³ 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*”.⁴ 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.

Concerns with the AOCSSP procedure

4. 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.
 - (a) It is based on the Single Justice Procedure (“**SJP**”), which is damaging for several reasons, including poor response rate (estimates of 71% of people do not respond to letters), discriminatory impact on women, socio-economically disadvantaged individuals, and those with mental health/neurodivergent conditions.
 - (b) There is no evidence base to justify its introduction, or explain how the issues mentioned above would not simply translate across.
 - (c) There are weak to no safeguards to prevent miscarriages of justice. The AOCSSP procedure is automated, with no human oversight by a judge.
 - (d) It would incentivise pleading guilty, by making it seem simple and straightforward, especially where the consequences of a criminal record are not fully appreciated by the individual.

³ Examples include offences involving motor vehicles, minor criminal damage, and being drunk and disorderly in a public place.

⁴ Judicial Review and Courts Bill, ‘[Explanatory Notes](#)’, 21 July 2021, p.13.

- (e) It presents a binary choice of guilty or not guilty with no opportunity to offer mitigating circumstances.
 - (f) Although it will apply originally to three non-recordable offences there is no guarantee that it would not be expanded to recordable offences. The consequences of having a criminal record can be severe impacting employment and educational opportunities, travel and insurance.
 - (g) 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.⁵
5. We are not convinced that sufficient safeguards exist to mitigate against these issues. For this reason, **we recommend that Peers vote in favour of removing clause 3 from the Bill entirely.**
6. **In the alternative, we would encourage Peers to vote in favour of the following safeguards.**

Restricting the types of offences

Amendment 28

Page 5, line 37, at end insert "and

(b) it is not a recordable offence, as specified in the Schedule to the National Police Records (Recordable Offences) Regulations 2000 (S.I. 2000/1139)."

Member's explanatory statement

This amendment would exclude any offences which are recordable from the automatic online conviction option.

7. **JUSTICE recommends that Peers amend the Bill to ensure that the AOCSSP 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

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

impact parents,⁶ pub-goers and owners,⁷ and those taking part in processions and assemblies, which would include activities such as vigils, community events, and demonstrations.⁸

Safeguards to ensure defendants understand the consequences of pleading guilty

8. 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.
9. We therefore recommend that greater safeguards should be put in place to ensure that defendants have fully 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. We also call 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

Page 5, line 18, at the end insert-

“(5) Before this section may be commenced, the Secretary of State must publish statutory guidance which sets out how prosecutors should provide

⁶ 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).

⁷ 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).

⁸ 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](#).

and explain to defendants any information contained within the required documents in an accessible way.”

Member’s Explanatory Statement

This amendment is intended to clarify how prosecutors will ensure that defendants fully understand the information provided to them.

Amendment

Page 6, line 8, at the end insert-

“(d) a document in clear and accessible language which

(i) explains the consequences of agreeing to an automatic online conviction and penalty; and

(ii) directs the accused to legal advice and information.”

Member’s Explanatory Statement

This amendment would include further information about the consequences of engaging with the automatic online conviction process and a signpost to legal advice within the required documents that are sent to the defendant.

Safeguards for vulnerable individuals

10. 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. 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. **JUSTICE therefore recommends that the Bill make it incumbent on prosecutors to consider the appropriateness of the procedure for defendants, taking into account any potential vulnerabilities.**

Amendment 26

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.

Ensuring the AOCSSP procedure is well evidenced

11. **JUSTICE recommends that Parliament 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 24

Page 4, line 28, at end insert—

“(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.”

Member’s explanatory statement

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

Amendment 25

Page 5, line 10, at end insert—

“(3A) If, within a reasonable period of time, a person to whom subsection (3) applies denies making such a notification, the court must not treat the purported notification as effective without determining that it came from them.”

Member's explanatory statement

This amendment is to probe the safeguards against fraud in the operation of acceptance of an automatic online conviction.

Amendment 30

Insert the following new 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 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,

(b) the suitability of the use of the single justice procedure for Covid-19 offences,

(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.”

Clause 6 and 8 - The New Allocation Procedure

12. 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. Key concerns include:

(a) Children should not be included in this provision, given the need to afford them with additional protections and safeguards to reflect their inherently vulnerable nature and well-evidenced propensity to plead guilty notwithstanding the evidence or potential defences.

