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A Study Examining the Experiences of
Unrepresented Defendants in the Criminal
Courts

Charlotte Rebekah Walker

A thesis submitted in partial fulfilment of the
requirements for the degree of Doctor of
Philosophy

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This thesis is dedicated to my mum: Linda Ann Walker

May 1960 – March 2021

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List of Abbreviations

ABH	Assault Occasioning Actual Bodily Harm
CAB	Citizens Advice Bureau
CDA 1988	Crime and Disorder Act
CJA 1967	Criminal Justice Act
CJA 1972	Criminal Justice Act
CJA 1991	Criminal Justice Act
CJA 2003	Criminal Justice Act
CJCA 2015	Criminal Justice and Courts Act
CJ-SSS	Criminal Justice: Simple, Speedy, Summary
COA	Court of Appeal
CPR	Criminal Procedure Rules
CPS	Crown Prosecution Service
DL	Defence Lawyer
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GAP	Guilty Anticipated Plea
HMCTS	Her Majesty's Court and Tribunal Service
HMPPS	Her Majesty's Prison and Probation Service
HRA 1998	Human Rights Act
JO	Judicial Office
JP	Judicial Prosecutor
LA	Legal Advisor
MOJ	Ministry of Justice

NGAP	Not Guilty Anticipated Plea
PACE 1984	Police and Criminal Evidence Act
PSU	Personal Support Unit
SDJ	Stop Delaying Justice
TSJ	Transforming Summary Justice
U	Usher
YJCEA 1999	Youth Justice and Criminal Evidence Act

Abstract

This thesis explores the experiences that unrepresented defendants have when appearing in magistrates' courts in England and Wales. The majority of previous research done in the area is outdated (e.g. Dell 1971a, 1971b; Carlen 1976; McBarnet 1981). Twenty interviews were conducted with legal advisors, ushers, defence lawyers and judicial prosecutors. I also spent around 226 hours observing at two magistrates' courts and a range of hearings were observed. Mostly qualitative data were collected in this research, though some quantitative data were also gathered.

The findings from this study were compared with those from previous research and were considered in light of a number of theories and models (i.e. due process, crime control, human rights, liberal democratic, and procedural justice).

Similar to other research (e.g. Transform Justice 2016), the main finding of this thesis is that unrepresented defendants tend to experience problems when self-representing at court and these problems are varied. This is not ameliorated by virtual hearings. However, it is not just those who self-represent who experience difficulties when it comes to court proceedings; those who are represented do too. All defendants generally struggle to engage and effectively participate in court proceedings (e.g. follow and understand what is taking place) – although this is particularly the case for those who are unrepresented and/or have additional support needs (e.g. a learning disability) and/or have never been to court before. Within this thesis, the meaning of effective participation, the reasons why it is important and the barriers that exist, which act to undermine defendants' ability to effectively participate, are all discussed. A new theory – called defendant engagement – has also been developed. This theory draws upon the theories identified above and seeks to address issues around participation and proposes that defendants' status within criminal courts needs to be re-examined.

1.0 Chapter One: Introduction

There has been a dearth of recent academic research looking at the experiences of unrepresented defendants in the criminal courts in England and Wales since the 1970s and 1980s; yet court and criminal procedures have changed since then, as have legal aid and levels of legal representation. Whilst the majority of defendants are legally represented at the magistrates' court, there is a significant minority who are not: it has been suggested that around 20% of defendants are unrepresented for at least one hearing (Kemp 2010; Magistrates' Association 2015; Welsh 2016).

This research specifically focuses on unrepresented defendants in the magistrates' courts rather than in the Crown Court as although there are no official statistics for the number of those who self-represent in magistrates' courts, a greater proportion of defendants appear to represent themselves in summary proceedings than in the higher courts or for triable-either-way offences¹ (Kemp 2010; Magistrates' Association 2015; Transform Justice 2016; Ministry of Justice 2017a). Moreover, there is some indication that the number of unrepresented defendants in the magistrates' courts has been increasing over recent years, though more research is needed to substantiate this claim (Kemp 2010; Magistrates' Association 2015; Welsh 2016; Transform Justice 2016). In spite of this apparent increase, though, the implications of lack of representation on courts, defendants' rights and justice are not well researched.

The aims of the research are, therefore, to:

- Explore the current experiences of adult unrepresented defendants in the magistrates' courts;
- Examine the reasons why defendants self-represent;
- Identify the resources used by those self-representing; and

¹ Criminal offences are classified as being summary only, triable-either-way or indictable. Summary only offences (the least serious offences) can only be heard in the magistrates' court, triable-either-way offences (which are middle-range offences) can be heard in either the magistrates' court or the Crown Court, and indictable offences (the most serious offences) can only be heard in the Crown Court. For more information, see s. 2.1.

- Investigate the impact that unrepresented defendants now have on court proceedings and on the role of the judge, magistrates, prosecutors, defence lawyers and other court staff.

In this research, interviews were conducted and court proceedings (for example, first hearings, sentencing hearings and trials) were also observed in two different magistrates' courts. Attempts were made to interview defendants themselves, as their voices have historically been excluded and ignored in discussions around the experiences that they have at court. They are in the best position to talk about this given that they have direct experience of it and thus, their accounts of their experiences should be privileged over those of others.

