



**JUDICIAL REVIEW AND COURTS BILL  
FAIR TRIALS BRIEFING FOR 2ND READING IN THE HOUSE OF COMMONS  
AUTOMATIC ONLINE CONVICTION AND WRITTEN PROCEDURE FOR INDICATING  
PLEA**

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## ABOUT FAIR TRIALS

Fair Trials is an international human rights NGO that campaigns for fair and equal criminal justice systems. Fair Trials' team of experts expose threats to justice and identify practical changes to fix them. The organisation produces original research, campaigns to change laws, supports strategic litigation, reforms policy and develops international standards and best practice. Fair Trials supports movements for reform and builds partnerships with lawyers, activists, academics and other NGOs. It is the only international NGO that campaigns exclusively on the right to a fair trial, providing a comparative perspective on how to tackle failings within criminal justice systems globally.

### 1. INTRODUCTION

1.1 This briefing focusses on the Judicial Review and Courts Bill (hereafter "the Bill"), and the challenges posed to fair trial rights by the proposed expansion of digitalising the court estate which, as currently drafted, would expand the use of trial waiver systems including (1) online plea bargaining vis-à-vis a new automated conviction system and (2) the expansion of written postal procedures for indicating pleas in lieu of in-person hearings.<sup>1</sup>

1.2 The primary policy objective of this Bill is efficiency; to deliver swifter criminal justice, improve administration and case management in criminal courts, and provide alternative ways for people to engage with criminal courts processes in order to increase efficiency and accessibility in the criminal courts in England and Wales. According to the Government, the purpose of these changes is to result in time savings for the court and its users, a reduction in delays, greater flexibility for the effective deployment of court resources, and support for the system's recovery in the wake of the pandemic.<sup>2</sup>

1.3 The Ministry of Justice's (MoJ) Impact Assessment for the Bill refers to two "notable reviews" – Sir Robin Auld's 'Review of the Criminal Courts (2001)' and Sir Brian Leveson's 'Review of Efficiency in Criminal Proceedings (2015)' – which concern "*the functionality of the criminal*

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<sup>1</sup> The Explanatory Notes also explain that the Bill introduces "measures will also complement new criminal court measures that feature in the Police, Crime, Sentencing, and Courts Bill ("the PCSC Bill") (which enable greater use of audio and video technology in criminal proceedings where appropriate)". It is somewhat worrying that the Bill aims to complement the PCSC Bill; Fair Trials, Transform Justice and Just for Kids Law have recently outlined the fundamental rights concerns of the proposed expansion of remote proceedings set out in the PCSC Bill as currently drafted.

<sup>2</sup> Ministry of Justice, '[Judicial Review and Courts Bill: Increasing efficiency and accessibility in the criminal courts](#)' (June 2021)

*court system in England and Wales” which “have identified a number of legislative procedures and structures that are more inflexible and bureaucratic than is thought to be necessary; and that also fail to take advantage of new and emerging technologies”.*<sup>3</sup>

1.4 We recognise that inefficiencies and delays can seriously undermine the effectiveness of criminal justice systems, and we welcome the fact that the Government recognises the urgent need to address serious challenges regarding court capacity in England and Wales, and the backlog of criminal cases, which has put an enormous strain on the criminal justice system in recent years. We also recognise that technological developments have the potential to improve criminal justice systems, and that they could help to make them more effective and efficient, where they are applied appropriately with due regard for the rights of defendants.

1.5 The drive for increased efficiency in criminal justice proceedings, however, often puts human rights at risk, and Fair Trials believes that this Bill prioritises cost-savings and convenience far above fair trial rights. Rather than protecting the rights of defendants and enhancing their ability to participate in their legal proceedings, the Bill seeks to exclude them from the courts as much as possible, viewing the physical presence of defendants in court as drain on time and resources, rather than an essential aspect of a fair and equal criminal justice system. Further, the Bill trivialises criminal proceedings as standardised, administrative matters, incentivising people to conveniently sign away their rights, or even to be convicted and sentenced by a computer programme.

1.6 Defendants’ rights, and in particular, their fair trial rights, should always be central to criminal justice laws. The impact on human rights and access to justice should always be a primary concern that outweighs the interests of costs, and convenience for any measure the Government wishes to adopt to improve efficiency.

