



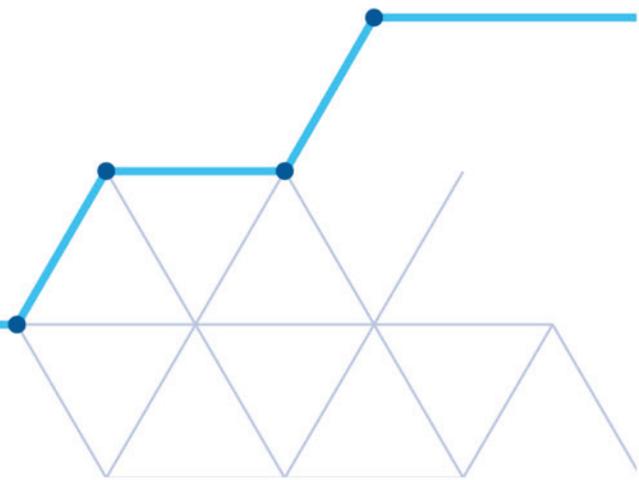
Ministry  
of Justice

# Unrepresented Defendants: Perceived effects on the Crown Court in England and Wales – practitioners' perspectives

Joe Thomson and Jane Becker

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# 1. Summary

The Ministry of Justice (MoJ) introduced reforms to legal aid under the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 with the aim of reducing spending on legal aid, directing funding at those cases that need it most and promoting alternatives to litigation. As part of this reform package, since January 2014, any defendant whose disposable annual income is £37,500 or more is no longer eligible for criminal legal aid at the Crown Court.

The current Criminal Justice System (CJS) processes, operation and planned reforms are largely based on the assumption that criminal defendants will be legally represented.

There is an evidence gap on the potential impact of these unrepresented defendants on court processes and reforms. This report provides an initial exploration, based on in-depth interviews with 21 practitioners (15 Crown Court judges and 6 CPS Crown Court prosecutors), of the perceived effects of unrepresented defendants in Crown Courts on practitioners and court processes. The exploratory nature of this project meant that the findings were indicative and should not be considered to be a comprehensive assessment of all the relevant issues.

## 1.1 Key findings

- The majority of the 15 judicial interviewees and all 6 of the Crown Prosecution Service (CPS) interviewees saw unrepresented defendants as the exception rather than the rule at trial.
- All interviewees consistently made a distinction between two main types of unrepresented defendant: 1) those who choose to be unrepresented for non-financial reasons; and 2) those who do so because of legal aid/funding issues. These groups were seen as posing distinctly different challenges to the court process, with those who choose to represent themselves for non-financial reasons being seen as more problematic.
- Unrepresented defendants were seen as having a varied but limited understanding of the court process by the majority of interviewees and were considered less able to participate effectively in the process.
- A consistent theme was the perception that unrepresented defendants' cases had longer hearings and case progression was slower. Other practitioners, such as judges and prosecutors, adjusted for the defendants' lack of understanding and participation which, in turn, slowed the whole process down.

- Interviewees saw unrepresented defendants as a barrier towards achieving early guilty pleas because they had a less detailed understanding of the discount scheme. Interviewees also expressed concern about unrepresented defendants' effect upon witnesses, with particular worries about the cross-examination process.

## 2. Background

In 2012 the Ministry of Justice (MoJ) introduced reforms to legal aid under the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act. The aim was to reduce spending on legal aid, direct funding at those cases that needed it most, and promote alternatives to litigation. While the financial eligibility rules governing entitlement to criminal legal aid remained broadly intact, the reform package included one significant change in respect of the Crown Court. Since January 2014, defendants whose disposable annual income was £37,500 or more were not eligible for criminal legal aid. This was a change from the pre-LASPO system which had no upper eligibility income threshold at the Crown Court. The application of the £37,500 threshold was subject to review on the grounds of hardship for individuals who showed that they could not afford to pay for their defence costs privately. Therefore there was a risk of an increase in unrepresented defendants in the Crown Court.<sup>1</sup>

The MoJ publishes statistics which show that the proportion of defendants dealt with in the Crown Court known to have had legal representation<sup>2</sup> decreased by two percentage points between 2010 and 2015.<sup>3</sup> During 2015, 93% (89,400) of defendants had legal representation at the first hearing while 7% (7,000) of defendants had no legal representation or unknown representation at first hearing. This compares to 95% (107,100) and 5% (5,500) respectively in 2010. In 2015, 27% of represented defendants had two or fewer hearings, compared with 17% of defendants whose representation was unknown or were known to be unrepresented.

