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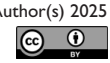

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How are unrepresented defendants treated in magistrates' courts?

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Abstract

This article examines how unrepresented defendants are treated in magistrates' courts in England and Wales. The findings are based on a small-scale study where 20 court actors were interviewed and 403 court hearings were observed. It is argued that although there are examples of good practice, where court staff do treat unrepresented defendants well and assist them to participate in the process, more needs to be done in relation to this. Currently, factors such as efficiency concerns are being prioritised over defendant engagement. This makes it more difficult for unrepresented defendants to participate in the process, which undermines their due process, liberal democratic and human rights.

Keywords

Defendant participation, discretion, efficiency, magistrates' courts, treatment, unrepresented defendants

Introduction

In this article, focus is on how unrepresented defendants are treated at court. Unrepresented defendants for the purpose of this research refers to defendants who attend court and are not represented by a lawyer for at least one hearing. Defendants appear unrepresented at court for a range of reasons. These include defendants: not being entitled to legal aid, not being able to afford legal representation, not wanting to pay for legal representation, wishing to save time, or not thinking that they need to be legally represented (Transform Justice, 2016).

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Research has been done focusing on the experiences that unrepresented defendants have at court (e.g. Transform Justice, 2016; Walker, 2024a, 2024b). Experiences will differ based on, for example, the individual themselves, whether they have been to court before, and the nature and seriousness of the offence they have been charged with. Nevertheless, it has been found that unrepresented defendants tend to experience issues when self-representing at court. Walker (2024a) argues that unrepresented defendants experience a number of pains (i.e. frustrations and disadvantages) when attending court. These relate to the difficulties that they experience when entering their plea, cross-examining, mitigating and understanding court proceedings. Other researchers have also found similar findings (e.g. Carlen, 1976; Transform Justice, 2016). These factors undermine unrepresented defendants' ability to effectively participate in court proceedings. The right to effective participation is implicitly recognised in art. 6(1) of the European Convention on Human Rights (ECHR). In SC v UK (2005:[29]), it was said that defendants should have a 'broad understanding' of the court process and 'understand the general thrust of what is said in court'. This is particularly important for those who are unrepresented as they do not have a lawyer there to speak on their behalf so more is required of them in terms of understanding and what they are required to do.

For the purpose of this paper effective participation refers to whether defendants can understand, follow, pay attention to, see and hear court proceedings, and it applies to all court proceedings, not just trials. It is important that defendants can effectively participate for procedural justice reasons. The main focus of procedural justice theory is on how fair procedures and processes are perceived to be (Donner et al., 2015). If defendants feel they have had a voice in the process, have been treated with respect and have trust in the decision maker and perceive them to be neutral, then they are more likely to accept the outcome and abide by the law, as are others in society (e.g. Tyler, 2003). If, for example, defendants cannot understand proceedings then their ability to have a voice in the process and to assess whether or not the decision-making process was fair will also be hindered. Being able to see and hear proceedings will also be relevant to whether defendants feel they have been treated with respect or not. Treating individuals with respect and giving them a voice in the process improves confidence in the system, which is linked with the perception of how fair and legitimate the process, outcome and criminal justice system are (e.g. Sunshine and Tyler, 2003).

It is also important from due process, liberal democratic, and human rights perspectives that unrepresented defendants can participate in proceedings so they have a fair hearing (Ho, 2010; Owusu-Bempah, 2017). If they do not have a fair hearing, then wrongful convictions could occur as a result. If unrepresented defendants are unable to engage in the process and understand or hear the case against them, then their ability to challenge the prosecution's case and hold the state to account will be hindered. Furthermore, Duff et al. (2007) argue that the trial should be regarded as a communicative process where defendants are called to answer a charge of alleged criminal wrongdoing. Unrepresented defendants will only be able to do this if they are able to effectively participate in proceedings by being able to understand and follow proceedings and navigate the legal and cultural space of the courtroom.

Despite the importance of participation, unrepresented defendants tend to experience difficulties at court. As a result, they are likely to need assistance to engage and

participate in the process. This was first made clear by Carlen (1976), who studied several magistrates' courts in London and documented the nervous behaviour of defendants, particularly unrepresented defendants. Most were unable to express themselves in court and found it a bewildering, frightening and alienating experience. She described them as being dummy players, unable to take part in the proceedings due to: the behaviour of the court staff and magistrates; the language used; the structure and architecture of the court building; the etiquette of ritual address; the formalities and procedures that go against conventional social practice; and the formal environment (Carlen 1976: 18–37).

Little research has been done focusing in detail on court staff and their treatment of unrepresented defendants. Although dated, some in-depth research has, however, specifically focused on the role of legal advisors when the defendant is unrepresented. It is important that legal advisors are discussed, given they play a significant part within the magistrates' court, ensuring that magistrates act within the law, that rules of evidence and procedure are abided by, and that unrepresented defendants are assisted (Cownie et al., 2013). Darbyshire (1984) conducted interviews with legal advisors and observed court proceedings; she found that the attitude of the legal advisor, the training that they had received and how experienced they were had an effect on whether and how much they were prepared to help an unrepresented defendant (by explaining things to them and repeating things to them etc.).