## **2. AUTOMATIC ONLINE CONVICTION AND PENALTY (PART 2, CHAPTER 1, CLAUSE 3)**

2.1 The Bill introduces a new procedure, to be known as the ‘Automatic Online Conviction and Standard Statutory Penalty’ (‘AOCSSP’) procedure in Clause 3 for certain summary-only, non-imprisonable offences that will make it possible for these cases to be handled entirely online and without any court involvement. Under this provision, defendants can enter their pleas

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<sup>3</sup> <https://publications.parliament.uk/pa/bills/cbill/58-02/0152/CriminalmeasuresImpactAssessmentsigned.pdf>

online, and be convicted and sentenced automatically, via the new 'Common Platform', a unified online platform for digital case management in criminal proceedings.<sup>4</sup> The automatic online conviction option<sup>5</sup> and penalty for certain summary offences<sup>6</sup> allows a person to accept the online conviction option and indicate their plea electronically;<sup>7</sup> if they plead guilty to the offence, they agree to be convicted and penalised.<sup>8</sup>

2.2 The Government aims to modernise and upgrade the criminal justice system,<sup>9</sup> by “*digitising and streamlining preliminary pre-trial court proceedings*” via the new Common Platform, which involves removing courtroom hearings. The Government claims that this “*will make the criminal courts more easily accessible to users*” and provide “*greater flexibility*” for the “*effective deployment of its resources; saving court time, reducing “delays” and “waiting times”, “unnecessary travel for court participants”, delivering swifter justice, and supporting recovery*”.<sup>10</sup>

2.3 However the efficiency and cost savings promised by the AOCSSP come at a cost to the rights of defendants. It eliminates human agency in the decision-making process that is central to a fair and effective criminal justice system and downplays the implications of criminal convictions; it incentivises, or even pressures defendants to plead guilty to offences they have not committed; and there are little to no safeguards to ensure that plea decisions are made knowingly and voluntarily.

## 2.4 Automation and trivialisation of criminal justice proceedings

2.4.1 The AOCSSP represents fundamental shift in the way we conceive of, and deliver, justice. Imposing an automated fine for offences completely removes any human consideration

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<sup>4</sup> Explanatory Notes, Para 35

<sup>5</sup> Part 2, Chapter 1, Clause 3, Section 16G(1)

<sup>6</sup> Part 2, Chapter 1, Clause 3, section 16G; Clause 3 inserts new sections 16G to 16M into the Magistrates' Courts Act 1980 (“MGA 1980”) to provide for the new automatic online conviction and standard statutory penalty process; Explanatory Notes, Para 109

<sup>7</sup> Part 2, Chapter 1, Clause 3, Section 16G(4); This section provides that an offer or acceptance of the automatic online conviction option by electronic notification means a written notification by electronic means, in accordance with the Criminal Procedure Rules (Explanatory Notes, Para 110).

<sup>8</sup> Part 2, Chapter 1, Clause 3, Section 16G(2)

<sup>9</sup> The measures in this Bill aim to help the Government realise the vision for the criminal courts that was described in the 2016 Government consultation paper titled ‘[Transforming our justice system: assisted digital strategy, automatic online conviction and statutory standard penalty, and panel composition in tribunals](#) [Government response](#)’ (2017); Explanatory Notes, Para 30

<sup>10</sup> Explanatory Notes, Paras 31-32

or tailored approach to criminal justice, and it downplays both the gravity of both the criminal proceedings themselves and the far-reaching implications of criminal convictions.

2.4.2 Human decision-making is a fundamental aspect of fair and effective criminal justice process that is usually taken for granted. Irrespective of the severity of the offence, the seriousness of being put through criminal proceedings as a defendant, and of becoming a ‘criminal’ cannot be downplayed as a trivial matter that can be relegated to a computer programme. Further human, and in particular judicial oversight, is the only means by which fairness, lawfulness, and proportionality in criminal justice proceedings can be guaranteed.

