



Exploratory research into unrepresented defendants in the Crown Court in England and Wales – perspectives from a small sample of practitioners

The Ministry of Justice (MoJ) introduced reforms to legal aid under the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012. The current Criminal Justice System (CJS) processes, operation and planned reforms are largely based on the assumption that criminal defendants will be legally represented.

In 2015, qualitative in-depth interviews were conducted with 15 Crown Court judges and 6 CPS Crown Court prosecutors to explore their perceptions of unrepresented defendants in Crown Courts on practitioners and court processes.

Several important caveats should be noted when reviewing the findings from this research;

- This research was very small-scale and exploratory. This means that the findings were indicative and should not be considered a comprehensive assessment of all the relevant issues.
- The findings were the specific views of the sample interviewed and may not be generalisable to other courts or individuals. The findings are also specific to the time period when the interviews took place (2015).
- Since the research was completed, the MoJ has committed to a full post-implementation review of LASPO.
- Qualitative research is often used to complement quantitative data. For example, in this report, published quantitative MoJ data (2015) indicate that there has not been a large rise in the volume of unrepresented defendants in the Crown Court (see p.2). However, that quantitative data cannot give granularity around issues such as offence type and reasons for lack of representation, and qualitative data is better placed to fill some of those how and why gaps.

Key findings

- The majority of the fifteen judicial interviewees and all six 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 emerging was the perception that unrepresented defendants' cases had longer hearings and case progression was slower.
- 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.

The views expressed in this Analytical Summary are those of the author, not necessarily those of the Ministry of Justice (nor do they reflect Government policy).



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. Whilst 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 Jan 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 a 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.¹

The MoJ publishes statistics which show that the proportion of defendants dealt with in the Crown Court known to have had legal representation² has decreased by 2 percentage points between 2010 and 2015.³ During 2015, 93% (89,400) of defendants had legal representation at the first hearing whilst 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 less hearings, compared with 17% of defendants whose representation was unknown or were known to be unrepresented.

Approach

In-depth semi-structured interviews⁴ were used to explore the views of judges and Crown Prosecution Service (CPS) practitioners⁵ in relation to unrepresented defendants. Fifteen Crown Court judges and six CPS Crown Court prosecutors were interviewed in 2015.⁶

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.

Findings

The findings from the interviews were grouped under several themes in the analysis which are reported below.

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 that they were 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

¹ There were also changes on 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>

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

³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/533097/criminal-court-statistics-jan-mar-2016.pdf

⁴ 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.

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

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

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 then they sacked their lawyer; and
- defendants who did not trust the criminal justice system and therefore chose to represent themselves.

For the second group, those who were unrepresented because of issues with legal aid, the interviewees felt these defendants perceived the level of contribution as too high and that 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 by the majority of interviewees. Some CPS interviewees went further by 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.

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 disproportional 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 their role and what they would be arguing. Other CPS interviewees maintained that they were the 'other side' to the unrepresented defendant and that therefore there was a limit to the extent to which they could assist. 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 the 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 which interrupted the normal proceedings, slowed down the process and judges had to pause frequently to check that the defendant understood;
- practical adjustments 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 of court, e.g. advance agreement of which evidence to submit which created more work during hearings and could also increase the number of hearings;

- over-participation and lack of clarity by defendants with unrepresented defendants raised 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 they sifted in order to find relevant evidence;
- that defendants could be very disruptive during hearings by, for example, continually talking over others;
- court staff having to respond to repeated enquiries from the defendant; and
- juries being discharged more frequently so judges could give additional advice to the defendant without risking influencing the jurors' view of proceedings.

One judge highlighted judges giving advice to defendants as 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 stated a very strong preference that the defendant facing charges was 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 aspects of the case could not be organised outside of court 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 in unrepresented cases. Some estimated this saying that trials could take at least twice as long. The reasons for this were similar to hearings but trials that involved juries and witnesses added another level of complexity.

Disclosure

Disclosure, i.e. 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 the unrepresented defendants releasing documents.

Also the CPS interviewees reported difficulties posed in serving evidence on unrepresented defendants, e.g. not knowing if they have the correct address, or the defendant saying they have not received the papers.

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 to do as it challenged their role of leading the prosecution. Another interviewee said that unrepresented defendants' behaviour towards barristers varied from openly hostile to collaborative, which was perceived to affect the engagement between the two parties.

The perceived effect on the jury

There were a number of concerns 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 (e.g. sympathy) or negatively (e.g. irritate the juror).

One interviewee described the risk that an unrepresented defendant might say inappropriate things or make remarks at inopportune moments, both of which 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 whilst 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.

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 of a chance of unrepresented defendant cases going to trial.

A few judicial interviewees said it was impossible to assess if 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.

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 as to how unrepresented defendants could be supported further were given by interviewees. For example:

- leaflets or videos to explain 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 aspects like assessing strength of evidence; or
- employing legal representatives on an ad hoc basis.

Some additional proposals focused on helping the courts and its practitioners to manage unrepresented defendants better, such as:

- 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 managing unrepresented defendants to allow them to feel more comfortable in 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 in 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)⁷ 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). The latter is to enable early engagement between all participants in proceedings and thereby increasing the number of cases brought to a conclusion by way of a single effective hearing.

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. Another couple of interviewees said that things could not be resolved at a single hearing as it took time to understand what 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 issues to 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.

Conclusion

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, with different needs and different challenges to the court.⁸ A consistent theme emerging from the interviews with the judiciary and CPS was unrepresented defendants' disproportional 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, i.e. the overall case length was seen to take longer. Interviewees suggested that this occurred because of a lack of understanding from unrepresented defendants which limited their participation in court activities. This affected other practitioners within the court such as judges and prosecutors who adjusted how they conducted hearings, generally slowing them down. In addition to this, unrepresented defendants were seen as a barrier towards 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 following 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 monitoring 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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Unpublished summary as of 27 April 2018

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

⁸ 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>