Astor (1986) who interviewed legal advisors and observed proceedings in different magistrates' courts reported similar findings. She found that while the majority of legal advisors enjoyed helping unrepresented defendants and empathised with them, some were rude and abrupt and did not give help when it was required. Whether the legal advisors had the skills to effectively help unrepresented defendants also had an effect on the level and quality of help that they could provide, as did the amount of time that they had. Astor found that legal advisors were under pressure to deal with cases quickly: the police, magistrates, and advocates all had other jobs to do and other cases to deal with. Consequently, there was tension between the desire of legal advisors to help unrepresented defendants and their desire to ensure that the courts ran smoothly and efficiently, although the latter was usually given priority to. A more recent study has been done by Transform Justice (2016). Here, 10 prosecutors, four district judges and seven magistrates were interviewed, two online surveys were completed by 96 lawyers and court proceedings were observed in several magistrates' courts in England. The study examined the experiences of unrepresented defendants and suggested that more could be done to assist them at court.

Discretion is relevant when considering how unrepresented defendants are treated, the experiences that they have and what values court staff grant priority to. Discretion is difficult to define (Gelsthorpe and Padfield, 2003; Pattenden, 1982). For the purposes of this article, discretion is defined as being when a judge, magistrate, legal professional or court employee must make a decision, and when making this decision, he or she has to weigh up different factors (Gelsthorpe and Padfield, 2003; Pattenden, 1982). A considerable amount has been written, for example, about discretion in welfare law (e.g. Alder and Asquith, 1981; Freeman, 1980; Titmuss, 1971); and the use of discretion by the police (e.g. Bronitt and Stenning, 2011; Myhill and Johnson, 2016; Skinns, 2019). Less

research has looked at how judges and court staff exercise discretion during criminal hearings; though work has been done concerning bail, legal aid, and the discretionary decisions that are made during criminal trials and sentencing (e.g. Flood-Page and Mackie, 1998; Pattenden, 1982, 1990).

In this article, focus is on how unrepresented defendants are treated and the role discretion plays in relation to this. This is of importance because the way they are treated at court will have an impact on the experiences that they have and their ability to engage in the process. How do court staff assist unrepresented defendants to engage in the process? To what extent do they do this, and what constraints exist in relation to this? It is argued that some of the problems and tensions identified by Astor (1986) are still relevant today. There is significant pressure, if not more pressure, on magistrates' courts to resolve cases quickly (Welsh, 2016, 2022). This creates tension between the need for efficiency (i.e. the aim to save time and reduce costs) and defendant participation. The former is generally prioritised to the detriment of the latter. Other factors also have an impact on the level and type of help provided: the culture of the court, the need for court professionals to remain impartial, concerns regarding security, the desire to promote good working relationships, assumptions about knowledge, defendants' behaviour, the differing approaches of court staff, and workloads.

Methodology

This article is based upon a small-scale exploratory study. The research project was conducted in two stages. For the first stage, I observed court proceedings at two magistrates' courts. I observed hearings at Courts A and B over a nine-month period, between 2018 and 2019. I spent around 100 hours observing at Court A and 126 hours observing at Court B. A range of hearings was observed, including plea hearings, sentencing hearings and trials. For a breakdown of the hearings observed, see the Tables 1 and 2.

Only a minority of hearings involved the defendant appearing virtually via live-link from prison (15 hearings – 7% – in Court A and 16 hearings – 9% – in Court B). The defendant was unrepresented in 5 (33%) of the virtual hearings in Court A and in none of those observed in Court B. No virtual hearings from a police station were observed, as these were – at the time of this research – not available in the police force areas where Courts A and B were located.

When observing I wrote down: the court name; the date of the observation; the type of hearing being observed; what offence(s) the defendant had been charged with; what plea had been entered; the defendant's gender and age; whether the defendant was represented or not; and whether the hearing was a virtual one or not. I also collected information on how those within the courtroom interacted with and responded to defendants, and how unrepresented defendants appeared to cope with representing themselves.

I deliberately observed a range of hearing types and cases at each court, spread out across different days to ensure that I observed different legal advisors, magistrates and judges. Non-probability sampling methods were used to identify which hearings I was going to observe, in which courtroom, and on what day. As a result of this sampling strategy and the fact that only two courts were observed, it cannot be said that the findings are necessarily applicable to other courts. For the purpose of this study, no types of

Table 1. The number and types of hearings observed at Court A.

Hearing type	Unrepresented		Represented	
	N	%	N	%
Sentence passed	40	50	53	38
Adjournments	17	21	41	29
Case management	11	14	27	19
Trials	9	11	4	3
Other*	3	4	15	11
	80	100	140	100

*This includes first hearings, hearings regarding breach of bail, second applications for bail and when the charge was withdrawn.

Table 2. The number and types of hearings observed at Court B.