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<sup>1</sup> There were also changes in family law legal aid at a similar time. MoJ has previously published research looking at litigants in person in family law cases.  
<https://www.gov.uk/government/publications/litigants-in-person-in-private-family-law-cases>

<sup>2</sup> Representation is classed as defendants who were known to be represented by a barrister at first hearing.

<sup>3</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/533097/criminal-court-statistics-jan-mar-2016.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/533097/criminal-court-statistics-jan-mar-2016.pdf)

### 3. Approach

In-depth semi-structured interviews<sup>4</sup> were used to explore the views of judges and Crown Prosecution Service (CPS) practitioners<sup>5</sup> in relation to unrepresented defendants. Fifteen Crown Court judges and six CPS Crown Court prosecutors were interviewed in 2015.<sup>6</sup>

The sample was selected to ensure that a range of experiences and views of Crown Court judges and CPS prosecutors were reflected. Efforts were made to get a spread of court circuits and CPS regions, but final interview choice was driven by availability. The exploratory nature of this project meant that the findings were indicative and should not be considered to be a comprehensive assessment of all the relevant issues. These findings were the specific views of those interviewed and may not be generalisable to other courts or individuals.

The aim of the interviews was to gather information around:

- practitioner experiences of unrepresented defendants;
- practitioners' views on what types of defendants are unrepresented;
- practitioners' views on what effect (if any) unrepresented defendants have on the court process; and
- practitioners' views on how the court experience could be improved for unrepresented defendants.

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<sup>4</sup> The interviews were conducted by MoJ social research analysts. All interviews were recorded and transcribed with the permission of the interviewee. The transcriptions were coded and prevalent themes identified. The findings section and headings are drawn from this research.

<sup>5</sup> Defendants were not interviewed as the focus of the research was on how unrepresented defendants may affect the judicial trial process.

<sup>6</sup> One judicial interview was conducted face-to-face. All other interviews were conducted by telephone.

## 4. Findings

The findings from the interviews were grouped under several themes in the analysis, and these are reflected in the headings below.

### 4.1 Features of unrepresented cases

The majority of judicial and CPS interviewees perceived unrepresented defendants as the exception rather than the rule at trial. Some interviewees perceived unrepresented defendants to be more frequent at pre-trial hearings (although still rare) and others perceived them as more frequent at breach hearings.

#### Changes in number of unrepresented defendants

The majority of interviewees believed that the numbers of unrepresented defendants had risen since legal aid changes, although the rise was seen as small. Some interviewees explained that they thought the changes left more people unable or unwilling to pay for legal representatives with the result that they had to represent themselves.

#### Offence type

There was a lack of consensus on whether there were particular cases that were more likely to have unrepresented defendants. No particular case type was identified but some interviewees thought that unrepresented defendants were more common in cases that had a 'personal' element to them. These included domestic violence or neighbour disputes where it was felt defendants believed that they would have an advantage over witnesses by representing themselves.

#### Types of defendants

Interviewees consistently made a distinction between two main types of unrepresented defendant:

- those who choose to be unrepresented for non-financial reasons; and
- those who do so because of legal aid/funding issues.

The two groups were seen as posing distinctly different challenges to the court process.

Most interviewees commented that those who choose to represent themselves for non-financial reasons fell into two sub-groups: those individuals perceived as having mental health issues or those who were determined to represent themselves regardless.

Interviewees felt both of these sub-groups were unaffected by changes to legal aid. Instead they proposed a number of alternative explanations for why these individuals were unrepresented including:

- defendants who thought they knew better than lawyers did;
- defendants who had been told by their lawyers to plead guilty and they had then sacked their lawyer; and
- defendants who did not trust the criminal justice system and therefore chose to represent themselves.