2.4.3 Although not made explicit, it is apparent that the Government’s justification for removing any human involvement under the AOCSSP is that it will apply only to minor offences where the defendant faces no risk of imprisonment. The only explicit references to specific offences that will be dealt by the AOCSSP are ‘travelling on a train or tram without a ticket’ and ‘fishing with an unlicensed rod’.<sup>11</sup> These types of cases may sound trivial and ‘straightforward’, but the range of summary-only, non-imprisonable offences that could potentially be subject to the AOCSSP (subject to Parliamentary approval) is much broader, and those that are much more serious. These include offences regarding the sale of alcohol to children under the Licensing Act,<sup>12</sup> and a range of football offences, including the use of missiles and the chanting of racist language.<sup>13</sup>

2.4.4 The absence of the risk of imprisonment should not, on its own, be a justification for reducing criminal justice processes. Criminal convictions, even for minor offences (other than certain types of traffic offences), can have far-reaching and very serious implications on people’s lives and opportunities. The existence of a criminal record can, for example, seriously undermine someone’s chances of finding employment, especially in certain sectors and professions (including nursing, social care, child-minding and teaching), accessing educational and training opportunities, obtaining certain types of insurance, or the ability to travel to certain countries. For those who are non-UK citizens, criminal records can affect the right to remain in the country. Research by the Ministry of Justice and the Department of Work and Pensions has found that one-third of applications for

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<sup>11</sup> Explanatory Notes, para. 42

<sup>12</sup> Licensing Act 2003, ss. 146 and 147

<sup>13</sup> Football Offences Act 1991, ss. 2 and 3

jobseekers' allowance had been made by people convicted of crimes,<sup>14</sup> showing that there is a strong link between a criminal conviction and the risk of poverty.

2.4.5 We would also highlight that the existence of previous convictions often has a material impact on future criminal justice decisions. It could, for example, mean the difference between bail and remand custody, be used to discredit the credibility of witnesses, or play a role in determining the length or severity of the sentence.

2.4.6 The Government pointed out that many of these cases are already handled through the Single Justice Procedure ('SJP'), where cases are dealt with 'on papers', without the need for defendants to appear in person.<sup>15</sup> Whereas the SJP is a judicial process, where decisions are made by a magistrate, albeit behind closed doors, the AOCSSP is completely automated, with no human oversight whatsoever in the decision-making process until after the defendant has been sentenced. However, there are serious concerns about the fairness of the SJP as well, and the impact that it can have on individuals. Fair Trials has recently found that hundreds of people were wrongly charged and prosecuted under the Health Protection Regulations and the Coronavirus Act 2020, via the SJP, and many of these charges went unchallenged. These charges and prosecutions are being brought without sufficient oversight, without any meaningful review process, and are resulting in guilty pleas and convictions for offences people have not committed, in a confusing process, which many may not have been aware of.

## 2.5 Incentivising guilty pleas

2.5.1 The Bill provides that defendants can be convicted and sentenced online via the AOCSSP only if they have pleaded guilty to the charges against them,<sup>16</sup> which itself can be done electronically, presumably via the same Common Platform.<sup>17</sup> This creates a remarkably quick and convenient way of pleading guilty to criminal offences, seemingly at the click of a button. The AOCSSP risks incentivising individuals to plead guilty to offences they may not have committed, and it does not have sufficient safeguards to ensure that guilty pleas are made on an informed basis.

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<sup>14</sup> Ministry of Justice and the Department for Work and Pensions, 'Offending, employment and benefits – emerging findings from the data linkage project' (November 2011)

<sup>15</sup> Explanatory Notes, para. 41

<sup>16</sup> Clause 16G (2)

<sup>17</sup> Clause 16G (4)

- 2.5.2 It is a common misconception that only people who are in fact guilty of a crime would plead guilty, because in reality, defendants are known to plead guilty for a variety of different reasons. First, it is central to the design of most plea-bargaining, or ‘trial waiver’ systems that defendants are rewarded for their guilty pleas with sentence or charge reductions. This alone is known to incentivise innocent people to plead guilty, particularly where there is an especially significant sentence reduction offered – something that is very potently evidenced by the proportion of individuals exonerated by DNA evidence in the United States that originally pleaded guilty.<sup>18</sup>
- 2.5.3 Research has also shown that guilty pleas are also motivated the desire to avoid the time and costs (including costs for legal assistance) associated with a trial.<sup>19</sup> Criminal cases where defendants plead guilty are resolved at a fraction of the time it takes for trials to take place,<sup>20</sup> and the median wait between the offence being reported and the completion of the case is over 160 days – a figure that has risen steadily in the past decade.<sup>21</sup> Lengthy waits for trials are likely to continue to be a long term challenge for the criminal justice system that might worsen in the coming years, given the recent increase in the backlog of cases, which currently stands at over 360,000 cases in the magistrates’ courts.<sup>22</sup>
- 2.5.4 These circumstances make the possibility of pleading guilty online, and being sentenced instantaneously an especially attractive option for many defendants. This will be the case especially for those whose socio-economic circumstances makes it difficult for them to find time off work, and to hire a lawyer to defend them at trial.
- 2.5.5 The primary objective of criminal justice proceedings is to convict the guilty, and to acquit the innocent through a fair process. While this does not preclude defendants from admitting their guilt, inducing defendants to plead guilty, irrespective of the factual matter of guilt or innocence, runs directly counter to the very purpose of the criminal