Hearing type	Unrepresented		Represented	
	N	%	N	%
Sentence passed	11	44	69	44
Adjournments	5	20	44	28
Case management	0	0	23	14
Trials	8	32	11	7
Other*	1	4	11	7
	25	100	158	100

*This includes first hearings, hearings regarding breach of bail, second applications for bail and when the charge was withdrawn.

offences were excluded from the court and interview samples. I observed appearances involving both unrepresented defendants and represented defendants to be able to make a comparison.

In the second stage of fieldwork, qualitative interviews were conducted. Twenty participants were interviewed in total – defence lawyers, ushers, legal advisors and judicial prosecutors. It must be noted that judicial prosecutors are not Crown Prosecution Service (CPS) prosecutors. The judicial prosecutors interviewed worked for the police and worked in the traffic court. Given that the study is about unrepresented defendants and their experiences, several attempts were made to interview defendants themselves. The initial plan was to recruit defendants by approaching them at court – after their hearing – if they did not appear to be distressed or irritated, but permission was not gained from the court managers to do so. One court manager explicitly denied me permission to approach defendants on HM Courts and Tribunal Service (HMCTS) premises, whereas the other directed me to submit an application to HMCTS. I did this and received permission to approach defendants at court many months later. I emailed one of the court managers several times explaining this, and I asked if the manager's stance had changed, but the manager did not respond. Due to this, time factors (associated with spending time at

court to identify unrepresented defendants and the time it takes to organise interviews), and because of the measures that were in place due to coronavirus, I decided against approaching defendants at court in this way.

While attempting to gain access via the courts, I employed several contingency strategies to try and recruit defendants. I sent letters to eleven Citizen Advice Bureaus (CABs) in the two areas being researched and a Law Centre in Court B, asking them if they would advertise my study by putting up a poster that I had sent with the letter. Although CABs do not offer advice on criminal justice matters, it was possible that defendants would use them for other services, or mistakenly believe that they did provide support with criminal law, and therefore attend and see these posters. I also asked the defence solicitors that I had interviewed to act as gatekeepers. I emailed solicitors asking if they would be willing to ask their current clients whether they had been unrepresented in the past and if they had, whether they would inform them about my study and pass on my details; or alternatively, if they would pass on my details to former clients. All attempts, however, were unsuccessful. This is, therefore, a limitation of this study due to the centrality of defendants to the research project.

As said, though, I did interview a total of twelve defence lawyers, three ushers, three legal advisors and two judicial prosecutors. Non-probability sampling strategies were used to recruit participants. Interviews took place face-to-face or over the phone. Permission was granted by HMCTS to interview the ushers and legal advisors. The defence lawyers worked at Court A and/or B; the ushers and legal advisors worked at Court A, as did the judicial prosecutors.

The views of the participants in this study, being a limited sample from two courts, cannot be taken as representing the views of those professions in general. Moreover, a defence lawyer could be said to have a vested financial interest in maximising representation and therefore, to be likely to favour a view that leads them to a pro-representation position. They may also adopt this position due to their own principles, inherent values, and views regarding justice. Staff at HMCTS may also have wished to promote their employer and their court in a particular light and may wish to seek to avoid criticism of their work. This must also be borne in mind when reading the results of this study.

Furthermore, when considering how unrepresented defendants are treated at court, this has been answered from the perspective of court staff and based upon what I observed (so from my own perspective); rather than from the perspective of defendants – which was what was initially intended. Nonetheless, in relation to unrepresented defendants and their experiences, inferences have been drawn from the observational data and the interviews conducted with the court actors listed above. Interviewing court staff can still tell us something about unrepresented defendants' experiences because the court staff interviewed spend a lot of time conversing and dealing with defendants, and they can provide context for unrepresented defendants' experiences, even if only as secondhand testimony. Also, observations were useful in that they allowed me to become familiar with court proceedings and see how those within court responded to unrepresented defendants, compared to how they responded to represented defendants or legal representatives, which assisted me in understanding the experiences that defendants have and the level of assistance provided.

Findings

The study's findings are now discussed. As stated, the focus is on the treatment of defendants at court, with particular emphasis on unrepresented defendants. Treatment within previous research has concerned whether defendants were treated fairly, how they were spoken to, how they were addressed in court, where they were made to stand or sit in court, what assistance they were given, and by whom (Astor, 1986; Carlen, 1976; Cownie et al., 2013; Darbyshire, 1984; Transform Justice, 2016). The first section provides an overview of some of these matters that are relevant to the treatment of defendants, which can act as barriers to participation or enhance it. Then the data collected from the current study is set out in relation to how court actors assist unrepresented defendants. When quoting interviewees, the following abbreviations will be used to identify their roles: DL (defence lawyer), JP (judicial prosecutor), U (usher), and LA (legal advisor).

