

**Justice denied? The experience  
of unrepresented defendants in  
the criminal courts**

April 2016

# About Transform Justice

**Transform Justice** is a national charity campaigning for a fairer, more humane, more open and effective justice system.

**Transform Justice** was set up in 2012 by Penelope Gibbs, a former magistrate who had worked for five years to reduce child and youth imprisonment in the UK. The charity will help create a better justice system in the UK, a system which is fairer, more open, more humane and more effective. **Transform Justice** will enhance the system through promoting change – by generating research and evidence to show how the system works and how it could be improved, and by persuading practitioners and politicians to make those changes. Transform Justice has produced reports on the centralisation of magistrates' courts, on criminal appeals against sentence, on justice reinvestment and on magistrates and diversity.

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# About Penelope Gibbs

Penelope Gibbs worked in radio production and at the BBC before being inspired to move into the voluntary sector. She set up the Voluntary Action Media Unit at TimeBank before she joined the Prison Reform Trust to run the Out of Trouble campaign, to reduce child and youth imprisonment in the UK. Under her watch, the number of children in prison in the UK fell by a third. Penelope has also sat as a magistrate. Penelope set up Transform Justice in 2012 and it became a registered charity in 2013.

# Contact

**For further information contact:**

**Penelope Gibbs**  
Director

**Transform Justice**  
43 Lawford Road  
London NW5 2LG

[penelope@transformjustice.org.uk](mailto:penelope@transformjustice.org.uk)  
[www.transformjustice.org.uk](http://www.transformjustice.org.uk)

Registered charity number 1150989  
Company number 08031781

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# Introduction

"The disquiet amongst the magistracy over Criminal Court charges ...is only one of the disturbing threats to the criminal justice system now becoming increasingly apparent.... Most worrying for the adversarial system of which we are rightly proud is the significant reduction in legal aid. At the heart of the adversarial system is the concept of 'equality of arms', with both sides being equally able to present their case. This has been so seriously undermined by the lack of access to legal aid that it has become a regular and disquieting feature of the magistrates' court to find defendants attempting to respond to a charge they don't fully understand, with no experience of the law or of legal procedures, against qualified professionals with all the resources of the CPS behind them...They constitute a real threat to the long tradition of a fair trial for all who appear before us."  
(From letter by Christopher S Morley JP Buckinghamshire Bench in the Magistrate magazine Jan 2016)

"I have prosecuted trials against unrepresented defendants. It is a complete sham and a pale imitation of justice" (prosecutor)

"The magistrate probably thinks if [someone] is stupid enough to represent himself he's probably guilty... Going unrepresented certainly hinders any defendant, without a shadow of a doubt" (prosecutor).

"What should come out is my huge disapproval and I can't help that...having seen the difference between having good representation and [not]... I want to go home at the end of the day feeling that I've made appropriate disposals, appropriate decisions, where the outcome has been fair, and unfortunately you can't" (magistrate).

# Executive summary

What price justice? There have always been defendants in the magistrates' courts who have appeared without a lawyer, particularly in traffic cases. But our report suggests that there has been a significant increase in the number of people representing themselves who are not choosing to do so. The main reasons are:

- **ineligibility for legal aid due to income or type of offence,**
- **lack of awareness of rights to legal aid,**
- **lack of organisation.**

The judges and lawyers we interviewed are concerned that unrepresented defendants are at a disadvantage, and only differed in their views of how significant that disadvantage was. As one magistrate pointed out, luck plays its part. If an unrepresented defendant appears in front of a very empathetic bench, an experienced legal adviser and a prosecutor who is also used to defending, they are likely to be patiently coached through the process. But they may instead face a busy court, with no legal adviser, where inexperienced and/or impatient advocates and judges are under pressure to deal with cases speedily. It takes time, skill and confidence to deal with unrepresented defendants well, and involves treading a fine line between providing support and maintaining the neutrality of the court process. Unfortunately, many lawyers felt that some colleagues and court staff do not go the extra mile and, even when they do, cannot make up for the lack of a defence advocate.

There are no official figures for the number of unrepresented defendants in the magistrates' courts, though all interviewees felt numbers had recently increased. Official statistics from the Crown courts indicate numbers have remained steady at around 6% over the last five years. The lack of data means unrepresented defendants in the magistrates' courts are invisible in policy terms. But we have found that the impact on court staff, judges and advocates of dealing with unrepresented defendants is immense – cases are taking longer, and explanation skills and patience are being tested. Many advocates doubt there are genuine savings to the State in denying legal representation to reluctant defendants, but the absence of a cost benefit analysis means we don't know for certain.

What is clear is the cost to justice – interviewees had witnessed unrepresented defendants not understanding what they were charged with, pleading guilty when they would have been advised not to, and vice versa, messing up cross examination of witnesses, and getting tougher sentences because they didn't know how to mitigate. Most advocates felt more and better access to legally aided lawyers was the only answer.

Certainly, that is one potential remedy, but we should also look at the whole system. Lawyers and judges themselves find it hard to keep up with criminal law and procedure, and are under constant pressure to speed up cases. If we are to deliver justice, we essentially have two options – to fund lawyers for all defendants who want or need them, or to change the whole system so that the needs of unrepresented defendants are integral.

# Research sources and methods

This has been a difficult area to research since there is very limited academic research or data on the subject. We have used qualitative evidence, the data that exists, and articles from mainstream and social media to reach our conclusions.

**Data:** We used a survey conducted by the Magistrates' Association (MA)<sup>01</sup>, and data generated by the Ministry of Justice (MoJ) and the Legal Aid Agency. Some of the latter has been obtained via FOI requests.

Transform Justice worked with the Institute for Criminal Policy Research (ICPR) to gather evidence. Dr Gillian Hunter and Dr Jessica Jacobson designed a survey for prosecutors in December 2015/January 2016, to which 42 responded. This was promoted on Twitter and via email. An earlier survey was promoted on Twitter in February 2015 to which 54, mainly solicitors, responded. Lastly Transform Justice posted a poll on Twitter. The identities of the poll respondents are unknown but Transform Justice's following is dominated by lawyers and legal experts.

**Interviews:** ICPR interviewed ten prosecutors from the Independent Bar, four District Judges and seven magistrates. We are very grateful to the Judicial Office for permission to interview the judges<sup>02</sup> involved. We did not have permission from the relevant bodies to interview CPS staff or legal advisers. We also made ultimately unsuccessful efforts to interview unrepresented defendants themselves.

**Observations:** we commissioned four post-graduate students (Niall Williams, May Deegan, Amanda Clough and Claire Kershaw) to observe unrepresented defendants in court proceedings in the magistrates' courts in the East, South-East, North-East and West of England. They observed courts over 34 whole days in December 2015 and January 2016 focussing on hearings involving unrepresented defendants.

In the main, we have focussed our work on unrepresented defendants in the magistrates' courts since the MoJ is conducting their own research study on unrepresented defendants in the Crown Court (to be published in June/July 2016). Our evidence on unrepresented defendants in the Crown Court comes from the prosecutors we interviewed and surveyed, most of whom worked in both magistrates and Crown courts.