An interpretivist standpoint has been taken in this research. For an interpretivist, it matters how the subjects understand phenomena and the meanings they give to them, because their experiences will be conditioned by their own circumstances and characteristics (Schutt 2006: 43). Furthermore, in order to assist and support unrepresented defendants during the court process, it is useful to consider how they experience representing themselves (so what their point of view is) to better understand how this can most effectively be achieved. However, as will be discussed in Chapter Four of the thesis, this proved not to be possible. Defendants were observed during court proceedings, though, and quotes from those proceedings are provided in the results chapters. Interviews with other court actors - defence lawyers, judicial prosecutors, legal advisors and ushers – also shed light on the area. The perspective of legal advisors and ushers on the subject matter has been lacking in recent research on magistrates' courts.² Their viewpoints, as well as the other court actors interviewed, are important given that they work in court, are involved with criminal proceedings and have experience with observing and conversing with unrepresented defendants, as well as setting the culture and ambiance of the courts.

² Transform Justice (2016) conducted the most recent research project specifically focusing on unrepresented defendants in the magistrates' courts. Court proceedings were observed, interviews were conducted with prosecutors, judges and magistrates and two online surveys were completed by lawyers. For more information, see s. 3.1 and s. 3.2.

1.1 A note on terminology

The terms self-represented defendant and unrepresented defendant will be used interchangeably throughout this thesis to refer to those self-representing in the criminal courts. The terms self-represented litigant and litigant in person will also be used to refer to those who are self-representing in the family or civil courts. For the purpose of this research, an unrepresented defendant is someone who at some stage during court proceedings is not represented by a lawyer who is acting on record.³ It is important to bear in mind that unrepresented defendants are not a homogenous group: they may have been unrepresented at their first appearance and then later represented; or they may have been represented at their first appearance and then later unrepresented; or they may have been unrepresented throughout. They may have received some legal advice outside the courtroom itself at some stage or they may not. Some will have been to court before (for example, as a defendant, or a witness), but others will not. Some may be unrepresented for financial reasons, for instance, but financial difficulties will not be the case for all unrepresented defendants (some may wish to put their case themselves, for example). Some unrepresented defendants may have additional needs (such as a physical disability or learning difficulty). Thus, it cannot be said that all unrepresented defendants have the same characteristics or will all have the same experiences at court.

1.2 Outline of thesis/thesis plan

Defendants' experiences at court are and will be shaped by a number of different factors, and these will be discussed in the next chapter (Chapter Two). Chapter Two provides a review of the criminal justice system in England and Wales, sets proceedings in the magistrates' courts in context and indicates the history of and changes to legal aid in England and Wales and, more theoretically, discusses the importance of the crime control and due process models,

³ An unrepresented defendant includes those who have received advice from a lawyer or some other individual who is not acting on record and includes those who have the assistance of an interpreter, for example, or a McKenzie friend. Interpreters assist defendants (who have poor English language skills) and the court by translating what is being said during court proceedings (Aliverti and Seoighe 2017). McKenzie friends are allowed to accompany unrepresented defendants in the criminal courts, as well as those self-representing in the family and civil courts. McKenzie friends usually just provide emotional support and practical support (e.g. take notes), although they can address the court and examine witnesses if they are given rights of audience (Courts and Tribunal Judiciary 2010). For more information, see Chapter Three, s. 3.3.3.

human rights, procedural justice, and discretion. Chapter Three explores the previous research on unrepresented litigants, in the criminal courts but also in the civil and family courts. This study's methodology will be discussed in depth in Chapter Four, and its findings are set out in Chapters Five to Eight. My main finding is that unrepresented defendants generally experience problems when attending court; though some benefits of self-representing were mentioned by participants, far more disadvantages were discussed. The reasons for defendants self-representing are varied and the impact that defendants have on court proceedings and on court personnel are also mixed. Whilst the main focus of this research project is on unrepresented defendants rather than represented defendants (as less recent research has been done focusing specifically on those who self-represent in the criminal courts than those who are represented: Transform Justice 2016; and Thomson and Becker 2019), the experiences that represented defendants have at court have also been considered and compared. The main themes that arose out of the research are reflected on in depth in the final chapter (Chapter Nine); the results are considered in relation to a number of theoretical perspectives discussed in Chapter Two. A new theory which has been developed is discussed, suggestions for reform are made and, lastly, some concluding thoughts are set out.

2.0 Chapter Two: The Criminal Justice System and Legal Aid System in England and Wales

Defendants' experiences may differ depending on which court their case was heard in, the nature of the offence that they were charged with and at what stage in the proceedings they were unrepresented. How court personnel responded to them and whether they were physically present in court or whether they appeared via live link, for example, may also have an effect on their experience.