For the second group – those unrepresented because of issues with legal aid – the interviewees felt these defendants perceived the level of contribution as too high.

Interviewees felt self-employed defendants had particular problems proving their level of income.

### **Level of understanding**

Unrepresented defendants were seen as having varied but limited understanding of the court process. Some CPS interviewees went further, highlighting issues such as unrepresented defendants not understanding how to present evidence about their case at hearings, how to prepare defence statements or how to ask questions in court.

## **4.2 Efficiency**

A consistent theme emerging from the interviews with the judiciary and CPS was the perceived disruptive impact of unrepresented defendants on CJS efficiency in the Crown Court. They felt that unrepresented defendants had a disproportionate effect on court efficiency.

### **Pre-trial**

A defendant's legal defence team or counsel would normally engage with the CPS prosecutor for the case prior to the initial pre-trial hearing. This did not appear to occur with unrepresented defendants in the same way.

Most of the CPS interviewees said that they were unable to prepare for unrepresented defendants as they were not forewarned. This posed particular issues when defendants faced charges on sensitive issues.

Some CPS interviewees said that they tried to help unrepresented defendants and engage with them pre-trial, explaining the CPS's role and what the CPS would be arguing. Other

CPS interviewees maintained that they were the 'other side' and that therefore there was a limit to the extent to which they could assist an unrepresented defendant. They reported not wanting to discuss aspects of their case directly with the defendant and run the risk of appearing to encourage the unrepresented defendant to plead guilty. The CPS interviewees frequently said that they asked the judge to tell the unrepresented defendant to appoint a solicitor to represent them so that they could serve documentation on the solicitor.

### **Length of hearings**

Most interviewees thought unrepresented hearings took longer than those with a legal representative. A variety of reasons were given as to why.

- Court processes, legal practices and legal concepts had to be explained to the unrepresented defendant. This interrupted the normal proceedings, slowed down the process and judges had to pause frequently to check that the defendant understood.
- Practical adjustments had to be made, such as moving the defendant from the dock so they were fully participating in proceedings. Unrepresented defendants were allowed to sit towards the back of the barristers' benches.
- Some matters could not be resolved outside the court hearing, such as advance agreement of which evidence to submit. This created more work during hearings and could also increase the number of hearings.
- Unrepresented defendants were prone to over-participation and lack of clarity and were more likely to raise points not related to their case; some gave long speeches that were not focused on the relevant issue; and the court was presented with lots of irrelevant correspondence which had to be sifted through to find relevant evidence.
- Defendants could be very disruptive during hearings by, for example, continually talking over others.
- Court staff were likely to have to respond to repeated enquiries from the defendant.
- Juries were sent out more frequently so judges could give additional advice to the defendant without risking influencing the jurors' view of proceedings.

One judge said judges may feel constrained to give advice to such defendants and this could present a key problem for the adversarial system of justice. They were conscious that their involvement should not stretch into an inquisitorial role.

## Number of hearings

Most interviewees believed that unrepresented cases resulted in more hearings and more adjournments than those with representation. Reasons stated included:

- to allow the defendant time to find representation; and
- to allow the defendant to get legal aid.

All the judges interviewed expressed a very strong preference that a defendant facing charges should be represented. They were willing to delay a hearing if there was any chance that representation could be obtained.

Additionally, some interviewees stated that unrepresented cases incurred a greater number of hearings because certain aspects of the case could not be organised outside court hearings easily. Reasons given for this included:

- problems in obtaining a defence statement;
- defendants not being prepared for hearings;
- to allow defendants more time to understand evidence; and
- to give them time to serve their own evidence.

## Length of trials

Most interviewees believed trials lasted longer when defendants were unrepresented. Some interviewees estimated that trials could take at least twice as long. The reasons for this were similar to those given for an increased number of hearings, but trials that involved juries and witnesses added another level of complexity.