01 <http://bit.ly/1VOLKnn>

Survey on litigants in person and unrepresented defendants 13.1.2015. MA members in certain areas agreed to report on numbers of unrepresented defendants and type of case each time they sat. We have excluded family cases in our analysis.

02 Any reference to judge encompasses both magistrates and district judges

# How many people are unrepresented?

There are few people prosecuted in court who have no help from a lawyer at any point. Some people use the same trusted lawyer (or solicitor plus barrister) at every stage, from police station interview, throughout every court hearing. A few may use a lawyer for some stages but not others.

In the magistrates' courts, the MA survey and all our interviewees indicate that the numbers who are unrepresented for at least one hearing make up a significant minority. Magistrates in the MA survey reported that 25% of defendants who came before them in 2014 were unrepresented. The number unrepresented in different types of hearings varied immensely from nearly half in private prosecutions, to one in five at first hearings. The magistrates said that defendants were unrepresented in over a fifth of (non-traffic) trials and sentencing hearings.

The magistrates and district judges we interviewed had very differing estimates of the proportion of unrepresented defendants, ranging from 15% to 40% of non-traffic cases - the differences may be due to individual experiences or to regional differences. Cases ranged from first hearings, to trials and remand hearings, and the offences included assault, theft and public order. As mentioned previously, there are no official statistics on the number of unrepresented defendants in the magistrates' courts. Although all legal advisers and court associates fill in court forms which ask whether the defendant is represented and whether they applied for legal aid, this data is not systematically collected or collated.

MoJ have published figures showing that 5561 (6% of all) Crown Court defendants were unrepresented at first hearing in 2014<sup>03</sup>. These figures also suggest some people are unrepresented at hearing after hearing - 1310 defendants had 6 or more hearings when unrepresented.

There are also a significant number of people who are unrepresented at appeal. 5% (where representation was noted) of those appealing conviction or sentence from the magistrates' court were unrepresented in 2014 and 2015<sup>04</sup>. And in the annual report of the Court of Appeal the registrar wrote; "applications for leave to appeal lodged by applicants acting in person have increased by 25.3% this year: a significant proportion"<sup>05</sup>. In 2014/15, 6% of applications to appeal were from unrepresented people - the same proportion as in the Crown Court.

03 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/463199/ccsq-bulletin-april-june-2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/463199/ccsq-bulletin-april-june-2015.pdf) Annex B

04 Response to MoJ FOI103857

05 <https://www.judiciary.gov.uk/wp-content/uploads/2015/12/coa-criminal-division-annual-report-2014-15.pdf>

# Has there been a change in the number of unrepresented defendants?

Of 143 responses to a Transform Justice poll on Twitter<sup>06</sup>, 90% of respondents felt that there had been an increase in unrepresented defendants in the criminal courts in the last two years, while 8% felt that there had been a decrease. The Crown Court has reported no significant increase in unrepresented defendants in the last five years, with 5-6% unrepresented at the first hearing throughout this period<sup>07</sup>. However, this is not the impression of the prosecutors who answered our survey, nearly all of whom felt there had been an increase in unrepresented defendants in Crown Court cases.

The Magistrates Association survey (which has a relatively small sample size) indicated an increase in numbers of unrepresented defendants in the magistrates' courts from 23% in February 2014 to 27% in November 2014. Numbers of unrepresented defendants increased across all criminal hearings except remand and traffic trials.

All prosecutors we interviewed and surveyed thought that numbers of unrepresented defendants in the magistrates' courts had increased in recent years.

The dearth of comprehensive, reliable data makes it difficult to draw quantified conclusions about whether there has been an increase and, if so, how great. However, the strength of the perception of those working on a daily basis in the courts is compelling. There is a pressing need to collect and collate this data to ensure that the scale of the situation is better understood.

06 <https://twitter.com/PenelopeGibbs2/status/706444378127073280>

07 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/463199/ccsq-bulletin-april-june-2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/463199/ccsq-bulletin-april-june-2015.pdf) Annex B

# Who has a right to a legally aided lawyer?

Legal Aid in magistrates' and Crown Court criminal cases is granted if the defendant's income meets the prescribed criteria, and it is in the interests of justice to provide representation<sup>08</sup>.

The right to a legally aided lawyer has not changed since 2010. Means testing for magistrates' court cases was re-introduced in 2006, and for Crown Court cases in 2010. The measurement of means has not changed since means testing was brought back in – there has been no adjustment for inflation.

In practice you usually can't get legal aid in the magistrates' court if you are accused of a non-imprisonable offence. This includes nearly all traffic offences<sup>09</sup>.

In the case of imprisonable offences, people who have a disposable household income of less than £22,325 can get legal aid for a case in the magistrates' court. Those who are accused of more serious crimes, which are heard in the Crown Court, will be granted legal aid if their disposable household income is less than £37,500 a year. Some Crown Court defendants get a proportion of their costs met by legal aid, and also pay a contribution themselves. These contributions can be high – up to 90% of disposable income, and total contributions range from £6,731 for a burglary, to £185,806 for a homicide defence. Those who qualify for legal aid can choose their own solicitor, as long as their firm is registered with the Legal Aid Agency.

According to the Legal Aid Agency (LAA) only a very small number of applicants for legal aid are turned down. In y/e March 2015, 5% of applications for legal aid in the magistrates' courts were refused, which amounts to 19,019 cases<sup>10</sup>. All our estimates for the number of unrepresented defendants in magistrates' courts exceed 5%. This suggests that a significant number of unrepresented defendants do not apply for legal aid.

All those who are accused of an imprisonable offence (and those already in custody) are entitled to consult the duty solicitor in a magistrates' court, if it is their first appearance and they have not already contacted or contracted an alternative solicitor. Most magistrates' court have a duty solicitor to whom court staff and judges will refer eligible defendants with a court hearing that day. Duty solicitors are only permitted to give advice to a client for one hearing (and not guilty hearings are excluded) – all subsequent hearings will be covered by a non-duty lawyer, or the individual may be unrepresented. One prosecutor said "sometimes duty solicitors aren't available, and sometimes just point blank refuse to speak to the defendants for whatever reason...maybe because the defendant is in the process of getting legal aid, or because they've already given them legal advice on the last occasion." It seems likely that the increase in defendants who turn up at court unrepresented has also added to the workload of duty solicitors.

If a judge suspects that an unrepresented defendant is entitled to legal aid, or to see the duty solicitor, they can and often do delay or adjourn the case.

08 <https://www.gov.uk/guidance/criminal-legal-aid-means-testing>

09 The interests of justice test determines whether a client is entitled to legal aid based on merits. As part of the test the assessor must consider the 'Widgery criteria' which include whether someone is likely to lose their livelihood or suffer serious damage to their reputation. All cases involving under 18 year olds meet the Widgery criteria.