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<sup>18</sup> Innocence Project, DNA Exonerations in the United States, <https://innocenceproject.org/dna-exonerations-in-the-united-states/>

<sup>19</sup> Rebecca Helm, ‘Constrained Waiver of Trial Rights? Incentives to Plead Guilty and the Right to a Fair Trial’, *Journal of Law and Society*, Vol 46, Issue 3, 423

<sup>20</sup> Ibid.

<sup>21</sup> Georgina Sturge, ‘Court Statistics for England and Wales’, Briefing Paper No. CBP 8372 (22 Dec 2020)

<sup>22</sup> National Statistics, ‘Criminal court statistics quarterly: April to June 2021 (30 Sep 2021)

justice system, and it has the potential to worsen socio-economic disparities in criminal justice outcomes.

## 2.6 Insufficient safeguards

- 2.6.1 Despite further incentivising defendants to plead guilty, the Bill does little to ensure that plea decisions are made knowingly and voluntarily in the absence of any judicial oversight. The ECtHR has stated that one of the safeguards necessary to ensure compliance of trial waivers with the right to a fair trial is that “*the bargain had to be accepted...in full awareness of the facts of the case and the legal consequences and in a genuinely voluntary manner*”.<sup>23</sup>
- 2.6.2 While in theory, this requirement could be satisfied by the procedure if defendants have in fact understood the consequences of their plea and entered into the procedure voluntarily, the Bill does not contain adequate provisions to ensure that this is the case. There is, for example, no explicit mention of the need for defendants to be informed of their rights and the wide range of implications pleading guilty – and if such information has been provided, there is no way of ensuring that it has been sufficiently understood. the absence of effective judicial review means that the voluntariness and understanding of a defendant cannot be adequately assessed.
- 2.6.3 The Government is no doubt alert to this challenge, which is why in its Fact Sheet,<sup>24</sup> it has emphasised that the Common Platform is only accessible to lawyers, which effectively bars defendants from pleading guilty online without the assistance of a lawyer. However, there is nothing in the wording of the Bill that makes this explicit. It is only the *de facto* practical barrier of the Common Platform that may prevent certain categories of unrepresented defendants indicating their plea and accepting their sentences via the AOCSSP.
- 2.6.4 Further, it must be highlighted that the mere fact that a lawyer is in the loop where a plea decision is made is not an absolute guarantee of fairness. The assumption that a guilty plea is necessarily made knowingly on the basis that the defendant is assisted by a lawyer

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<sup>23</sup> *Natsvlishvili and Togonidze v. Georgia* App. no. 9043/05 (Apr. 29, 2014) paras 91-92

<sup>24</sup> Judicial Review and Courts Bill Fact Sheet (Courts), p. 3

has recently been criticised by the European Court on Human Rights,<sup>25</sup> especially with regard to vulnerable defendants.

## 2.7 Appeals

2.7.1 The Bill not only incentivises defendants to plead guilty online, but it also makes it unduly difficult for defendants to access courts subsequently to set aside the conviction or to challenge their sentence. The Bill sets out that a magistrates' court has the power to set aside a conviction<sup>26</sup> or replace a penalty imposed on a person, if it appears to the court that the conviction is unjust,<sup>27</sup> and that this can be considered on the papers by a single justice.<sup>28</sup>

2.7.2 We are concerned that, only it is only in limited circumstances, such as where a magistrates' court (composed of a single justice) refuses to set aside a conviction, that the decision referred to a full magistrates' court. And it is only in these cases that the matter is considered at a hearing and the defendant/ prosecutor can make their representations in-person.<sup>29</sup> As stated above, it is a basic human right for defendants to have access to courts, but the Bill imposes significant barriers that prevent this.