General factors relating to treatment, which can undermine or enhance participation

Defendants who are represented and unrepresented struggle when it comes to court proceedings, limiting their ability to participate effectively (Owusu-Bempah, 2018). Previous research identifies a number of factors, relating to the treatment of defendants, which tend to alienate and intimidate them. These include: how they are addressed; the positioning of court actors within the courtroom; the use of the dock; the chummy relationship and banter between other courtroom actors, which excludes defendants; the language used during court proceedings; the ritualistic nature of court proceedings; and the tendency to silence defendants (e.g. Carlen, 1976; Darbyshire, 1984; Jacobson and Cooper, 2020; Mulcahy, 2013). As a result, defendants are often marginal players during court proceedings, despite it being their court case.

These elements also arose in the current research. In the cases observed, legal terms – like 'swearing an oath', 'pre-sentence report', and 'commit to the Crown Court' were not always routinely explained to defendants, regardless of whether they were represented or not. Furthermore, the friendly exchanges, jokes shared, and discussions had about non-work-related matters that took place between prosecutors, defence lawyers, legal advisors and/or ushers, who were all in a familiar environment surrounded by familiar people, set defendants apart from the other actors within the courtroom and contributed to them being implicitly isolated. These exchanges were so frequent that this behaviour was too commonplace to record while observing. In Carlen's (1976) research, defendants were not always addressed in a respectful or formal way. This was not the case in this research, though. The title and defendant's last name were usually used by court actors, rather than just their first name, last name, or something else. Furthermore, Darbyshire (1984) observed some legal advisors being aggressive towards defendants, shouting at them, engaging in arguments with them and being openly racially prejudiced. No behaviours of this sort were observed in the present research which suggests some improvements have been made in this respect. Nevertheless, the extent to which defendants could participate was still constrained

due to, for example, the terminology used and the relationships other courtroom actors had with each other, which they were excluded from.

Represented defendants being prioritised

Some of the interviewees felt that unrepresented defendants were not treated as fairly as other defendants due to them being made to wait longer for their cases to be called:

> It's normally the solicitors who go first with their clients followed by interpreters because of the cost implications by the court, and after that any other attendees will be dealt with and after that the remainder of the list is dealt with if people haven't actually attended court. (Interview participant 19 – JP)

Based on the interviews, this tendency to deal with represented cases first is because: court staff are concerned with defence lawyers' caseload and so prioritise their cases; defence lawyers themselves will advocate to protect their own time; and there are greater perceived financial implications for delaying a represented defendant's court case. There was also the concern that unrepresented defendants' cases take longer:

> Defence solicitors absolutely dread being stuck behind an unrepresented defendant case because they know that it will inevitably drag on much longer than should be the case for whatever it is. (Interview participant 5–DL)

In the cases observed, unrepresented defendants were dealt with last, although one legal advisor made an active effort to deal with unrepresented defendants first. Generally speaking, however, those without legal representation were made to wait until all cases involving represented defendants had been dealt with, unless a defence lawyer was unprepared for a case for whatever reason. Usually, unrepresented defendants waited outside the courtroom and so were not able to enquire about what was happening until the usher went outside the courtroom. When the defendant's case was ready to proceed, the usher called them to go inside the courtroom.

If the court ran out of time in the morning session, then defendants were asked to come back for the afternoon session. If they had run out of time in the afternoon session, then they had to return another day. In cases where none of the defendants were in the cells, unrepresented defendants should be dealt with first where possible, as any anxiety that they feel is likely to be exacerbated by waiting long periods of time which undermines their ability to participate in proceedings when their hearing finally takes place. However, priority was usually given to other court actors for efficiency reasons and to promote good working relationships.

Both Bottoms and McClean (1976) and McBarnet (1981) stated that those who work at court spend a lot of time interacting with each other, they often deal with similar cases on a day-to- day basis, and they do the same things multiple times a day. As a result of this, 'networks of shared understandings' (McBarnet 1981: 4) of how cases should be handled are developed, and cases are processed through the system in a routinised way. This enables court personnel to quickly deal with their long list of cases (Young, 2013: 42). Informal norms develop and a professional culture is formed around the shared

goals and interests of court staff (for example, ensuring cases are dealt with efficiently, doing justice, and maintaining group cohesion: Blumberg, 1967; Welsh, 2016). In order for these goals to be achieved, court personnel have to co-operate with each other. This is something that the Criminal Procedure Rules encourage.

The workgroup culture found in courts, described above, and the behaviour of those working, therefore, affects the experiences that defendants, particularly unrepresented defendants, have. Unrepresented defendants may cause problems for the court personnel and court process, as they are likely to disturb the normal and efficient routine. As a result, as was found in the current study, and in Transform Justice (2016), unrepresented defendants are generally dealt with last due to court staff exercising their discretion in such a way which tends to result in represented defendants being prioritised.

The use of the dock

The magistrates and judges observed sat on raised benches in the courtroom. All docks were situated at the side of the courtroom, and some docks were enclosed with glass, while others were not. In Court B, seats were available in front of the secure docks. In Court A, in 68 (91%) of the in-person hearings, unrepresented defendants were told to sit or stand in the dock. In only 7 (9%) of these hearings were they told to stand elsewhere in the courtroom, usually near the dock or towards the back of the lawyers' benches. In Court B, all unrepresented defendants who had attended were asked to stand in front of the seats near the glass dock or sit on them, rather than sitting or standing inside the secure dock.