10 FOI request 98866

# Extract from a letter from Hans Dieter Kehler, DB Law, Camborne to the Law Gazette, 9.2.2015<sup>11</sup>

*"We had two separate clients for first appearances. Legal aid applications were submitted and received by the court the preceding Wednesday. By Monday, the court had not yet processed the applications. The clients went to court unrepresented, explained the problem of the legal aid application and asked for an adjournment because they did not know what to do without advice on the papers they had just received from the front desk.*

*The court's view was that they had had enough time to arrange a solicitor and no delay would be allowed. Apparently, the court not processing the applications within the targets set by the Legal Aid Agency can now be laid at the door of the defendant.*

*Not feeling quite comfortable, perhaps, in dealing with unrepresented defendants, the magistrates moved the matters into another court, where a district judge had no qualms in extracting guilty pleas, absent any opportunity for the defendants to go through their papers and discuss the elements of the offences with a legal professional. One client was sentenced there and then; the other was committed to the Crown court for sentencing.*

<sup>11</sup> <http://www.lawgazette.co.uk/analysis/letters/the-state-were-in-with-criminal-legal-aid/5046595.fullarticle>  
This was written before the countrywide introduction of centralised, digital legal aid applications

# Why do defendants represent themselves?

“When I first started, the unrepresented ones were the mad ones who you couldn’t talk to. Now it’s because they can’t afford to pay the legal aid contributions” (prosecutor Crown Court).

There have always been unrepresented defendants, but our interviewees felt that changes to the way legal aid has been managed in recent years has prompted an overall increase. There is neither routine data nor research on why people are unrepresented, so our conclusions are based on our interviews, survey, and court observations.

We have explored in this research the difference between those who choose to attend court without legal representation, and those who are forced to for a variety of reasons. It is this second group that is the primary focus of our work, and concern. Our findings appear to suggest that the growing barriers to accessing legal representation mean that it is this group which may be increasing in number.

No-one can be compelled to use a lawyer. There have always been people who refuse a lawyer because they feel they can advocate for themselves as well as, or better than, a lawyer. All our interviewees had come across members of what some called the “awkward squad”. One interviewee was prosecuting an unrepresented defendant in the Crown Court in a major money laundering case. The defendant had sacked one set of lawyers and was determined to defend himself, even in this complex case. One prosecutor described such people as being on “a self-destruct collision course”, another thought the decision was more tactical, “I have prosecuted two unrepresented defendants who had clearly worked out they could cause more disruption that way”. One District Judge felt that such unrepresented defendants tended to be male, middle class and middle aged.

Some judges mentioned Freeman on the Land<sup>12</sup> as examples of those who refuse to have a lawyer on principle. A significant minority of the “awkward squad” were perceived to have mental health problems which clouded their understanding of the value of legal advice. Prosecutors felt that a greater proportion had chosen to represent themselves in the Crown Court than in the magistrates’ courts.

Why do people end up representing themselves but not by choice? Most of the prosecutors who responded to our survey felt financial considerations were the dominant factor. These are the main reasons suggested by those we interviewed:

- **Legally aided defendants become dissatisfied with the lawyers they have been using and prevented from seeking another. Some defendants dismiss their lawyers because they feel they are not defending them well enough. They are usually allowed to seek new lawyers once, but judges’ patience may run out if they want to change lawyer a second or third time. Some lawyers and judges see such defendants as part of the “awkward squad”. But refusal to let a defendant seek another lawyer can leave defendants feeling they have no choice but to conduct long and complex Crown Court trials themselves (see the case of Roger Khan).**
- **Some people of middle income cannot afford to employ a lawyer. Many people earn too much to qualify for legal aid, but not enough to afford to employ a lawyer privately. Others feel the contributions demanded by the Legal Aid Agency (LAA) are too high. Private lawyers are likely to charge at least twice legal aid rates (which**

<sup>12</sup> Freeman on the Land do not believe they are bound by our laws, and therefore do not consent to any part of the legal process.

<sup>13</sup> <http://www.transformjustice.org.uk/wp-content/uploads/2015/10/TRANSFORM-JUSTICE-INNOCENT-BUT-BROKE.pdf>

- all advocates say are not adequate, particularly after recent cuts), and a defendant will not get back all their private fees even if their case collapses or they are acquitted<sup>13</sup>. This prompts many, who would prefer to have a lawyer, to defend themselves.
- Some defendants appear to be eligible for legal aid on income grounds, but their applications are rejected. People who are self-employed, do casual work or rely on the charity of friends and family, often have very low or no income, but find it hard to prove their financial situation to the LAA.
  - If an LAA form is filled out incorrectly in any way, it can be rejected. A delay may occur while this is resolved, which leads to the defendant not being represented for at least one hearing.
  - Anyone who has already contracted or contacted a solicitor may be prevented from using the duty solicitor at the court. So if a legal aid application has not been approved, or a solicitor does not turn up, defendants can find themselves unrepresented<sup>14</sup>. One defendant who was observed at court was accused of assaulting a police officer. His solicitor had not turned up and he was about to represent himself in court: "It doesn't matter if I go in on my own or not. It won't change anything. They said I punched that copper so I'm going to prison". Another problem is that some defendants feel the duty solicitor is working for the state and so can't be trusted.
  - Many first time defendants simply don't understand the system, and arrive at court not knowing their rights to legal aid, or the importance of having legal advice. They may have been unrepresented at the police station.
  - Those with chaotic lives may not be organised enough to arrange a lawyer.
- "For some people with learning needs, or drink and drug issues, even though they have been through the system many times, they lack knowledge about how to find a solicitor and tend to just come to court and hope to get the duty solicitor" (District Judge).
- Some interviewees felt that access to the duty solicitor had become more limited in recent years, and thus they had less time to help unrepresented defendants.
  - Courts are under huge pressure to reduce delays and avoid adjourning cases. Some advocates felt judges had become less likely to stop a case to allow a defendant to seek legal aid or to see the duty solicitor.

<sup>14</sup> The Duty Sol can act in these circumstances if it is a non-business day (i.e. Saturday) or the own client solicitor cannot be contacted prior to the hearing or the court is unable to determine whether there is a own client solicitor already acting for the client

# Case study: Roger Khan

Roger Khan is serving a thirty year sentence for an attempted murder he maintains he did not commit. He was eligible for legal aid for his trial in 2011, but was not happy with the approach of his lawyers, whom he felt were not doing enough to prove his innocence. The judge allowed him to try a second set of lawyers but, when he had the same problem, the judge said he would either have to keep them, or represent himself.

Khan had to build his own case from his remand cell, including going through 89 DVDs of CCTV. At one point during his trial he protested to the judge, 'I am not really getting a fair trial, am I your honour? The odds seem to be packing up against me... I have no idea what is happening...I am supposed to sit here, take it, and everything is fine with everyone else, but I am the one going, the lamb that is going to the slaughter.'

Roger's case was taken up by the Centre for Criminal Appeals ([www.criminalappeals.org.uk](http://www.criminalappeals.org.uk)). They felt that this was miscarriage of justice and could be attributed to the fact that Roger represented himself – he had no means of investigating his own case properly, of going through the bin bags of written evidence, or of challenging the prosecution witnesses. Roger's case has however been turned down by the Criminal Cases Review Commission.<sup>15</sup>

<sup>15</sup> More detail is available: <http://www.spectator.co.uk/2015/11/the-disturbing-case-of-roger-khan-and-the-cost-of-cheap-justice/>

# Understanding the charge and whether to plead guilty or not

"I could count on the fingers of one hand how many have actually understood the charges. I have had one who was facing a GBH s18 charge, believing he is in court for common assault and being shocked when I had to tell him the serious nature of the charge" (prosecutor).