## 3. PLEADING GUILTY IN WRITING BY POST (PART 2, CHAPTER 1, CLAUSE 4)

3.1 Clause 4 introduces changes to Section 12 of the Magistrates' court Act ('MCA') that will expand prosecutors' powers to give defendants aged 16 years and over to plead guilty by post to summary-only offences.<sup>30</sup> This provision ignores existing flaws in existing written procedures for indicating pleas, it downplays the importance of in-person hearings in fair

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<sup>25</sup> *VCL and AN v. United Kingdom*, Apps Nos. 77587/12 and 73603/1, paras. 195-200

<sup>26</sup> Part 2, Chapter 1, Clause 3, Sections 16M

<sup>27</sup> Part 2, Chapter 1, Clause 3, Sections 16M(1)

<sup>28</sup> Part 2, Chapter 1, Clause 3, Sections 16M(3)

<sup>29</sup> Part 2, Chapter 1, Clause 3, Section 16M(4); Explanatory Notes, Para 123

<sup>30</sup> Section 12 of the Magistrates' court Act ('MCA') 1980 currently sets out the procedure that is commonly known as 'pleading guilty by post' which enables prosecutors to provide a defendant who is prosecuted for a summary-only offence and is aged 16 years and over (or under 16 years when jointly charged with an adult) with the option to indicate a guilty plea in writing and opt that a magistrates' court may proceed to try, convict, and sentence them at a court hearing in their absence, without the need for the defendant or other parties in the case to make a court appearance at any stage of the proceedings.<sup>30</sup> This procedure can only be applied to the prosecution of summary-only offences that have been initiated against a defendant in writing by a postal requisition or summons away from a police station.

and effective criminal proceedings, and it lacks proper safeguards to ensure that defendants make well-informed choices regarding crucial decisions in their cases, including their pleas.

- 3.2 **Existing written procedures are not fit for purpose:** Recent statistics show that pleading guilty by post is not fit for purpose, and flaws in current written procedures have even led to people being convicted either without their knowledge or engagement. For example, 71% of those who receive a SJP notice letter in the post do not respond.<sup>31</sup> In the case of offences prosecuted under Coronavirus-related offences, the most recent statistics show this figure rising to 90%.<sup>32</sup>
- 3.3 **Hearings and sentencing in the defendant's absence:** We are concerned that Clause 4(5) the magistrates' court powers to proceed to try, convict, and sentence a defendant who has opted to proceed with the pleading guilty by post procedure after being charged and bailed from a police station at a court hearing *in their absence*.<sup>33</sup> Clause 4(6) gives a magistrates' court the power to discharge a defendant from their duty to surrender to the custody of the court where they have opted to proceed with the pleading guilty by post procedure having been charged and bailed from a police station. A defendant's right to take part in person in their own criminal proceedings is an essential fair trial right,<sup>34</sup> and the act of waiving this right should not be viewed as a simple administrative matter.
- 3.4 **Insufficient safeguards:** The Government's proposals give no acknowledgment of a defendant's need for or access to assisted support, in terms of written literacy and use of postal services. The expansion of plea by post therefore relies on a defendant's ability to seek available and adequate support, including legal assistance, and in the absence of adequate safeguards to verify that the defendant has understood their rights and the possible implications of their choices, there is a worrying risk that they will be waiving their rights unknowingly.

#### 4. VULNERABLE DEFENDANTS

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<sup>31</sup> See PQ 143756, <https://questions-statements.parliament.uk/written-questions/detail/2021-01-26/143756> - data directly available here: <https://drive.google.com/file/d/1r1owWjhJ4suAF-hrPEOM4VVT5inXIesk/view>

<sup>32</sup> Ibid.