Sometimes, when the defendant was legally represented, their lawyer asked the court if their client could be seated outside the dock (whether it had glass around it or not) because they suffered from anxiety, for example. This was observed to take place in Court A, but not in Court B. In Court A, in 122 (94%) of the in-person hearings, represented defendants were sat in the dock, so in 8 (6%) of these hearings, they were not. No unrepresented defendants were observed to ask to be seated outside the dock, and it is not clear whether they knew that they could request this or not. A defence lawyer suggested that they would not know:

> I've had clients that have had hearing problems. . .and when they've told me that they've got hearing problems, I will say to them right then I will ask the judge if rather than going to the dock behind the glass, you can come and sit next to me, or they might have mobility problems. Some are obvious, some aren't so it might be better for them to sit behind me, or they might just be generally vulnerable. You know mentally unwell. They might have agoraphobia. Lots of different things which means it's not really the right thing for them to go into the dock, but they are not going to raise that. There not, you know, they're going to be told right ok, you go in there and they are going to go. (Interview participant 3 – DL)

As well as the issues discussed by the interviewee above relating to hearing and the negative impact the dock has particularly in relation to those who have physical or mental health issues, the use of the dock interferes with the presumption of innocence, isolates and segregates defendants, and hinders their ability to speak to their defence lawyers and hear court proceedings (Mulcahy, 2013). This is due to the positioning of the dock

and the impression that the use of the dock gives regarding dangerousness and guilt (Mulcahy, 2013).

These problems are likely to be exacerbated when they are placed in a secure dock, as unlike open docks, secure docks have high walls and panels – some of which go straight to the ceiling. Thus, there are issues relating to how the use of the dock negatively impacts on the due process rights of defendants and how these considerations should be balanced with security concerns. Whether a defendant should be placed in the dock or not is something that is left to the discretion of the court, although the use of the dock is said to be common practice (Mulcahy, 2013), which tends to undermine defendants' ability to participate. This is particularly the case for those who are unrepresented due to them not having a lawyer to speak on their behalf during court proceedings. In the hearings observed, in most cases, priority was given to security concerns – despite the magistrates' courts tending to deal with low level summary offences – and again to efficiency concerns. Defendants were generally brought into the courtroom and told to stand in the dock or were escorted to it. As a result, the standardised and efficient court routine was not interrupted.

How do court actors assist unrepresented defendants?

Interviewees were asked about how they and others within court seek to help unrepresented defendants. First, defence lawyers', judicial prosecutors', and legal advisors' views regarding how other court actors assist unrepresented defendants are considered. Then, the different ways in which ushers, legal advisors, and judicial prosecutors themselves have said that they provide assistance to unrepresented defendants are examined in the context of observational data so that a comparison can be made.

How do defence lawyers, judicial prosecutors and legal advisors think that other court actors respond to unrepresented defendants?. Most defence lawyers and judicial prosecutors thought that both ushers and judges responded to unrepresented defendants well and tried their best to assist them:

> They [district judges] are understanding. They do listen. The district judges I think are very good. It's just a level of empathy that they show, and I think that's what people need, a bit of empathy. (Interview participant 10–DL)

In the Transform Justice (2016) study, judges and magistrates who were interviewed said they tried to ensure that unrepresented defendants understood the charge, the consequences of pleading guilty and not guilty and, if they had pleaded not guilty, how to defend themselves during the trial. It was noted, though, that due to judges and magistrates having to remain impartial, they were restricted in how much assistance they could provide.

One interviewee, however, in the current study said the approach taken by the judge depended upon the judge involved:

> Different ones [respond differently]. I've seen district judges that have been absolutely rude to unrepresented defendants and shouted over them and won't listen to what they are saying. . .If

> they're speaking and if they're speaking in a broad [county name] accent, I mean we have one judge here who objects to people calling her love. She's in [place name] get over it. A young man will say 'no, love' thinking he's being sensitive and then he gets a telling off for doing that and that throws them completely. (Interview participant 7–DL)

There was greater agreement that practices varied among legal advisors and Crown Prosecution Service prosecutors, suggesting that court staff have discretion in this regard and responses differ. For instance:

> Very dependent on individuals I'd say. Some prosecutors will be sort of very legalistic and won't change anything that they say or do – you know their patter is their patter and it doesn't matter whether somebody is represented or unrepresented. Other prosecutors will you know appreciate that somebody is unrepresented, and you know, go up and [say] 'oh is this your record?' and make sure that they [understand] – so it really is dependent on the other party that we're talking about. (Interview participant 16–LA)

> Legal advisors some [will help]. We've got a mixed bag in [Court A]. Some will go out of their way to help the unrepresented defendant and others won't.
>
> (Interview participant 3–DL)

Prosecutors are in a problematic position when responding and conversing with unrepresented defendants. A defence lawyer (interview participant 5) mentioned that prosecutors must 'be very, very careful not to be actually seen as giving advice to the defendant as there is clearly a conflict of interest there' which would put them 'in breach of their professional obligations' and, consequently, they must remain 'neutral'. This was also noted in the Transform Justice (2016) study. Many of the prosecutors, in the Transform Justice study empathised with unrepresented defendants, and expressed concern about problems that they might face when representing themselves at court, and they said that they did what they could to help them, without compromising their own case. In relation to legal advisors, one prosecutor thought that they often overstepped their remit, though another expressed concern that legal advisors did not always help when required.