Many prosecutors were concerned that people would accept the charge against them without understanding the implications, or that alternative, lesser charges might be more appropriate. Lawyers will ask for a charge to be "downgraded" if the evidence supports this.

Prosecutors also said that unrepresented defendants found it hard to understand whether the case against them was strong or weak, so they could not make an informed decision about whether they should plead guilty or not. Unrepresented defendants are often not clear what counts as a viable defence. This leads them to plead not guilty when they have no real chance of being acquitted. A lawyer would have been able to advise them of their situation, and of the risk of losing credit for a guilty plea in going to trial.

"There are more not guilty pleas, definitely because people don't understand the difference between a defence and mitigation. They might accept the conduct... but plead not guilty because they had a good reason to do it. But this is not a reason to plead not guilty" (prosecutor).

The opposite also occurs, with one prosecutor suggesting that sometimes unrepresented defendants do not realise the strength of their case and "are bullied by the clerks and bench into pleading guilty." A magistrate was also concerned: "they are told by the clerk if you plead guilty at the earliest opportunity the court will be more lenient than if you plead not guilty and are found guilty in the long run, so it's a bit of a game of poker in this respect, and I think...that's wrong.

If someone believes they are innocent, then they should hold their nerve but a lot of them will cave in".

## **Court observation: DJ tries to persuade unrepresented defendant to plead guilty**

*The unrepresented defendant is faced with three charges. He has pleaded guilty to burglary (after his DNA was found on a can of drink), and failure to attend bail, but not guilty to a related arson offence. The DJ addresses him about the arson offence: "are you sure you are going to plead not guilty – you weren't going to plead guilty to the burglary until the can of drink proved to be yours. If the arson evidence comes back as yours, you are going to look silly. Are you sure the fingerprints are not yours on the leaflet? Are you sure you are not going to plead guilty to arson?"*

# Trials

## Court observation: understanding joint enterprise

*A white British male in his 30s is accused of stealing drills belonging to a DIY store. The unrepresented defendant appears calm, though gets a little flustered when explaining that he didn't steal the drills. He admits he was present, but says he is not guilty of theft. When it is pointed out that he is being charged for theft as joint enterprise, the unrepresented defendant doesn't seem to understand, as he continues to say he is not guilty and didn't steal the drills. When asked by the magistrate if he would like to plead guilty or not guilty, the unrepresented defendant says, "I don't want to plead guilty, because I didn't steal the drills". The prosecution then says that this was a joint enterprise, because the unrepresented defendant held the door open while his friend stole the drills. The prosecution says they had expected a guilty plea. The legal adviser asks the unrepresented defendant, "do you understand, the prosecution has explained..." who replies, "Yeah, but I didn't steal the drills". The legal adviser says "Right. I think we need to go to trial".*

Our research suggests that those who find themselves forced to go to trial without representation are subject to multiple disadvantages. Some of these are practical - one usher told us that unrepresented defendants usually end up at the bottom of the court list, sometimes even having their case adjourned to the next day, despite arriving first. Lacking proper understanding of the court system, they were unable to prevent this happening.

One barrister was also concerned that the court experience could be very stressful for someone not familiar with it:

*"the court can be a scary place, people can be incredibly nervous and distressed by the experience of going to court - they might fear they are going to be sent to prison for a basic road traffic offence when the most they are going to get is a fine...So the anxiety and stress of the court process, and ignorance of it, can be worse for [an unrepresented defendant]"*.

Waiting many hours in court for their case to be called can only exacerbate the anxiety. For many, this is just the start of their problems.

# Preparatory paperwork and the digital system

“You have to make sure they have the correct papers – they will often lose the papers that have been sent to them, or not bring them to court, or bring the wrong bundle” (prosecutor).

Unrepresented defendants are at an immediate disadvantage in preparing for their cases. The CPS are required to send all the relevant files by post to the defendant before their trial. However, our evidence suggests that this is not a reliable system. Examples were given of files being sent to a solicitor the defendant met but did not engage. Other times, the defendant may not have a stable address to which to send them. One prosecutor felt this in itself could lead to miscarriages of justice:

“a defendant does not know what documents to expect and by when. CPS will often dump loads of evidence on the defendant ON THE DAY OF TRIAL. I recently did a case ... where there was simply no evidence of the first count. Having listed the matter for an application to dismiss, the CPS denied receiving the skeleton (court had it and defence had proof of sending); it was put over to the day of trial to argue. The trial HAD STARTED when the evidence was provided to the defence”.

Unrepresented defendants are excluded from the new digital case file system being rolled out across England and Wales. This can put an individual at a significant disadvantage, as they must work from paper copies of the files. The police, prosecutors, defence, judges and court staff will all have access to the same digital case files. As a result, unrepresented defendants are likely to see the files later than others (if they get them at all), and in a form which is much less convenient. If the defendant has not received the case files in advance, the court should adjourn to a different day. However, pressure on courts to avoid delay, and individuals being unaware of their right to request this, means it seldom happens. So far, unrepresented defendants are also excluded from using the new court wi-fi systems which are being introduced throughout England and Wales.

## **Court observation: unrepresented defendant does not have paperwork**

*A Polish man is accused of the theft of a bank card and possession of a knife. He has an interpreter but no lawyer, despite wanting to be represented. The CPS say they served papers on the solicitors they thought were acting for him, but the defendant has not received them. In court the documents are emailed to the legal assistant and then given to the defendant. He is given time to read them but comes back into court, and says he thinks there were a number of discrepancies in the documents he was given. The defendant says he doesn't want to represent himself, “I don't really know the law enough. I'd like to have a fair trial”. In the end the chair of the bench concedes that the documents had not been served on the accused; that, in either event, they had been served a month late, and that the current trial had been compromised and needed to be adjourned.*

# Evidence and disclosure

Our research suggests that unrepresented defendants do not have an effective understanding of evidence and the rules of disclosure:

*“very few (even those who have been through it before) understand how the process works. They also have difficulties when evidence/disclosure is not done, in knowing they are entitled to it, and can force the Crown’s hand at this point. I have prosecuted some who have simply no idea what was happening” (prosecutor).*

Another prosecutor pointed out that, “their clumsy approach to the laws of evidence and admissibility mean that sometimes evidence is introduced that would not normally feature in a trial, thus requiring further discussion and remedy”.

Unrepresented defendants also struggle to challenge evidence. As one prosecutor explained, “some of these issues or challenges will not come to light, no-one analyses it, no-one picks holes in it and it’s just unfair. The state is paying people to prosecute and it’s got to pay someone, if you can’t afford it, to defend.”

Perhaps the biggest problem with evidence is that unrepresented defendants don’t understand the procedure to properly eliminate it. Experienced advocates will ignore the evidence which is agreed by both sides, and focus only on particular points of contention. One prosecutor suggested that, “people on the outside forget how much the system depends on people co-operating really.” Our research suggests that unrepresented defendants struggle to navigate the legal processes and procedure to coherently present their case.