This chapter explores the literature relating to the criminal justice system and the legal aid system in England and Wales. It provides a brief overview of trial process, and the institutional differences between the Crown Court, magistrates' courts, and youth courts, with a particular focus on the defendant's position and the impact of legal representation (or the lack of it) on them. Changes in court procedures and the support that is available to lay users are discussed, with a particular view towards demonstrating the absence of up-to-date literature on unrepresented defendants – a gap that this study will fill. These changes are put in theoretical context, paying particular attention to Packer's (1964) models of criminal justice and the research that has been done in the areas of discretion, procedural justice and human rights.

2.1 Trials at first instance

All criminal cases start in the magistrates' court, and magistrates' courts deal with more than 90% of all cases from start to end, the remainder passing to the Crown Court for trial or sentencing (Ministry of Justice 2016a: 3; Jacobson et al 2015). Criminal offences are classified as either being indictable (e.g. murder and rape), summary (e.g. low-level motoring offences and minor assaults) or triable-either way (e.g. theft and burglary). The majority of defendants are prosecuted for summary offences.⁴ When a defendant has been charged with a triable-either-way offence, they can choose for their case to be heard in the Crown Court or the magistrates' court. The magistrates will send the case to the Crown Court, regardless of

⁴ 1,163,000 defendants were prosecuted for summary offences in 2016 (580,000 were prosecuted for summary motoring offences and 583,000 were prosecuted for summary non-motoring offences) (Ministry of Justice 2016b: 1). 268,000 were prosecuted for triable-either-way offences, and 25,000 for indictable only (Ministry of Justice 2016b: 1).

the defendant's wishes, if they do not think their sentencing powers are sufficient or the case is particularly complex. Unlike in the Crown Court, for example, the maximum prison sentence that a defendant in the magistrates' court can receive is 6 months, or 12 months if they have committed more than one offence (Marson and Ferris 2020: 75). In addition to the Crown Court and magistrates' courts, there is also the youth court. This court will not be discussed within this thesis, though, given that the focus of the thesis is on adult unrepresented defendants.⁵ In the Crown Court, trials take place before a judge and a jury; although judges sit alone for other hearings, like bail applications (Cammiss 2013). In the magistrates' court cases are heard by two or three magistrates or a district judge (Courts and Tribunals Judiciary n.d.a). Magistrates in magistrates' courts hear the majority of cases.

2.2 The role of the judge and clerks/legal advisors in an adversarial system

An adversarial criminal justice system is used in England and Wales. In an adversarial system, evidence is gathered and presented in court by the prosecution and defence; and witnesses are cross-examined by the opposing parties (unlike in an inquisitorial system, judges or magistrates play no role in investigating cases). Judges (and magistrates) play an independent and neutral role, ensuring that proceedings are conducted as fairly as possible by ensuring that all relevant matters are heard (Courts and Tribunals Judiciary n.d.b). Judges tend to ask questions of defendants and/or witnesses only rarely, for example, in order to clarify a point already made by that witness, or to enable them to elaborate on points made during their previous examination (Jackson and Doran 1995: 143-146). Some judges also ask questions to test the accuracy of the defendant's or witness' statements but this is relatively rare (Jackson and Doran 1995: 147-157). Judicial approaches to asking questions vary significantly, in terms of how often they intervene, and whether they ask questions during or after a witness' examination (or cross-examination) by a lawyer or by the defendant themselves, if they are self-representing (Jackson and Doran 1995: 134-136). A judge may interrupt witness examination, for instance: if the rules of evidence and procedure are not

⁵ A youth defendant (under 18 years of age) is not automatically entitled to legal aid. In many cases legal aid will be granted, though, and this is particularly the case when the defendant is under the age of 16 due to such defendants being unlikely to be able to understand proceedings or state their own case (Legal Aid Agency 2020a: 28). This research, therefore, focuses upon adults as there appears to be a greater proportion of adults self-representing and greater concern around this.

being followed; if, in their view, a lawyer is acting inconsiderately towards an opposing party's witness; or if they are not focusing on the relevant issues in the case and are asking irrelevant questions (Jackson and Doran 1995: 99-122). The judge announces his/her decision at the end of the case. In the magistrates' court, the magistrates/district judge decides upon guilt or innocence and if the defendant is found guilty then the sentence as well, whereas in the Crown Court, the jury decides on guilt or innocence, and the judge determines what sentence to impose on those found guilty.

In addition to these roles, judges should provide help to unrepresented defendants during the trial. The Equal Treatment Bench Book⁶ (Judicial College 2018: 8-9) recognises that unrepresented defendants may face additional difficulties compared to those who are represented. As a result of these difficulties, 'throughout a trial a judge must be ready to assist a defendant in the conduct of his or her case' (Judicial College 2013: 10). For example, basic rules should be explained at the outset of proceedings; and when unrepresented defendants are cross-examining witnesses, judges should help them to formulate the questions (Judicial College 2018: 12). How judges respond to this guidance in practice is unclear, though, as no research has looked at this in the criminal courts.

Although much is dated, some in-depth research has, however, specifically focused on the role of legal advisors⁷ when the defendant is unrepresented. It is important that clerks are discussed, given that 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 clerks and observed court proceedings; she found that the attitude of the clerk, 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 50 clerks and observed proceedings in nine different magistrates' courts reported similar findings. She found that whilst the majority of clerks enjoyed helping unrepresented defendants and empathised with them, some were rude and abrupt and did not give help when it was

⁶ The Equal Treatment Bench Book contains guidelines for judges in both the civil and criminal courts to help ensure that everyone is treated fairly and equally in court regardless of their ethnicity, sexuality, gender etc.