Some defence lawyers, in the current study, also suggested that there are limitations to what legal advisors can do to assist unrepresented defendants:

> Legal advisors I think struggle more and more because there's a lot more asked of them. In that once upon a time in every magistrates' court, you'd have a legal advisor well dealing with the legal bit and then you'd have an admin assistant who would be inputting the results of things, updating the diary with further court dates, and they've gone, so the clerks have gone from being a purely legal function to being administrative as well and in the midst of all of that I think unrepresented people suffer a little bit. (Interview participant 11–DL)

How much assistance legal advisors can provide to unrepresented defendants is restricted due to the limited time that they have to assist them due to the amount of work that legal advisors are required to do. This is likely to have increased over recent years

due to court closures and a reduction in the number of staff in courts (Justice, 2019). There is also concern that the number of unrepresented defendants has increased due to cuts to legal aid and threshold for legal aid not rising in line with inflation (Transform Justice, 2016; Walker, 2021; Welsh, 2016) which will mean a greater number of unrepresented defendants will require help, putting further strain on legal advisors.

A few defence lawyers also mentioned how some additional factors will impact the response defendants receive:

> I think. . .they are treated with respect unless they show otherwise. (Interview participant 3–DL)

This suggests that staff exercise their discretion in a way, which means that defendants' behaviour will influence the level and nature of assistance that they are provided with throughout the court process. However, defendants may be nervous or confused about what is happening, and this may result in them coming across as rude or hostile. They may also be trying to be polite but due to lack of understanding around how those within court should be addressed, they may come across as being disrespectful. Thus, the Equal Treatment Bench Book (Judicial College, 2024) outlines how this should be recognised, and defendants should be put at ease and basic conventions should be stated at the outset to help defendants to engage in the process.

Ushers', legal advisors' and judicial prosecutors' views as to how they respond to unrepresented defendants and observational data. The two judicial prosecutors noted that they both go to court, and one presents their case to the court, while the other acts as back up and provides assistance to unrepresented defendants outside of the courtroom (which was also seen in observations). One judicial prosecutor went into detail about the type of assistance that they provide:

> The back-up prosecutor will if required go and have a word with any of the attendees who wish to have assistance and it is purely absolutely informative. . .if an offence has been committed and we have sufficient evidence we will let that defendant know we've got sufficient evidence, and I'm sure that is then supported by back up information by the legal advisor who would support what we've got or not got and they would be advising them fairly as to what the course of action ought to be for them. (Interview participant 19 – JP)

When ushers were asked about whether there were any particular things that they would need to say or do if a defendant was unrepresented, they discussed how they print off their case papers for them and give them other relevant paperwork. The ushers also said how they will ask unrepresented defendants if they wish to see the duty solicitor when eligible (this was also noted while observing):

> We ask them if they would like to speak to a duty solicitor. We normally ask them two or three times but having said that, sometimes when they go in court. . .the legal advisor will say 'have you been asked if you want to speak to the duty solicitor?' 'No'. 'Would you like to speak to them?' 'Yes' – and the legal advisor knows that they have been asked but a lot of it is the fact that once they are in court, the bravado is here outside, 'I don't need anyone. No, I'm alright',

> but once they actually get in court and see that there is either a judge there or a bench there, especially if they have never been in court before, it's totally different. It's more real to them, so I can understand why they change their minds – and obviously, they're looking up to them if they have got a judge, and they think 'oh maybe I could do with [a solicitor]'. It's split second. It's just split second. They can walk through full of bravado, no problem. 'No, no, no' and then when they're asked again: 'yeah I think I better'. (Interview participant 14 – U)

Based on what the usher said, it is, therefore, critical that unrepresented defendants are asked about whether they would like representation both before they enter the courtroom and once they do.

A legal advisor also emphasised the need for ushers to be aware of any disabilities or special needs that an unrepresented defendant may have that they would need to make the court aware of:

> The ushers may need to support an unrepresented person more, yeah because obviously they need to check whether they want a solicitor and they need to check whether they need the papers, if they have got any special needs that need supporting–that obviously a solicitor would put us on notice of, so it could be their disabilities or things like that that an usher would need to be alive to. (Interview participant 18 – LA)

Ushers mainly dealt with defendants outside of the courtroom itself, whereas during court proceedings, the legal advisor, judge or magistrates played a greater role in responding to and dealing with defendants. While observing court proceedings, notes were taken relating to the assistance that was offered to defendants, both unrepresented and represented.