# Cross examination

“Justice isn’t served simply because they can’t do a thorough cross examination” (Magistrate)

There was consensus amongst interviewees that unrepresented defendants flounder in preparing for and conducting cross examination. Interviewees reported that they often do not call the right witnesses to back up their defence, or fail to call a prosecution witness when they don’t agree with their evidence (not surprisingly, most do not understand what a Section 9 statement is). Interviewees suggested that the normal procedure of court can be upset when unrepresented defendants force the prosecution to call witnesses whose evidence could have been agreed in advance:

“an unrepresented defendant will “fully bind” more witnesses than a competent lawyer” (prosecutor).

We were told of a witness to a minor car park accident who travelled from Slough to St Albans to give evidence, only to discover that no-one disputed his testimony.

Prosecutors and judges said most unrepresented defendants did not understand the basic rules of cross examination. One prosecutor told us, “unrepresented defendants don’t understand the question and answer process, and they tend to try and put their case to the witness”.

Concern among interviewees arose in relation to a range of things they had witnessed in court. Unrepresented defendants wanted to make statements to witnesses rather than ask questions, and when they did, often asked irrelevant or “illegal” questions. Above all, it was felt they often did not understand how to challenge prosecution witnesses:

“they don’t make the right points, they don’t ask the right questions. They can actually undermine their own case” (prosecutor). In seeking to make cross-

examination as fair as possible, judges and prosecutors explained that they may step in where an unrepresented defendant is struggling. This raised concerns in itself, as one prosecutor outlined, “the judge has to do all of the work for them, and is in a tricky position because he is meant to be impartial, but may have to take over cross-examination.”

“I have, in all my years of prosecution, never met a lay person who can [cross examine] on their case. They choose to give statements and expect an answer. I often seek to have a court appointed defence advocate to aid through this minefield” (prosecutor).

There is another side to this procedural challenge that is also worrying, namely that unrepresented defendants’ ignorance of how to cross examine can lead to the abuse of witnesses, particularly in cases where the alleged perpetrator has been accused of a crime by someone they know and emotions are high. The risk is greatest in domestic violence cases where the alleged victim may be terrified anyway and reluctant to give evidence.

The court system has attempted to resolve this through allowing judges to appoint an advocate just to cross-examine vulnerable witnesses, when a defendant is unrepresented<sup>16</sup>.

Court appointed advocates are paid by the hour for the time spent on the cross-examination. Some lawyers interviewed pointed out that the interests of justice would be better served by providing legal aid for the defendants in these cases, and they thought it would probably cost little more. The LAA would pay a solicitor from £345 (ex VAT) for all preparation and advocacy work for a magistrates’ court domestic violence trial. In y/e September 2015, the LAA spent £8.7 million on 7130 cases involving court appointed advocates, with monthly spend ranging from £189,000 in October 2014 to £1.26 million in July 2015. Average cost per case varied but was £1,276 in September 2015<sup>17</sup>.

<sup>16</sup> <https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/2015/crim-proc-rules-2015-part-23.pdf> in these circumstances the defendant is prohibited from cross examining the witness.

<sup>17</sup> FOI reference 103089

## Case study: a case collapses because of risk of insensitive cross-examination

A man is accused of common assault. It is the fourth hearing. The alleged victim has not requested special measures prior to this hearing, but screens are made available on the day. The man has no legal aid so needs to cross examine the witness from behind a screen. The bench decides that this screen is insufficient safeguard for the witness. There is no duty solicitor to cross examine on behalf of the accused. The CPS decides to offer no evidence rather than request another hearing when everything could be properly arranged. So the case is dismissed. The look of disbelief/relief of the accused is memorable. Surely we can do better than this. (magistrate – quoted from an email).

# Vulnerable unrepresented defendants

"It's defence solicitors...who realise [their client] has difficulty understanding or certain vulnerabilities...They are the ones who flag up that there should perhaps be a psychiatric report or some change to the court process – an intermediary to help the defendant understand the questions...If you don't have a solicitor flagging those things up...nobody knows, they remain hidden" (Prosecutor).

Many defendants are vulnerable. Mental health problems, learning difficulties, disabilities and addictions are more prevalent amongst those accused of crimes than in the general population. A full assessment by a mental health practitioner will pick up these issues, while experienced advocates may be able to spot signs too. However, vulnerable unrepresented defendants may slip through the net. As one prosecutor described, there are a "number of defendants who suffer either from undiagnosed mental health conditions, or serious mental health conditions, which mean that they have no insight into their disorder. And it is wrong to imagine that it is obvious when someone suffers from serious mental health problems, often it really is not."

Judges and magistrates we interviewed stressed they would deal with vulnerable defendants with the same care and compassion, whether unrepresented or not. Where vulnerabilities are clear, judges adapt the process or seek legal help, but advocates, and the evidence of our observations, suggested vulnerabilities may be missed or even ignored. If this happens, unrepresented defendants miss out on the support available – assessments, expert reports, access to intermediaries, input into mitigation, ability to argue that they are not fit to plead.

One issue highlighted by a magistrate was that only some of her colleagues have enough training to recognise hidden vulnerability:

*"what you need are very highly trained, specialist magistrates, which in that sense we don't have...So you may have someone who really doesn't understand the questions they are being asked...and you may have a very good legal adviser who can [re-phrase them], but it's pot luck and I don't think a court process should be pot luck".*

## **Court observation: unrepresented defendant with mental health problems**

*A man in his late 20s was on remand for the theft of a mobile phone. He had mental health issues and had seen a mental health practitioner but was refusing to see a solicitor. He gave evidence to the court via video-link. When the legal adviser asked the unrepresented defendant for his plea, he asked if he would be allowed home again. He then said it was a "not guilty plea due to a psychotic episode". The adviser accepted the plea but said, if he was relying on a defence of psychosis, he would need medical evidence covering the period of the offence. The unrepresented defendant was not granted bail. The CPS had very little on file about the offence, but said the unrepresented defendant was remanded as he failed to attend court after being charged with the offence.*

# Sentencing

“On balance a person who is unrepresented stands a 15% chance of getting a longer sentence or a worse outcome than if he was represented, even by a not very competent advocate” (prosecutor)

“Sentencing requires access to the guidelines, an understanding of what they are reading and then how to apply them...I have watched a bench give a community penalty when a skilled advocate would have got a Conditional Discharge for the same offence and facts” (prosecutor)

A few respondents had seen unrepresented defendants get relatively lenient sentences, in their view because judges or juries felt sorry for them:

*“sometimes you get cases where the jury think that it is obviously unfair that the defendant hasn’t got a lawyer, and I’ve seen cases where somebody has been acquitted because the jury didn’t like the imbalance” (prosecutor).*

But most advocates thought unrepresented defendants got tougher sentences - not because judges were tougher on them, but because unrepresented defendants had no idea how to mitigate. A lawyer will find out as much as possible about their client’s personal circumstances, and the circumstances of the crime, and knows what mitigating factors fit the sentencing guidelines. Unrepresented defendants have no idea what is, and isn’t relevant. We heard from one prosecutor that, “I have not yet heard a good plea in mitigation from a self-representing defendant. The mitigation usually turns out to be a rehearsing of the facts...or a simple “I don’t know what to say”.”