⁷ Legal advisors are also known as magistrates' clerks. These terms will be used interchangeably throughout this thesis.

required. Whether the clerks 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 clerks 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 clerks wanting to help unrepresented defendants but also ensure that the courts ran smoothly and efficiently, the latter of which the clerks in Astor's research gave greater priority to.

Another study which discussed the assistance provided by court professionals including legal advisors was done by Jacobson and Cooper (2020). 159 interviews were conducted with practitioners and 316 hours of observation took place (in criminal courts, family courts, and in immigration and asylum and employment tribunals Family Court: Jacobson 2020b: 108). It was concluded that court professionals including legal advisors significantly helped those who were self-representing (Jacobson 2020b: 127). They did this by, for instance, explaining things to them and sometimes encouraging them to obtain legal representation. The extent to which they could assist defendants to participate was constrained though, due to, for example, the nature of the environment which they worked in (the formal setting and complex legal procedures that had to be followed) and the pressurised nature of it. Court lists were often overloaded, court staff had increased workloads due to court closures and cuts to staff, technology did not always work, and paperwork was not always available (Jacobson 2020b: 124).

Some of the problems and tensions identified by Astor (1986), then, are still relevant today. There is a lot of pressure, if not more pressure on the magistrates' courts to deal with cases quickly (Welsh 2016: see s. 2.3 below), and how clerks should balance this tension and these competing interests is not clear: there is little guidance for clerks on how to help unrepresented defendants. It appears that clerks, like judges and magistrates, still do not receive specific training on how to deal with unrepresented defendants (Transform Justice 2016), and the Criminal Procedure Rules (CPR) and Criminal Practice Directions (CPD)⁸ make little reference to self-representing defendants (Transform Justice 2016), apart from saying that:

⁸ Together, the Rules and Directions govern what practice and procedure should be followed in criminal courts (Criminal Practice Direction 2020: para. A5).

The legal advisor 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 (Criminal Practice Direction 2015: para. 24A.16).

A factor that renders Darbyshire's and Astor's studies less relevant than Jacobson and Cooper (2020), though, is that courts themselves have transformed radically over the past three decades.

2.3 How have criminal procedure and court practice changed?

Across all court proceedings, including the criminal, civil, and family courts (see Woolf 1996; the Civil Procedures Rules 1998; the Family Procedure Rules 2010), there has been a move towards judge-led management of cases. From the 2000s onwards, various initiatives have been introduced in the criminal courts to improve the efficiency of the system: the 'Criminal Justice: Simple, Speedy, Summary' (CJ-SSS) initiative, the 'Stop Delaying Justice' (SDJ) initiative, and the 'Transforming Summary Justice' (TSJ) initiative (Hannibal and Mountford 2017; Robinson 2017; Ward 2017). A number of changes have also been made to the CPR, which were first established under the Courts Act 2003. These initiatives and rules were introduced with the aim of reducing the number of unnecessary hearings, delays, adjournments, the length of trials, the number of ineffective trials,⁹ the number of late guilty pleas, and the time it takes for a case to be dealt with from when a person is arrested to when they are either acquitted or convicted (Hannibal and Mountford 2017; Ward 2017).

Darbyshire (2014: 30) claims that effective case management is 'crucial in securing fair treatment of, and outcome for, the defendant and witnesses, and saving expense'. Since the adoption of the CPR, judges rather than the parties are responsible for managing the progress of cases, for example by: encouraging parties to cooperate with each other in the progression of the case; identifying disputed issues and the needs of witnesses with the help of the parties at an early stage; monitoring the progression of the case; discouraging and avoiding delays; establishing timetables; and encouraging the use of technology (r. 3.2 CPR 2020). In order for the objectives of case management to be achieved, various parties need to co-operate and work together, including the police, prosecutors, defendants, defence lawyers, and judges

⁹ An ineffective trial is a where the trial does not take place on the date it was scheduled to do so due to, for example, inaction of the prosecution, defence and/or the court (Ministry of Justice 2014: 7).

(Ward 2017). If a party does not comply with a case management rule or direction then the court may: fix, postpone, bring forward, extend, cancel or adjourn a hearing; exercise its powers to make a costs order; and, where appropriate, impose any other sanction (rr. 3.5(6)(a)-(c) CPR 2020).

In order to deal with cases quickly, defendants in the criminal courts are also increasingly encouraged to plead guilty at the earliest possible opportunity through the provision of more lenient sentences (or ‘sentencing discounts’) for early guilty pleas (Leveson 2015; Ward 2017). Discounts will be more generous the earlier in the proceedings the guilty plea is made, and depending upon the circumstances in which the plea was made (s. 144(1) Criminal Justice Act (CJA) 2003), up to a maximum of a one-third deduction where the defendant pleads guilty at the first opportunity (Sentencing Council 2017). After the first stage of proceedings (and a trial date has been set), the sentence can be reduced by a maximum of a quarter. If the defendant pleads guilty on the first day of trial, then it can be reduced to a maximum of one-tenth (Sentencing Council 2017). When a defendant pleads guilty, there is no need for witnesses to be called in relation to guilt (though they may, on rare occasions, be called in relation to information relevant to sentence), and so a pre-trial guilty plea saves time and money, and saves (most) witnesses from needing to testify (Sentencing Council 2017).