<sup>33</sup> Part 2, Chapter 1, Clause 4, Section 5 amends Section 12(5) of the MCA 1980; Explanatory Notes, Para 131

<sup>34</sup> ECtHR, *Hermi v. Italy*, App. No. 18114/02, paras. 58-59

- 4.1 The expansion written proceedings and online systems in criminal justice proceedings poses significant risks to neuro-diverse people, and people with mental health conditions or cognitive impairments.<sup>35</sup> Many of these defendants already face serious disadvantages that affect their ability to participate effectively in legal proceedings, which will be worsened where there are reduced opportunities for in-person, physical interactions with the court.
- 4.2 The Equality and Human Rights Commission (EHRC) has stated that remote justice is unsuitable for disabled people, such as those with learning difficulties, cognitive impairments or mental health conditions.<sup>36</sup> It noted that such proceedings lead to a loss or reduction of *“opportunities to identify impairments and make adjustments”*. The EHRC were also concerned that the emergency use of remote justice may *“place protected groups at further disadvantage and deepen entrenched inequality.”*<sup>37</sup>
- 4.3 Echoing these concerns, a recent Criminal Justice Joint Inspectorate (HM Inspectorates of Prisons, Probation, Constabulary and Fire & Rescue) report emphasised the need for default screening of all criminal suspects and defendants for disability, including neuro-disability.<sup>38</sup> This proposal was supported by the former Lord Chancellor, who in July 2021 stated that *“screening is absolutely essential if we’re really going to get to the heart of the needs of those who come into contact with the criminal justice system”* and that *“it’s an ineluctable truth [that] the number of people in the system with that type of need is disproportionately higher*

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<sup>35</sup> According to [Home Office-commissioned research by the National Appropriate Adult Network](#), 22% of suspects in police custody are mentally vulnerable but only 6.2% are identified and recorded as such by the police, indicating that the current screening process for vulnerabilities in police custody is inadequate.

<sup>36</sup> Equality and Human Rights Commission, ‘Inclusive justice: a system designed for all: Interim evidence report’, April 2020. [https://www.equalityhumanrights.com/sites/default/files/inclusive\\_justice\\_a\\_system\\_designed\\_for\\_all\\_interim\\_report\\_0.pdf](https://www.equalityhumanrights.com/sites/default/files/inclusive_justice_a_system_designed_for_all_interim_report_0.pdf)

The EHRC conducted a survey which showed that many criminal justice professionals viewed it as part of their role to help recognise and / or identify whether a defendant or accused person has any impairments. The majority of their responses stated that impairments sometimes get missed. The reasons for this include a lack of awareness or understanding about impairments; no processes in place to flag identification (particularly for minor offences being dealt with using the single justice procedure in England and Wales) and a lack of accountability as a result of professionals sharing responsibility. In England and Wales, 97 out of 132 respondents said impairments are sometimes missed. Equality and Human Rights Commission, ‘Inclusive justice: a system designed for all: Findings and Recommendations’, June 2020 [https://www.equalityhumanrights.com/sites/default/files/ehrc\\_inclusive\\_justice\\_a\\_system\\_designed\\_for\\_all\\_june\\_2020.pdf](https://www.equalityhumanrights.com/sites/default/files/ehrc_inclusive_justice_a_system_designed_for_all_june_2020.pdf)

<sup>37</sup> Equality and Human Rights Commission, ‘Preventing the health crisis from becoming a justice crisis’, 22 April 2020. <https://www.equalityhumanrights.com/en/our-work/news/preventing-health-crisis-becoming-justice-crisis>

<sup>38</sup> Criminal Justice Joint Inspectorate, ‘[Neurodiversity in the Criminal Justice System: A review of evidence](#)’ (July 2021)

*than the rest of the general population*”, an issue which he *“hears every day”*, he promised that *“there will be action”*.

4.4 These concerns are not addressed anywhere in the Bill, which takes no account of the fact that it can be much more difficult for defendants with certain types of disabilities, impairments, or health conditions to engage with online systems and written proceedings. Further the very nature of remote proceedings that are proposed in this Bill are such that defendants are denied physical access to courts altogether, or that such access is delayed until later stages in the proceedings or during appeals. This removes or reduces opportunities to screen for and identify disabilities, impairments, or other factors that affect a defendant’s ability to participate knowingly and effectively in the proceedings, thereby enabling appropriate adjustments to be made.

4.5 The Explanatory Notes indicates that a full hearing at court will *“always be available when needed”* and where the court considers it to be in the *“interests of justice”*.<sup>39</sup> However, this wording is not adequately reflected in the Bill itself, including with regard to the AOCSSP, and in the absence of effective processes for identifying vulnerabilities, it is doubtful that the court will be able to make informed assessments on the interests of justice.

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<sup>39</sup> Explanatory Notes, Para 32