If judges do not have information to mitigate the sentence, they can’t act on it. A District Judge admitted that mitigation was, “particularly important. An advocate can make all the difference to a conditional discharge instead of a fine - they tell you a bit more that a defendant might not think to tell you themselves”.

One prosecutor said unrepresented defendants could even confuse aggravating and mitigating features of an offence, and end up getting themselves a longer sentence:

*“most people for instance, think it’s mitigation to say they were drunk at the time. The sentencing guidelines say that’s an aggravating feature!”*

Pre-sentence reports (PSRs) help judges understand what mitigation might be relevant for an unrepresented defendant. These are completed by probation officers either in full, or in a shortened version, but only for some offences and offenders. Interviewees felt that full PSRs were particularly helpful in sentencing unrepresented defendants, but that they were disadvantaged because they did not understand the role of the PSR in the sentencing process, nor how to encourage a judge to order a full one.

One District Judge was also concerned that unrepresented defendants may not actually understand their sentence. Normally she would ask the advocate to explain the sentence, but an unrepresented defendant may, “go away not fully understanding no matter how hard you try...and it must be such a scary experience that a lot of it can go over your head”. A prosecutor with experience of representing defendants, also worried that unrepresented defendants may walk away from court in a fog of ignorance:

*“the court is an intimidating place for most people and it is not unusual that I will have to sit down and explain what happened following a hearing where the client was present but simply didn’t understand what was happening”.*

Another prosecutor said, “I would think that approximately 25% do not have a clue what has just happened. I often find that the ushers in court are having to explain what has just happened...Most ushers are good, but there are some who are as clueless as the defendant”.

### **Court observation: not understanding mitigation**

*A man in his 30s has pleaded guilty to speeding. He is faced with a six month driving ban, since he had too many points on his licence. He is a delivery driver and is in danger of losing his job. When he turns up at court unrepresented he seems to have no idea of what to do. He has not told his employer that he is in court. The judge tells him, "this could be very significant for you as you are in danger of losing your job, it would be fairer to you to allow you time to speak to your employer". The legal adviser tells him to get a letter from his employer to say he could lose his job, "as the court has to ban you unless you can prove to the court reasons why not". The case is adjourned to allow the defendant to try to mitigate his sentence.*

# The role of court staff, practitioners, judges and lay assistants

"I think we're seeing more of it [unrepresented defendants]... that's just the way it's going with legal aid and I think we need to be more in tune with that and more prepared for it. I don't for one minute say that my style of chairing a court is perfect but I know from talking to other colleagues that there isn't enough consistency with legal management of how unrepresented defendants will be treated" (magistrate).

It is not quite clear who is supposed to do what to help unrepresented defendants, given there is little written guidance. The Equal Treatment Bench Book makes clear that judges and magistrates should help unrepresented defendants understand the legal process, and their role in it. Those we interviewed tried hard to ensure unrepresented defendants understood the charge, the implications of their plea and how to defend themselves throughout a trial. But in the interests of justice, judges must remain impartial, and so are limited in the help they can offer one party.

Legal advisers have potentially the greatest opportunity to help unrepresented defendants. They can meet with them one to one before the hearing, and give some advice on how to present their case. But they cannot give legal advice. One prosecutor felt that they often overstepped their remit, "the whole system is undermined. Court clerks' role is corrupted in terms of advising on evidence, plea and mitigation, to say the least". Another prosecutor was concerned that legal advisers sometimes didn't take opportunities to help:

"I have seen a whopping line of defence that just hasn't been explored, and in my view it should be the clerk who covers them first because he's responsible for the law, and then it's for the magistrates to clarify points...But I have stood in court and seen the clerk miss the defence point, and I've had to stand up and say, "I think what Mr X is saying...and I've actually turned to the defendant

and said, "please correct me if I'm wrong but I think what you are saying is this..."."

Magistrates' courts presided over by a District Judge and Crown Courts often do not have legal advisers present. All legal advisers are legally qualified but court associates, who usually sit with DJs, are administrators and note takers. They have no legal training, and limited ability to help unrepresented defendants.

A Deputy District Judge recognised that unrepresented defendants were particularly disadvantaged by the absence of a legal adviser. He said he turned up sometimes at court, and the associate would say 'I'm just an associate, I can't give you any advice on the law...I say don't worry, I know the law and we'll muddle along.' So they're not even there to flag up for the unrepresented defendant things that might be important".

The role of McKenzie friends in the criminal courts seems very undeveloped. McKenzie friends, who help an individual in court but are not legally qualified, are common in family courts, though their role is controversial. Some are friends or volunteers, but others are paid. Only one of our interviewees had ever heard of a paid McKenzie friend in the criminal courts. Friends, family and/or support workers were sometimes encouraged to sit with the defendant (rather than being relegated to the public gallery), but seldom spoke on behalf of the defendant, as sometimes happens in civil courts.

Prosecutors were not convinced McKenzie friends helped unrepresented defendants, suggesting it can be, "like the blind leading the blind. Because it's such an adversarial process...the only person that can help an unrepresented defendant is another lawyer." Another prosecutor worried that, "they've told me what the law is and have got it wrong...it's one of those cases where a little bit of knowledge is a dangerous thing."

# Do prosecutors adapt their behaviour?

"I try not to change my advocacy, but inevitably I end up highlighting defence points not raised by the defendant in the guise of explaining why they are not good points" (prosecutor).

Prosecutors in criminal courts are either employed by the CPS directly, or are independent barristers or solicitors contracted to do particular cases for the CPS. Independent barristers usually work on both prosecution and defence cases. Those we interviewed frequently empathised with the plight of reluctant unrepresented defendants. Many expressed concern about the disadvantages they faced, and spoke of doing what they could to assist while not compromising their own case.

One prosecutor described seeking out unrepresented defendants before any trial to explain the process and explore their argument. "This isn't to obtain some tactical advantage in court – it's in order to see what sort of questions he should ask to defend himself and, sometimes, you can make points for him when you're prosecuting, and that is effectively prosecuting and defending at the same time".

Another prosecutor faced with a difficult unrepresented defendant in a long running case, tried to facilitate the defence case:

*"whenever there have been issues of law, you almost find yourself having to argue both sides of it and its extremely difficult to do, to be on the one hand a crown advocate and on the other hand to have the responsibility for making sure that things are carried out justly. So you find yourself saying "we say this but it may well be that defence counsel will argue that....""*

Another prosecutor said he would, "occasionally ask a prosecution witness a question which is likely to assist the defence (even if it undermines my own case), if the defendant is unlikely to think to ask it".

In magistrates' courts the prosecutor is sometimes an associate, ie someone who is not legally qualified, but has completed an internal CPS training course. An unrepresented defendant may have a hearing, even a trial, in which the only legally qualified person in the room is the District Judge.

# Stepping into the breach

Unrepresented defendants by definition do not have a defence advocate, but, in practice, defence lawyers often step in to help. This may be the Duty Solicitor going beyond their remit, or a defence practitioner waiting for the next case who steps in to help. This is only financially rewarded if the client eventually gets legal aid – the motivation of lawyers is mainly the interests of justice.