A system of early hearings to aid in case management has been introduced. In proceedings expected to remain before the magistrates’ court, if the prosecution expects the defendant to plead guilty, then they will now appear for their first hearing before a ‘guilty anticipated plea’ (GAP) court, within 14 days of being charged (Hannibal and Mountford 2016). If they expect the defendant to plead not guilty, then they will appear before a ‘not guilty anticipated plea’ (NGAP) court within 28 days (Hannibal and Mountford 2016). The cases are separated into different courts for efficiency reasons: if a defendant is appearing at a guilty anticipated plea court, then the preparation work that the prosecution will have to do is drastically reduced; time and resources are not used preparing trial-ready files, which are unlikely to be required (Leveson 2015). Equivalent procedures for ‘early guilty plea hearings’ are also available in the Crown Court, for those expected to plead guilty, as well as those who have changed their mind since pleading not guilty before the magistrates’ court and being referred to the Crown Court (Hungerford-Welch et al 2015).

Changes have also been brought about as a result of the introduction of the single justice procedure (this was introduced by s. 48 of the Criminal Justice and Courts Act 2015). As a result of this change, if an adult has been charged with a non-imprisonable offence, then they may not need to go to court. Guilty or not guilty pleas can be entered via post and/or online. If the defendant pleads guilty, then a single magistrate or judge will, in private, make a decision relating to sentencing, but if a defendant pleads not guilty, then their attendance will be required (gov.uk n.d.b). More than half of cases at magistrates' courts are now dealt with through this procedure (Hanna and Dodd 2020: 86). The number of single justice procedure cases has continued to increase since 2015 and in 2019 they accounted for 57% of all completions at magistrates' courts (Ministry of Justice 2019a: 10). Time is saved, as well as money, as a result of defendants being dealt with in this way, but due to cases being dealt with in private, there are concerns around the impact that it has on transparency, open justice and on unrepresented defendants (Justice Select Committee 2021). More research needs to be done examining this.

With the aim of improving speed and efficiency, video link technology is also increasingly used in court proceedings (Ward 2017). Any non-defendant witness can give evidence through a live link when it is in the interests of the efficient or effective administration of justice (s. 51 CJA 2003), or where a witness (including a defendant) is considered vulnerable (ss. 24 and 33A of the Youth Justice and Criminal Evidence Act (YJCEA) 1999). A first hearing in a magistrates' court can now also be conducted via a 'virtual hearing', using a video 'live link' from a police station (s. 57C of the Crime and Disorder Act (CDA) 1998). This live link is available to defendants who have been detained at the police station after being denied bail (s. 57C(3) CDA 1998), as well as those granted a 'live link bail' (i.e. where they have been granted bail but required to return to the police station for the virtual hearing: s. 57C(4) CDA 1998; s. 47(3) Police and Criminal Evidence Act (PACE) 1984; and see also Ward, 2017). Defendants who appear via live link enter a plea, bail and remand decisions are made and if they have pleaded guilty, then the defendant may be sentenced immediately (Transform Justice 2017a; Ward 2017). Presently, virtual hearings by live link are only available in some police force areas, including Kent, London, Norfolk, and Cheshire.

However, at the time of writing (February 2020), based upon what was said by those interviewed for the current research project (the methodology is discussed in detail in Chapter

Four), video links from prison to court are used more frequently. Prisoners can attend a pre-trial hearing, a remand hearing, or a sentencing hearing via a video link, rather than attending court in person. Defendants (at the police station or in prison) do not have a choice as to whether the live-link will be used. The number of defendants who appear via live link (either from the police station or from prison) is currently unknown. How many are legally represented is also not known (Transform Justice 2017a). It is also unclear what effect appearing via live link has upon the experience of both represented and self-representing defendants. When the defendant is represented, their solicitor generally chooses to speak to them on video and will attend court in person; although lawyers can, if they wish, sit with their clients and appear via video as well (Transform Justice 2017a). Chapter Seven discusses the advantages and disadvantages of defendants appearing via video.

Furthermore, as a result of the Coronavirus Act 2020, the ability to conduct hearings by live-link (audio and video) has been expanded further. Witnesses, lawyers, defendants and judges are able to take part in eligible criminal proceedings through a live audio link or live video link (see, ss. 53-56, and schs. 23-26 Coronavirus Act 2020). The impact this has had on court proceedings and the experiences that defendants and other court actors have had has yet to be researched.