## Disclosure

Disclosure – disclosing the evidence relevant to the contested points – in unrepresented cases was seen as difficult by most interviewees. A variety of reasons were given including:

- unrepresented defendants not understanding the concept of disclosure;
- defendants not knowing what to ask for; and
- defendants not setting out their argument.

Interviewees felt that problems appeared to stem in part from unrepresented defendants not being in a position to engage with the CPS properly due to their lack of legal training. They also felt unrepresented defendant's distrust of the CPS stopped them releasing documents.

The CPS interviewees also reported difficulties in serving evidence on unrepresented defendants; for instance, not knowing whether they had the defendant's correct address, or defendants saying they had not received the papers.

## **4.3 Perceived effect upon other practitioners**

### **Perceived engagement with a barrister**

Some of the judicial interviewees discussed unrepresented defendant engagement with barristers during the trial. Several said barristers tried their best with unrepresented defendants, but one interviewee noted that this was difficult for the barrister as it challenged their role of leading the prosecution. Another interviewee said that unrepresented defendants' behaviour towards barristers varied from openly hostile to collaborative, and the approach adopted was perceived to affect the engagement between the two parties.

### **The perceived effect on the jury**

A number of concerns were raised by judges about the potential for unrepresented defendants to affect the neutrality of the jury in trials. Some interviewees said that an unrepresented defendant could, depending on their behaviour, affect the jury either positively (for instance, generating sympathy) or negatively (for instance, creating a sense of irritation among jurors).

One interviewee said there was a risk that an unrepresented defendant might say inappropriate things or make remarks at inopportune moments, and such actions could unreasonably prejudice legal fact-finding. A small number of judges went further into how, because of this, they had to operate the trial in a different manner. For example:

- explaining to the jury why they had to keep stopping the unrepresented defendant while they were presenting their case;
- talking to juries at the outset about the situation, the judge's role, and that the jury should not treat the defendant differently; and
- regularly sending the jury out so matters could be discussed without influencing them. This was said to lead to delays.

### **The perceived effect on witnesses**

Most interviewees expressed concern about the perceived effect of unrepresented defendants upon witnesses. The most common reason for concern was cross-examination and how unrepresented defendants might behave while conducting it. Interviewees gave examples of defendants being aggressive, rude and asking unnecessary questions. The

common perception of these interviewees was that this led to an unpleasant cross examination experience for witnesses. Some judicial interviewees described how they had to control unrepresented defendant's behaviour in these situations, and tread the line between allowing the defendant to put forward their case and preventing harm to witnesses.

A small number of judicial interviewees discussed how they thought unrepresented defendants could lead to wasted time for witnesses. Unrepresented defendants were perceived to call witnesses to trial unnecessarily as they did not understand who should give evidence.

#### **4.4 Outcomes and pleas**

Judges interviewed mentioned problems in discussing the concept of pleas and discounts to sentence with unrepresented defendants. This was because they did not think that someone without formal legal training could understand these concepts as easily. They felt it was difficult to explain them to the unrepresented defendant without appearing to tell them to plead guilty.

Despite their concerns about neutrality of juries, most of the interviewees thought that unrepresented cases saw the same outcomes as represented cases; some elaborated by saying that the outcome might take longer to achieve but would still be the same. Others thought there might be more chance of unrepresented defendant cases going to trial.

A few judicial interviewees said it was impossible to assess whether the outcomes were any different. Other interviewees felt a higher proportion of guilty verdicts resulted from unrepresented defendants' cases.

Some CPS interviewees said that they were concerned that an unrepresented defendant might not get a fair trial, as they were not properly qualified to put their case forward. Conversely, one interviewee did not think unrepresented cases were fair on the CPS due to the judicial adjustments and perceived effect on jurors mentioned earlier.

#### **4.5 Suggested solutions**

Most interviewees mentioned the informal help they and court staff might give an unrepresented defendant, such as explaining what was happening or what to expect. The CPS interviewees also mentioned other forms of support that unrepresented defendants

were offered. These included court staff advice on process, local members of the bar offering advice and lawyers working before any legal aid had been granted.