Several prosecutors we interviewed mentioned that they might ask another lawyer they know to help if they really felt a defendant was floundering:

*"I speak to a defendant before the hearing, my first words are, "I am the prosecutor, you don't have to speak to me, but is there anything you want to know as to how this case is to be run?" If there are issues in relation to a defence, then I will always say, "Don't speak to me about that - I'll get you someone to talk to". There is usually someone from the Bar, or solicitors that I know who will step in pro-bono".*

# Do cases involving unrepresented defendants take longer?

"I've seen judges bending over backwards to help unrepresented defendants and explaining to them that they need to get a lawyer...but there is a limit to what they can do and how much time they can devote to someone, because they're often very busy and have lists that they need to get through in the day" (prosecutor).

The consensus from our interviewees, those who responded to the survey, and our observations, was that hearings involving unrepresented defendants last longer, indeed sometimes much longer. As one prosecutor put it, an unrepresented defendant, "has a very clear effect on the process. It slows it down in almost every example I can think of."

But a couple of interviewees thought hearings, particularly trials, with unrepresented defendants could be quicker than with represented defendants, partly because they don't know how to probe and challenge in cross-examination. One prosecutor described how, "It can add ages to a trial time, or the defendant gets a rabbit in headlights mentality and the case speeds through." Some judges also referred to lawyers on occasions being long-winded and thus needlessly slowing down proceedings.

The majority of our interviewees and respondents felt unrepresented defendants slowed things down in a number of ways:

- There were basic processes which the court had to do which would otherwise have been done by a defence lawyer before the court hearing started, for example filling in the case management form to identify issues for a trial.
- Explaining things, and establishing the facts of the case, took much longer. Judges and clerks spoke more slowly and had to give fuller explanations, particularly in a trial.

"You definitely take it slower because you want to ensure they understand what's being said...You always have to keep on repeating to them what they are meant to be doing - they forget" (magistrate).

- If the judge felt a solicitor should be sought in the interests of justice they would adjourn or delay the hearing to allow time for this.
- If witnesses whose statements could have been pre-agreed were called, this wasted time. Equally, if it was clear that crucial defence witnesses had not been called, the case would need to be adjourned to give time for them to be contacted.
- Unrepresented defendants may introduce irrelevant detail in telling their story or bring with them a lot of irrelevant documentation, so the court is much slower to get to the contentious evidence. Discussion of "uncontroversial" evidence also wasted time.
- Proceedings are delayed if papers need to be printed out and the unrepresented defendant given time to read them.

The length of additional time taken varied. One prosecutor described a Crown Court case that was supposed to last 6-8 weeks, but was in its fifth month (and still going) when he was interviewed. Another referred to his experience in the magistrate courts, "I have known a case, listed for an hour, for a driving offence take all day (started at 10.50hrs finished at 18.20hrs). Prosecutors are only paid to 16.30/17.00hrs and I regularly stay until the bitter end. My worst case was... when I was still sitting in the prosecutors seat at 21.55hrs. It is unacceptable for anyone to be there that late".

## Do cases involving unrepresented defendants cost more?

Estimates of the extra time taken varied. One prosecutor said it quadruples, another that it doubles, the time taken. All the judges interviewed agreed that it considerably increased the time a hearing took – three said it could double the time taken, another that each hearing would take 30-45 minutes longer. One prosecutor gave the example of a recent trial of someone accused of driving without due care and attention, which lasted four hours when it should have taken half an hour.

Many of the interviewees highlighted the challenge of dealing properly with unrepresented defendants given pressures on the court system to deal with cases speedily. Judges are under pressure not to delay, and particularly not to adjourn cases. This pressure to get on with cases may be a factor in the increase in unrepresented defendants – advocates felt that, in the past, judges were more likely to adjourn a case when they felt an unrepresented defendant could get representation.

A research study examining different funding models would be required to determine the financial impact and hidden costs of current trends in legal aid, delays, successful appeals and other elements. Such a study would need to factor in the outcomes of sentencing, bail and appeal decisions. If unrepresented defendants are indeed pleading guilty to offences which had a high chance of acquittal, and getting tougher sentences, then the total cost to the system would be great. The evidence gathered for this report indicates there may be considerable extra costs associated with dealing with unrepresented defendant and many interviewees felt that restricting access to legal aid is a false economy:

“it makes the whole system more expensive, because more hearings are required and longer time is needed to explain the system” (prosecutor).

# The complexity of criminal law and procedure

“Given the fundamental changes in the court procedures in recent years, culminating in Better Case Management, it can be tricky enough for lawyers to know the details of current procedure. Unrepresented individuals have little chance of fair process” (prosecutor).

The Government has added thousands of new criminal offences in the last ten years to an already complex system. Lawyers and judges find it hard to keep up with new laws, rules on procedure and sentencing guidelines, let alone case law. None of these developments are written in layman’s language and the evidence suggests that many people find it very hard to understand what is going on in court. Additional challenges of limited literacy, and English as a second language are not uncommon. All this makes it difficult for an unrepresented defendant to understand the law and how it can be used. They are at a huge disadvantage in trying to defend themselves against trained lawyers.

If the numbers of unrepresented defendants remain high, justice will only be achieved if the system itself is simplified – both in terms of legislation and legal process.

# Do unrepresented defendants get a different outcome?

"I worry about the outcomes for [unrepresented defendants] more than anything else. In the twenty-four years I've been practising now, the culture has changed...I think we have a victim court culture now... there are so many ways to catch a defendant out now that weren't there five years ago. ...There are so many things that a defendant wouldn't know, nor be expected to know...I just think they are at a massive disadvantage, but they don't know it" (prosecutor).

"There are technical, legal issues which, if done badly, will result in an adverse result for the defendant. As to the running of a trial, I think it borders on the unethical for a person who wants representation, or needs it, to be asked to run their own trial; especially in magistrates' courts, where the bench is heavily led by the CPS" (prosecutor).

The question of whether unrepresented defendants receive worse outcomes is at the heart of this enquiry. Our findings suggest that there are many ways in which lack of representation impacts individuals' experience of court, and how the case unfolds. But there is also evidence that being unrepresented can affect the sentence received.

Not surprisingly, judges were more confident than prosecutors that the outcomes of trials and sentencing were the same, whether or not someone had a lawyer. Prosecutors felt that unrepresented defendants were more likely to be disadvantaged in terms of sentence than verdict.

Whether someone pleads guilty or not, and to what charge, greatly affects any court outcome. Prosecutors (many of whom also act for the defence) were concerned that unrepresented defendants pleaded not guilty when they had no good defence, and pleaded guilty when they did. They were also concerned that an unrepresented defendant may not even understand what they are charged with.

Without a rigorous quantitative study of cases and their outcomes, it is difficult to draw concrete conclusions. However, the qualitative data that we have gathered for this report raises sufficient concern to warrant further examination.