Changes have also been made to the preparation and delivery of pre-sentence reports by probation staff. A pre-sentence report can now take three different forms: a standard delivery report (which usually requires a three-week adjournment), a fast delivery report (this is typically done on the day of court or in 5 days and these are shorter reports and are less detailed) and a 'stand down' (oral) report, which is usually delivered on the day. The Criminal Justice Act 2003 (s. 158(1)(a)) provided that pre-sentence reports can be given orally in court, so they no longer have to be written, and the TSJ and the CJ-SSS initiatives encouraged the use of fast delivery reports or oral reports to reduce delays and to save resources (Robinson 2017). As a consequence of this, the reports are now produced more quickly than used to be the case and are more likely to be done orally (Robinson 2017).

As well as these changes to court procedures which have been discussed above, there has been an increasing focus on supporting court users to participate in court proceedings, particularly those who are considered vulnerable. The provisions, schemes and enactments

that have been implemented that seek to facilitate the participation of lay users, including defendants will now be explored.

2.3.1 What provisions exist to support lay users at court?

The Witness Service was launched in 1994, which provides practical and emotional support to witnesses giving evidence in court (Hilton et al 2012). The Witness Service supports prosecution and defence witnesses, though mostly prosecution witnesses, including victims. It is not available to defendants. Since 1974, victim support agencies have also provided support to those affected by crime; a Victims' Charter was issued by the government in 1990, which sets out what information and support victims should receive and how they should be treated, and this was replaced by the Victims' Code in 2013 (the current version is the 2021 Code). This Code further sets out what victims are entitled to and the level of service they should receive from those within the criminal justice system (Kirby 2017). In 2018, guidance was also issued by the Crown Prosecution Service relating to how prosecutors should assist witnesses at court to give their best evidence (CPS 2018). The question is then whether similar measures are needed for defendants compared to those which have been provided to witnesses, including victims.

The Equal Treatment Bench Book (Judicial College 2018) guides judges in relation to how they should respond to both self-representing litigants in the civil and family courts, and self-representing criminal defendants. Some of this guidance includes that: the judge's name and the correct mode of address should be clarified, as should other individuals present in the courtroom; basic conventions and rules should be explained at the beginning; the procedure and the purpose of the hearing should be explained; the person self-representing should be informed of their right to request a break; and they should be informed that only one person will be able to speak at one time.

There are some specific provisions that are also available to certain defendants regarded as being 'vulnerable'.¹⁰ Vulnerability is a concept with a number of different meanings (Brown

¹⁰ A single definition – legal or otherwise - of what constitutes a vulnerable defendant does not exist. The Youth Justice and Criminal Evidence Act (YJCEA) 1999 (s. 33A(4)) states that a defendant is vulnerable if they have a mental disorder or a significant impairment of intelligence and social functioning (learning disability). The Criminal Practice Direction (2015: 3D.2) acknowledges this but

2015: 27); The ‘exact meaning and parameters of [vulnerability] remain somewhat elusive’ (Munro and Scoular 2012: 189). Within academic literature, several different types of vulnerability have been identified. These include: innate vulnerability, which is due to personal and or physical factors such as age, and physical and mental health issues; situational vulnerability, where the circumstances they are in can make them vulnerable (such as being homeless, a drug user, and/or a sex worker); and universal vulnerability, reflecting the innate vulnerability of every person due to the nature of the human condition (Brown 2015: 28; also see, for example, Palmer et al 1988; Pinsker et al 2010; Fineman 2008).

Within the court system, when reference is made to vulnerability, the focus is usually on the defendant’s age, or whether they have physical or mental health issues, or learning disabilities (Judicial College 2018: 42). However, there has been a lack of research examining the prevalence of these particular vulnerabilities amongst defendants who appear at court (Murphy and Mason 2007). This makes it difficult to measure and make assessments in relation to the number of defendants identified as having a vulnerability and what that vulnerability is (JUSTICE 2017: 12). Nevertheless, data have been collected in relation to offenders, who necessarily had to be defendants at some point in order to be sentenced (Bryan et al 2007; Hagall 2002). Cunliffe et al (2012) found that 36% of the surveyed prisoners said they had a disability or mental health problem. Furthermore, Brooker et al (2011) found that 39% of adult offenders under supervision in one probation area had a current mental illness and 49% had a past/lifetime mental illness; and the Offender Health Research Network (2009) found that 75% of adult prisoners had a dual diagnosis (mental health problems combined with alcohol or drug misuse). Mottram (2007) found around 7% of adult prisoners had an IQ of less than 70 and 25% an IQ between 70-79. On average, adults in England and Wales have an IQ of 100 (BBC 2014). Defendants with these specific needs are likely to need to be supported in court to be able to understand and effectively participate in the process (Clare 2003; Talbot 2012).

In response to these issues, the Equality Act 2010 requires that ‘reasonable adjustments’ are made to court processes for a disabled person who would otherwise be ‘put at a substantial

also says that ‘many other people giving evidence in a criminal case, whether as a witness or a defendant, may require assistance’, although no more information is provided in relation to this. In the Equal Treatment Benchbook it also provides that ‘parties may be “vulnerable” in court as a result of various factors’ and that ‘there is no general definition of “vulnerability” under the law’ (Judicial College 2018: 42).

disadvantage ... in comparison with peers who are not disabled' (s. 20(5)). Under s. 6(1) of the 2010 Act, a person has a disability if they have a 'physical or mental impairment' that 'has a substantial and long-term adverse effect on [their] ability to carry out normal day-to-day activities'. According to the Criminal Procedure Rules 2020 (r. 3.8(3)(b)) 'every reasonable step' should be taken by the court to facilitate the participation of everyone involved, including defendants, both before and during the trial.