Assistance provided: Observational data. At the beginning of hearings, it was noticed that it was rare for different court actors to be directly identified to defendants (in terms of who they were, what their role was, or where they were sat). When court staff used their discretion to identify them, it was usually during virtual hearings, placing those who attended court at a disadvantage. Magistrates, judges and prosecutors tended to be mentioned only in passing usually when the defendant was provided with an explanation of what was going to happen during the hearing, the defendant was asked a question, or the defendant was asked to respond to something that the prosecutor had said during proceedings. For example, the legal advisors would usually say, 'the prosecution will outline their case and thereafter you'll be able to address the magistrates and outline your case' (Case 336) or 'we've heard what the prosecution have said. What would you like to say?' (Case 338). This assumes prior knowledge, though, and that a defendant will know what the roles of these court actors are, or where they are sat in the room. This is problematic as defendants will not always have that knowledge – even if they have been to court before – and hearings are fast-paced, so it cannot be assumed that they will pick this information up as hearings progress. A lot of information is transferred during court proceedings, and a lack of clarity at the outset will give rise to confusion and misunderstandings that will hinder defendants' ability to participate, particularly those who self-represent because as said, they play a more active role in proceedings.

Furthermore, although unrepresented defendants were told more frequently the consequences of pleading guilty or not guilty – in terms of sentencing discounts and reduced court costs for early guilty pleas – than represented defendants, in most cases defendants were not told regardless of whether they were represented or not. In contrast, most defendants who had been charged with an either-way offence were provided with an explanation of the implications of the choice of court. This was usually said very quickly, though, and not all defendants were told that they could choose where the trial was going to be heard. After defendants were provided with the explanation, they tended to have a puzzled look on their faces, which suggests they did not always understand. The impression that was, therefore, gained was that legal advisors were usually just going through 'the motions of due process', to use Carlen's (1976: 86) terms.

In most hearings, defendants, both represented and unrepresented, were not asked whether they had any questions at the end of the hearing by the legal advisor, magistrates, nor judge. In the Equal Treatment Bench Book (Judicial College, 2024), it is stated that defendants should not be asked whether they understand or not, as due to them feeling embarrassed or scared, they may say that they do even when this is not the case. It is being suggested here, though, that this question could still be initially asked, with a follow-up request asking defendants to explain in their own words what has been said. Again, this is of particular importance with regards to unrepresented defendants as they do not have a lawyer there to answer such questions, so they are reliant upon court staff to a much greater extent.

In relation to the consequences of not turning up to the next hearing, unrepresented defendants were told this more frequently than represented defendants but again in the majority of cases defendants were not told. Most defendants who had been sentenced to a financial penalty, though, were given information on how to pay, in the form of a leaflet and were told the consequences of not paying it. Also, the majority who had been disqualified from driving were also told that driving in the future would be a criminal offence that would bring them back before the court. Thus, in the cases observed, the consequences of sentences were explained to defendants more frequently or assiduously than more introductory information about the court and its actors.

A legal advisor interviewed in the present research set out all the things that someone in their position *should* do to assist a defendant when they are unrepresented, in order to ensure fair treatment throughout the trial and this included explaining things and doing so in greater depth to help them understand what was taking place. During observations, however, the assistance provided by court staff relating to matters specifically affecting unrepresented defendants varied. For example, despite what the legal advisor suggested, unrepresented defendants at both courts were rarely asked if they had seen their papers, or if they had had time to read them before being asked to enter a plea (or at the start of another relevant hearing). However, we have to be careful drawing immediate inferences that this was an omission. When the legal advisor did not ask about papers, it may have been because they already knew whether defendants had them or not – they may, for example, have already been informed by the usher and/or the prosecutor. However, it is unreasonable to expect legal advisors to keep notes of who has received what papers in a busy court, and it would be safer for advisers routinely to ask. When the defendant had not seen their papers, they were normally asked if they wanted to see them. If they did,

the hearing was adjourned. They were usually asked if they had seen the pre-sentence report, where one had been requested; but there were a few instances where it had not come to light that they had not until later on in the hearing. This shows the importance of always asking at the beginning, as unrepresented defendants may not necessarily know that they should see it, or that they should ask.

Explanations at the beginning of the hearings as to what was going to happen during the hearing were only provided at both courts in around half of the cases when the defendant was unrepresented. Explanations of court proceedings are important, particularly for unrepresented defendants, as it has been found that they tend to struggle to understand or follow court proceedings (Walker, 2024a). This is due to them, for example, not knowing what is going to happen and also due to the nature of court proceedings and the language used. Thus, legal jargon should be avoided or explained. According to a legal advisor, though, the language and terminology used by legal advisors when assisting unrepresented defendants varies:

> Yeah, there's more trying to assess the person and going back to road traffic, so a boring example again, but you get an idea of sort of somebody's level of intellect or the terminology that you would use. You would have to assess that really quickly with an unrepresented defendant – and it's fairly easy to do because you'll start talking about the offence and you have to read out the wording and you can sort of see people either struggling or you know, appearing to be completely on fire with the language but yeah, there is more tailoring in how you say things and what you say in that sort of hearing because you don't want to be speaking to someone who is highly intelligent as you would somebody who is really struggling with the legal language and so on. (Interview participant 16 – LA)

An issue with this approach is that it can be difficult to make such an assessment. Defendants may have issues with language or understanding, but they may not always be obvious nor visible to others. A defendant may be highly intelligent, but it does not mean they will always understand legal language.