### **Suggestions for further/future support**

A variety of suggestions about how unrepresented defendants could be supported further were given by interviewees. One such suggestion was that leaflets or videos might help explain to them the 'goings on' of the court and its processes and what was expected.

A number of suggestions focused on access to legal representation including:

- a duty solicitor scheme, like that of the magistrates' courts;
- giving defendants access to someone with legal training, who can give them advice and help on matters such as assessing strength of evidence; or
- employing legal representatives on an *ad hoc* basis.

Other proposals focused on helping the courts and its practitioners to manage unrepresented defendants better. These included:

- judicial discretion to grant representation where appropriate, suggesting this would be cost-effective as particularly difficult unrepresented defendants took a lot of court time; and
- training for newly qualified prosecutors on how to manage unrepresented defendants so that they would feel more comfortable dealing with them.

A couple of interviewees said nothing could be done to support a defendant if they chose to represent themselves. This was because they believed these defendants were so set on their way of doing things that they would not listen to advice.

### **Better Case Management**

A judicially-led initiative known as 'Better Case Management' (BCM)<sup>7</sup> was introduced throughout England and Wales on 5 January 2016. The initiative is designed to help to deliver speedier justice in both magistrates' courts and the Crown Court and includes a national Early Guilty Plea (EGP) scheme and the Plea and Trial Preparation Hearing (PTPH). PTPH aims to enable early engagement between all participants in proceedings and so increase the number of cases brought to a conclusion in a single effective hearing.

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<sup>7</sup> Please see: <https://www.gov.uk/government/news/crime-news-better-case-management-rollout-and-new-guidance>.

When asked if unrepresented defendants could be a barrier to the planned BCM scheme, over half of judicial interviewees believed they could. Some did not think unrepresented cases could be dealt with in the reduced number of hearings under BCM. One interviewee was sceptical about BCM as it assumes better engagement between defence and prosecution which they did not see as possible in unrepresented defendant cases. A few interviewees said matters could not be resolved at a single hearing as it took time to understand the case an unrepresented defendant was putting forward. Other interviewees did not think unrepresented defendants would be able to access evidence or serve papers as the system becomes digitalised.

CPS interviewees also thought unrepresented defendants could pose issues for BCM. One thought they would pose the same problems for BCM as they did to the current system. Others believed that BCM could make things better as proceedings should be more uniform and better recorded.

## 5. Conclusions

The findings from this explorative study based on interviews with 21 Crown Court legal practitioners showed that there were perceptions of different types of unrepresented defendants who had different needs and posed different challenges to the court<sup>8</sup>. A consistent theme emerging from the interviews with the judiciary and CPS was unrepresented defendants' disproportionately disruptive effect on CJS efficiency in the Crown Court. This was attributed to unrepresented defendants having a large impact on efficiency relative to their low numbers in comparison to cases where defendants were represented.

Unrepresented defendants were perceived to lengthen hearings and the process as a whole; overall case length was seen to be longer. Interviewees suggested that this was because a lack of understanding among unrepresented defendants limited their participation in court activities. This affected other practitioners within the court. Judges and prosecutors adjusted how they conducted hearings, generally slowing them down. In addition, unrepresented defendants were seen as a barrier to achieving early guilty pleas. Interviewees also expressed concern about unrepresented defendants' effect upon witnesses, with particular concerns about the cross-examination process.

On the basis of this small study, the policy implications are likely to be:

1. Ensuring that unrepresented defendants are considered more explicitly and consistently within the MoJ's efficiency programmes and reforms. For instance, MoJ policy delivery teams need to look at the impact of unrepresented defendants when collecting management information data for schemes such as BCM.
2. Working with CJS partners such as the Judicial Office, HMCTS and the CPS to look at best practice in handling unrepresented cases in the Crown Court.
3. Continuing to monitor the number of unrepresented defendants and their impact over time. Then, if appropriate, assessing and costing options to mitigate any negative impact of unrepresented defendants in the Crown Court.

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<sup>8</sup> Similar themes were found by the previous MoJ study looking at litigants in person in the civil courts. <https://www.gov.uk/government/publications/litigants-in-person-in-private-family-law-cases>