The Criminal Practice Direction (2020: paras. 3G.1-3G.14) sets out the ways in which court proceedings can be adapted. These include: the use of clear and understandable language; arranging for the defendant to visit the courtroom before the trial or hearing so that he/she can familiarise himself/herself with it; frequent and regular breaks; holding proceedings on the same or almost the same physical level; and allowing the defendant to sit with members of his/her family or other supporting adults. The needs of various participants (including unrepresented defendants) are also set out in the Equal Treatment Bench Book (Judicial College 2018), which states that court procedures may need to be adjusted and sets out the ways in which they could be. Guidance is also available for practitioners: for example, the Advocate's Gateway (n.d.) provides various toolkits, which seek to assist legal professionals in identifying and responding to vulnerability. Steps have, therefore, been taken; guidance is available and judicial actors have discretion to decide whether, if any, of these measures will be put in place. More research, however, is needed around how often these adaptations are implemented in practice, and what impact they have.

Some additional attempts have been made in recent years to improve the treatment of vulnerable suspects at the police station and defendants at court. Lord Bradley in 2009, for example, reviewed the liaison and diversion services that were available to vulnerable people in the criminal justice system – the quality, nature and accessibility of those services varied - and recommended that a standard national liaison and diversion model should be created (Bradley 2009; Disley et al 2016). The government agreed to this in the same year (Disley et al 2016: 1). The aims of the services operating within the liaison and diversion model are:

Improved access to healthcare and support services for vulnerable individuals through effective liaison with appropriate services; diversion of individuals, where appropriate, out of the youth and criminal justice systems into health or other supportive services; delivery of efficiencies within the youth and criminal justice systems; and the reduction

of re-offending or escalation of offending behaviours (NHS England Liaison and Diversion Programme 2014: 10).

The services aim to identify ‘people who have a mental health, learning disability, substance misuse or other vulnerabilities when they first come into contact with the criminal justice system’ (NHS n.d.) whether they are suspects at that stage or defendants or offenders. Once a vulnerable person is identified and an assessment has been carried out, the information can then be used:

To refer the person to health or social care services – for example, treatment for depression or anxiety or support with learning disabilities; and to help the police, Crown Prosecution Service and courts make better decisions about how to deal with that person – for example, a court might decide that a person experiencing mental health problems, who is receiving treatment, should get a community sentence rather than go to prison (Disley et al 2016: 4).

Initially, in 2014, the national model was implemented in ten trial sites in England and an evaluation was completed, involving case studies, interviews, and surveys (Disley et al 2016). There were 22,502 adult cases referred into a liaison and diversion service between April 2014 and February 2015. Around 40% were referred for one or more interventions and 70% had information communicated to criminal justice services (Disley et al 2016: 44). The impact of the services was considered; for example, in the first 18 months of implementation. In relation to the police, it was found that: an increasing number of people with vulnerabilities were being identified in custody; members of the liaison and diversion team provided valuable advice to the police; information from the service had informed police charging and remand decisions in some instances; and information about suspects’ vulnerabilities could increase or decrease the chance that the case would be prosecuted rather than diverted (Disley et al 2016: xviii). Judges and magistrates were extremely positive about the outcomes of this service for court users, as well as in remand decisions, and in sentencing (although the analysis did not support this latter claim: Disley et al 2016: xviii-xix). Participants involved in the study were generally positive about the scheme, including service users due to the practical and emotional support that it could provide (Disley et al 2016: xx). More recent research is needed, particularly given that the schemes are now more widespread. Diversion and liaison schemes are now available in all magistrates’ courts, for

example, and the rollout of NHS commissioned liaison and diversion services achieved 100% coverage across police stations and courts across England in March 2020 (NHS n.d.). However, the move towards increasing virtual and online hearings may have had an impact on the services since the evaluation was conducted. There is also little information about unrepresented defendants, how often they are referred to these services, and by whom. Defendants must be referred to the service for an assessment, and so not every defendant receives an assessment. This may mean that some vulnerable defendants do not access the service due to issues around recognising vulnerability that have been touched upon above. All defendants can self-refer, but how many know about the service and do this? What, if any, procedures are in place at court for professional court users to refer defendants to use liaison and diversion services and how knowledgeable are they about them? How and in what ways are unrepresented and represented defendants assisted? What impact do these schemes have on their experiences at court? All of these questions remain to be answered.