In summary then, despite what the interviewed legal advisors suggested, practice appeared to vary – court staff exercised their discretionary powers in different ways. Although there were instances observed where explanations were provided and information was given, this was not always the case. Like unrepresented defendants, in most cases involving represented defendants, no explanation was given by court personnel, court actors were not directly identified, the consequences of pleas were not explained, and defendants were not asked if they had any questions at the end of the hearing. This was presumably to save time and due to the assumption that their legal representative would ensure the defendants adequately understand. This is problematic, however, as the findings from the current research and previous studies (e.g. Carlen, 1976; Kemp and Balmer, 2008; Kirby et al., 2014) suggest that those who are represented do not always understand proceedings either.

To facilitate participation, when defendants are represented, the onus is placed on defence lawyers in cases to explain to them everything which has happened and may be likely to happen in court in a way that they will understand. However, not all legal representatives will have the time, skills, or motivation to always do this (Baldwin and

McConville, 1997; McConville et al., 1994; Newman, 2013). Also, as stated, there have been reductions in spending in relation to criminal legal aid (Newman, 2013). Cuts to funding can have a negative impact on the service that is provided by those working in the industry, where there is pressure for lawyers to deal with clients efficiently (Newman, 2013). As a result, criminal defence lawyers feel as if their practice has turned into factory work where they are having to deal with lots of clients and push them through the system as quickly as possible for their firms to remain financially viable (Dehaghani and Newman, 2017; Newman, 2013). This will be a reason as to why defence lawyers want their cases prioritised and heard before unrepresented defendants as discussed above. Furthermore, even if lawyers do explain things to their clients and in a way that they understand, when in the courtroom, defendants may forget what has been said prior to the hearing and/or they may need certain things clarifying further.

Discussion and conclusion

In this research, the question of how unrepresented defendants are treated in court was explored through court observations and interviews with court staff. Treatment of defendants is important as it relates to due process, human rights, and procedural justice.

Some of the points that were raised in previous studies (Astor, 1986; Carlen, 1976; Darbyshire, 1984; Transform Justice, 2016) were also raised in the present research. For instance, the current research has emphasised that: there is some good practice by court staff to facilitate the engagement and participation of unrepresented defendants; there are varying levels of assistance provided by legal advisors; there are restrictions felt by legal advisors in relation to how much help they can provide; and there are concerns about unrepresented defendants being made to wait longer than represented defendants. Some improvements have been made since some of the earlier studies were conducted, in that court staff were not observed shouting at defendants and defendants were addressed in a respectful manner. Nevertheless, in the cases observed, explanations were still not always provided to defendants, represented defendants were prioritised over unrepresented defendants and, due to the terminology used, the use of the dock and the layout of the court, it can still be inferred that both represented and unrepresented defendants are excluded and marginalised during court proceedings as was the case in the 1970s and 1980s when most of the previous research was done in the area.

As a result, additional steps need to be taken to assist unrepresented defendants to effectively participate in court proceedings. The frequency with which things were explained to defendants – represented and unrepresented – varied; and the behaviour of the defendant themselves, whether they were represented or not, the court that they were in, how they were perceived and how much time court actors had also seemed to have an influence on how they were responded to. The Equal Treatment Bench book (Judicial College, 2024) guides judges in relation to how they should respond to unrepresented defendants during a criminal trial. It is unclear, though, what guidance – if any – others working in the criminal courts have in relation to how they should assist unrepresented defendants.

Despite this, as noted, there were good examples where staff went above and beyond unrepresented defendants, but this was not always the case, and their discretion was exercised in a way which hindered unrepresented defendants' ability to participate in the process. Court professionals are constrained to some extent due to the need to remain impartial and due to the increasing pressure that staff face due to court closure and cuts to staff. However, court professionals take different approaches with some being more helpful than others. In relation to knowledge, it should be assumed that unrepresented defendants need things explaining to them due to them generally struggling during court proceedings, jargon should also be avoided, as should the use of the dock due to the nature of offences that are unrepresented defendants are usually charged with when appearing in the magistrates' court. Unrepresented defendants also struggle in relation to participation because efficiency concerns are usually prioritised over and above the need for court professionals to facilitate the fair and effective participation of defendants within the adversarial court process. A change of approach is required, where the system is rebalanced in favour of due process rights. More attention needs to be given to defendant participation, and further research needs to be done with defendants themselves to see how this can be best achieved.

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