(b) The Government states that for both children and adults, online plea decisions would necessarily be made through a lawyer due to the need to use the Common Platform. However, this is not clear on the face of the Bill.

Legal Representation

13. JUSTICE considers that defendants must have the opportunity to receive legal advice and assistance prior to indicating a plea or trial venue. 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,⁹ 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*”.¹⁰ However, the Bill itself does not provide any such guarantees of access to legal advice – this should be set out in primary legislation. **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.**

Amendment 31

Page 11, line 13, at end insert—

“and has received the advice of a legal representative prior to submitting a plea.”

Amendment 32

Page 11, line 13, at end insert—

“and the court has been provided with a physical and mental health assessment of the accused confirming that the written procedure will not impede the ability of the accused to understand or effectively participate in proceedings.”

Amendment 33

Page 11, line 32, after “plea” insert “and consequences of pleading guilty”

⁹ 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.

¹⁰ Judicial Review and Courts Bill, ‘[Fact Sheet \(Courts\)](#)’, 21 July 2021, p.3.

Member's explanatory statement

The amendment would ensure that an accused person is not only informed about the consequences of giving or failing to give a written indication of plea, but also the potential legal and practical consequences of pleading guilty.

Children

14. 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.¹¹
15. 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.**

Amendment

Clause 8 to not stand part.

Member's Explanatory Statement

This amendment would remove the written procedure for children for indicating plea and determining mode of trial, from the Bill.

Amendment

Clause 13 to not stand part.

Member's Explanatory Statement

This amendment is consequential to the above amendment and would remove the involvement of a parent or guardian in proceedings conducted in writing, from the Bill.

¹¹ 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

16. At present, a defendant is ordinarily required to be present for both the plea before venue hearing and the allocation hearing. However, in both scenarios there are two circumstances where the court can proceed in the defendant's absence: (1) where a legal representative is present, and the defendant's conduct is disorderly so as to make it not practical to proceed in their presence; and (2) where the defendant gives consent via their legal representative.

17. The Bill 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. This includes where no legal representative is present, so long as the court considers there is no "acceptable reason" for the defendant's absence. Similar provisions exist for children. Key concerns include:

- (a) The measures would significantly impair the ability of defendants to engage in their proceedings.
- (b) It will normally be impossible for the Magistrates to know whether an "acceptable reason" exists or not, given their, and their legal representative's absence.
- (c) The court will assume a not-guilty plea. This could result in the defendant losing credit for pleading guilty if that is what they would have wished to do.
- (d) If the court decides to proceed in the magistrates (rather than Crown Court), then the defendant's right to a jury trial could be compromised.
- (e) The measure may in fact cause further delays, since defendants 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. 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".
- (f) The reforms are inappropriate for children, given their inherent vulnerability and need for a tailored approach to safeguard their rights.

18. 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.** Should clause 9 remain in the Bill, we urge Parliamentarians to include a sunset clause on the provision, as well as remove children from the scope of this clause.

Amendment 35

Insert the following new Clause—

“Expiry of sections 6 to 9

(1) Sections 6 to 9 expire at the end of the period of two years beginning with the day on which this Act is passed, subject to subsection (2).

(2) Sections 6 to 9 continue to have effect if, before the end of the period mentioned in subsection (1), each House of Parliament passes a resolution that they should not expire.”

Amendment 34

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.

Clause 13 - Increased Magistrates’ Sentencing Powers and the ‘Off Switch’

19. The Government has announced that it intends to increase the maximum custodial sentence that the Magistrates’ Court can impose from six to 12 months.¹² At the Common’s Report Stage, the Government tabled further amendments to the Bill to introduce an ‘off switch’ so that the new powers can be removed quickly if needed. This measure is now at clause 13. The increase is justified on the grounds that the powers

¹² 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.

will “provide vital additional capacity to drive down the backlog of cases in the Crown Courts over the coming years”.¹³

20. JUSTICE is concerned by the proposed increase in sentencing powers, and we doubt their purported efficacy for the following reasons.

(a) 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”.¹⁴ However, this estimate would represent a saving of only 1.6% according to recent HMCTS estimates.¹⁵

(b) Second, the saving presumes that defendants 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.

(c) 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,¹⁶ they should be confident that proceedings will take place in a fair and professional manner before announcing the imposition of new powers.