# Policy on unrepresented defendants in the criminal courts

Unrepresented defendants are almost a policy free zone. There is little guidance for judges, prosecutors and court staff on how to deal with them, and what there is may not be up to date. The Equal Treatment Bench Book has a section on unrepresented defendants which suggests that most have actively refused a lawyer:

*"Those who dispense with legal assistance do so usually because they decline to accept the advice which they have been given, whether as to plea or the conduct of the trial"<sup>18</sup>.*

The criminal procedure rules make little reference to unrepresented defendants except to clarify that,

*"The legal adviser is under a duty to assist unrepresented parties, whether defendants or not, to present their case, but must do so without appearing to become an advocate for the party concerned"<sup>19</sup>.*

The rules do not explain who should fulfil this role in the absence of a legal adviser.

While unrepresented litigants in civil courts have been the subject of five years intense work by the Civil Justice Council, unrepresented defendants are not mentioned in Government policy in recent years. The Leveson "Review of Efficiency in Criminal Proceedings" (January 2015) is the template for court reform, but hardly mentions them. The invisibility of unrepresented defendants in the criminal courts could be to blame for their exclusion from thinking on criminal case digitisation. But there is reason for optimism with the imminent publication of MoJ research on unrepresented defendants in the Crown Court, which is already prompting new thinking.

# The Civil Courts

No-one in the civil and family courts and tribunals would say that unrepresented litigants get all the help they need. However, more is available than in the Criminal Courts. There are advisers in Law Centres and CABs, pro bono legal advice from charities like the Free Representation Unit and clinics run by universities, and practical help from the Personal Support Unit (PSU). Over five hundred PSU volunteers based in courts support unrepresented litigants through the process, give non-legal advice and referrals to pro bono assistance.

There are many guides online for unrepresented litigants in the civil courts including a handbook published by the judiciary in 2015<sup>20</sup>. Meanwhile lawyers can consult guidelines<sup>21</sup> published by the Law Society, CILEX, and the Bar Standards Board last year.

18 [https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/judicial-college/ETBB\\_LiP+\\_finalised\\_.pdf](https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/judicial-college/ETBB_LiP+_finalised_.pdf)

19 <https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/2015/criminal-procedure-rules-practice-directions-2015.pdf>

20 <https://www.judiciary.gov.uk/publications/handbook-litigants-person-civil-221013/>

21 <http://www.lawsociety.org.uk/support-services/advice/articles/litigants-in-person-new-guidelines-for-lawyers-june-2015/>

# Conclusion

Unrepresented defendants face considerable difficulties at every turn, from knowing how to prepare for court, to understanding what they are charged with, to countering the evidence against them. Incomplete data makes it difficult to draw firm conclusions about the numbers involved and the scale of any changes. However, the perception among those that were involved with this study was strongly that the situation is deteriorating.

All our interviewees, including judges, felt that unrepresented defendants were at a disadvantage. They only differed in their views of how great that disadvantage was. Their biggest concern was that unrepresented defendants were getting more punitive sentences as a result of not understanding what they have been charged with, entering the wrong plea and not understanding how to mitigate. This raises concern about whether cases involving unrepresented defendants meet the criteria of article 6 of the ECHR – the right to a fair hearing. As yet, no strategic litigation has tested this.

Dealing with unrepresented defendants is certainly causing huge stress in the courts, particularly for unrepresented defendants themselves, and costing time and money. It would be worth at least investing resources in increasing the take up of legal advice and supporting those who are representing themselves. Few groups get so little help in complying with the demands of the State. Unfortunately, because they are a desperate and often vulnerable group of people, they have no co-ordinated voice, nor a channel for effectively raising collective concerns. Criminal courts have muddled along for years, dealing with unrepresented defendants as best they can. Increasing numbers, and recent reforms, mean that muddle is turning into what some of our interviewees perceive to be daily miscarriages of justice.

# Recommendations

We have a criminal court system designed to be operated by lawyers. Most of the problems encountered by unrepresented defendants arise from the fact that the system itself has only made slight adjustments to their needs. If we are to properly serve unrepresented defendants, and have a justice system that operates effectively, we should either provide legal representation, or completely redesign the system to meet the needs of unrepresented defendants.

## Research

1. Conduct further research to understand why there are unrepresented defendants, why numbers appear to have increased in the magistrates' courts and what they perceive to be their greatest barriers to accessing justice.
2. Research the psychology of those who choose to represent themselves and explore whether there is value in investing more resources in persuading them to access and maintain legal representation.
3. Analyse the extra time taken by cases involving unrepresented defendants and undertake a full cost benefit analysis.

## Increase uptake of legal aid and legal advice

1. Update the income thresholds for legal aid in line with the rise in inflation.
2. Increase the recompense offered to those who pay privately and are acquitted – to disincentivise self-representation.
3. Grant legal aid to all defendants in cases where an advocate is currently appointed to cross-examine.
4. Improve communication about the availability of legal aid and how to access it, particularly for those unfamiliar with the system.

5. Ensure applications getting stuck in the LAA system do not lead to defendants missing out on representation.
6. Expand the role of the duty solicitor so they have more flexibility to deal with unrepresented defendants who have already contacted a solicitor, and with other hearings such as trials to prevent people being imprisoned on remand or sentence without access to legal advice.

## Help and support unrepresented defendants

1. Ensure that the new digital courts programme does not disadvantage unrepresented defendants.
2. Ensure all unrepresented defendants are assessed for mental health and other vulnerabilities.
3. Provide better online and printed information for unrepresented defendants on how they can prepare for and conduct their case.
4. Give prosecutors, legal advisers, court associates, ushers and judges specific training in dealing with unrepresented defendants, and appraise their performance in doing so.
5. Pilot the provision in criminal courts of practical help similar to that provided by the Personal Support Unit in Civil Courts.

## Overall

1. Simplify the law and the legal process.
2. Factor the impact on unrepresented defendants into policy making in criminal justice.



**Oliver Gardner**  
@oliversgardner



Follow

Just watched as court sent unrep'd def to prison. He didnt say a word through hearing save his name & DOB. Turns out he was deaf.

RETWEETS  
48

LIKES  
3



3:00 PM - 3 Jan 2014



Reply to @oliversgardner



**Oliver Gardner** @oliversgardner · 3 Jan 2014  
@jenniferkelly only found out when he went down & then guard called to say he didnt know what happened. Everyone just thought he was quiet



**sarahB** @saidiebee · 4 Jan 2014  
@oliversgardner @barnacle99 seriously?! That's like something from Garrow's Law.



**Oliver Gardner** @oliversgardner · 4 Jan 2014  
@saidiebee he appeared by video from pol stn & it was only coz he told cop he didnt understand that cop then called court explain he is deaf



**Alex** @Hanrahandsy · 3 Jan 2014  
@oliversgardner @smithben what? That is horrifying. Why didn't he have counsel?



**mark brookes** @crigglestone · 3 Jan 2014  
@oliversgardner @racben18 justice in the 21st century .. I despair !!



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**Transform Justice**  
43 Lawford Road  
London NW5 2LG

[penelope@transformjustice.org.uk](mailto:penelope@transformjustice.org.uk)  
[www.transformjustice.org.uk](http://www.transformjustice.org.uk)