21. 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.¹⁷ 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. In light of

¹³ <https://www.gov.uk/government/news/magistrates-courts-given-more-power-to-tackle-backlog>

¹⁴ C Hymas, ‘[Tougher powers for magistrates to jail criminals and clear courts backlog](#)’, (The Telegraph), 18 January 2022.

¹⁵ “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.

¹⁶ “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>

¹⁷ Section 154 of the Criminal Justice Act 2003 (replaced by the Sentencing Act 2020).

the obvious limited benefit, and the heightened risk of potential miscarriages of justice, we consider that it would be prudent to pause any attempt at increasing magistrates' sentencing powers at this time.

Amendment 36

Leave out Clause 13 and insert the following new Clause—

“Commencement of Schedule 22 of the Sentencing Act 2020: repeal

(1) In Part 5 (custodial sentences) of Schedule 22 of the Sentencing Act 2020, omit paragraph 24 (increase in magistrates' court's power to impose imprisonment).

(2) Any regulation made pursuant to section 417 of the Sentencing Act 2020 (commencement of Schedule 22) which brings into force paragraph 24 of Schedule 22 of the same Act is revoked.”

Member's explanatory statement

This amendment would remove the provisions that allow the Secretary of State to vary magistrates' sentencing powers, and revoke any order made under section 417 of the Sentencing Act 2020 which brings into force paragraph 24 of Schedule 22 of that Act.

22. In the alternative, should the increase in magistrates' sentencing powers proceed, we recommend the following safeguards, including ensuring that the use of the powers is reviewed on a regular basis and their ongoing use is authorised by Parliament.

Amendment

Insert the following new clause -

"Commencement of Schedule 22 of the Sentencing Act 2020: reduction of sentences on revocation or expiration

(1) If the Secretary of State –

- a. makes a regulation pursuant to section 13 (Maximum term of imprisonment on summary conviction for either-way offence) of this Act, or
- b. revokes, or otherwise permits to expire, any regulation made pursuant to section 417 of the Sentencing Act 2020

(commencement of Schedule 22) which brings into force paragraph 24 of Schedule 22 of the same Act,

then any offender who continues to serve a sentence of more than six months imposed by a magistrates' court must have their sentence reduced to no more than would have been available prior to the coming into force of such regulation made pursuant to section 417 of the Sentencing Act 2020 (commencement of Schedule 22) which brings into force paragraph 24 of Schedule 22 of the same Act.

(2) The Secretary of State must make regulations to give effect to subsection (1) above by statutory instrument. Such regulations are subject to the negative resolution procedure."

Members' Explanatory Statement

This amendment would ensure that individuals serving sentences imposed under the new increased magistrates' sentencing powers would have their sentences reduced if such powers are revoked or expire.

Amendment

Insert the following new Clause -

"Commencement of Schedule 22 of the Sentencing Act 2020: expiry

(1) Any regulation made pursuant to section 417 of the Sentencing Act 2020 (commencement of Schedule 22) which brings into force paragraph 24 of Schedule 22 of the same Act –

- a. must expire after a period of four months beginning on the day on which such regulation was either brought into force or renewed pursuant to subsection (1)(b); or
- b. may only continue to have effect if, before the end of the period mentioned in subsection (1)(a), each House of Parliament passes a resolution that such regulation should not expire."

Members' Explanatory Statement

This amendment would ensure that the new increased magistrates' sentencing powers are subject to a sunset clause, requiring parliamentary approval for renewal every four months.

Amendment

Insert the following new Clause -

"Commencement of Schedule 22 of the Sentencing Act 2020: reporting

(1) The Secretary of State must lay before both Houses of Parliament a report every four months regarding the operation of the increased sentencing powers afforded to magistrates pursuant to any regulation made pursuant to section 417 of the Sentencing Act 2020 (commencement of Schedule 22) which brings into force paragraph 24 of Schedule 22 of the same Act, so long as such regulation has effect. The report must contain:

- a. data on the use of such increased sentencing powers in magistrates' courts and their impact on sentencing outcomes; and
- b. a breakdown of sentencing outcomes for those with protected characteristics."

Members' Explanatory Statement

This amendment would ensure that the new increased magistrates' sentencing powers would be subject to regular reporting on their impact, including with respect to those with protected characteristics, every four months.

JUSTICE

21st February 2022