2.3.2 Special measures

In addition to the provisions that have been considered above, certain defendants and witnesses may also be entitled to special measures to assist them during court proceedings. Again, though, defendants must be classed as vulnerable in order to be entitled to these special measures. The Youth Justice Criminal Evidence Act (YJCEA) 1999 sets out the current law relating to the provision of special measures to help a witness to give their best evidence in court (see YJCEA 1999, s. 19(3)). The following special measures are available: the use of screens (s. 23); the use of live-link (s. 24); the ability to give evidence in the absence of the public gallery (s. 25); the removal of wigs and gowns (s. 26); pre-recorded examination-in-chief (s. 27); pre-recorded cross-examination (s. 28); the use of an intermediary (s. 29); and aids to communication (s. 30). Child witnesses are automatically considered vulnerable, as are witnesses whose quality of evidence is likely to be diminished because they are suffering a mental disorder, have a significant impairment of intelligence and social functioning, have a physical disability or are suffering from a physical disorder (s. 16). Witnesses can also be eligible on the grounds that they are experiencing fear or distress in relation to giving evidence at trial (s. 17). For certain offences, like sexual offences, the complainant will be automatically eligible for special measures if he/she testifies (s. 17(4)). Defendants (though not defence witnesses) were initially excluded from this legislation. However, the government later extended eligibility for some special measures to vulnerable,

although not intimidated, defendants to use live link facilities (s. 33A YJCEA 1999),¹¹ and to use an intermediary whilst being examined and cross-examined (s. 33BA YJCEA 1999). The statutory provision with regards to the intermediary, though, at the time of writing (July 2021) has not been implemented. The court does, however, have ‘wide and flexible inherent powers to ensure that the accused receives a fair trial’ (*R v Camberwell Green Youth Court* 2005). An intermediary can be appointed to assist a defendant (*C v Sevenoaks Youth Court* 2009); screens can be used (*R v Waltham Forest Youth Court* 2004); and an array of other adaptations and special measures can be enacted as a result of the Criminal Procedure Rules and Criminal Practice Directions¹² including: communication aids (e.g. drawings, prompt cards and dolls), restrictions on the number of people allowed to sit in the public gallery, and the removal of wigs and gowns (though none of these were observed in this research). Giving evidence through live link, removal of wigs and gowns, and giving evidence in private are aimed at reducing the intimidation and anxiety felt by those giving evidence. Conversely, the use of an intermediary and communications aid are used to help witnesses/defendants to understand the questions posed and to express themselves if they have difficulties communicating (Fairclough 2018: 98-103).

2.3.2(a) *Why were defendants initially excluded?*

The initial exclusion of defendants from the special measures regime was recommended in the *Speaking up for Justice* Report (Home Office 1998). This Report argued that whilst vulnerable and intimidated witnesses should be entitled to special measures, these provisions should not extend to defendants, for three reasons. Firstly, procedures were already in place for interviewing vulnerable suspects. The procedures designed to protect vulnerable suspects in police custody are set out in the Police and Criminal Evidence Act (PACE) 1984 and its supporting codes of practice; so, for example, an appropriate adult must be present when a child or someone who is mentally vulnerable is being interviewed¹³ (Home Office 2019: para. 11.15). The issue, however, is that this concerns the treatment of vulnerable suspects at

¹¹ ‘A live link direction is a direction that any oral evidence to be given before the court by the accused is to be given through a live link’ (s. 33A(3) YJCEA 1999).

¹² An array of adaptations, including special measures, are set out in these provisions. The term ‘special measures’ refers to those adaptations listed in the YJCEA 1999, ss. 20-30.

¹³ Unless certain conditions are satisfied – for example, if an officer of superintendent rank or above considers that delaying the interview will, for instance, lead to: interference with, or harm to evidence connected with an offence; interference with or physical harm to other people; or serious loss of or damage to property (Home Office 2019: para. 11.1 and see paras. 11.18-20).

the pre-trial stage; these provisions do not mean that there is no need for special measures to exist to support vulnerable defendants giving evidence at trial (Fairclough 2018: 67-70).

The second reason for denying defendants eligibility to special measures concerned the existence of safeguards that are in place to ensure a fair trial (Home Office 1998: para 3.28). The first safeguard mentioned related to the right of a defendant to be legally represented. The problem with this, though, is that not all defendants are legally represented. Furthermore, even having a lawyer present cannot change the nature of proceedings or improve the ability of vulnerable and intimidated defendants to give evidence as special measures can (Fairclough 2018: 71-75).

The second safeguard that was referred to in the report was that the defendant has the right to choose whether or not to give evidence as s/he cannot be compelled to do so, unlike most other non-defendant witnesses¹⁴ (Fairclough 2018: 75). No further explanation as to why this means that defendants should not be provided with special measures was provided. Fairclough (2018: 76) argues that the Working Group was suggesting that if defendants find it difficult to give evidence, then they should not do so. As said above, however, the Criminal Procedure Rules 2015 (r. 3.9(3)(b)) state that courts should take steps to facilitate the participation of all parties. Furthermore, defendants have a right to be able to effectively participate in proceedings (art. 6(3)(c) ECHR). If defendants wish to give evidence, then they should be able to do so and should not be discouraged by a lack of available assistance (Fairclough 2018: 77). If defendants do decide to not give evidence for this reason, then this could negatively impact the outcome of their case, because adverse inferences can be drawn against them as a result of their silence. Fact-finders would also be denied the most direct opportunity to hear the defendant's version of events, and the prosecution's cross-examination thereof (Fairclough 2018: 77).¹⁵

In relation to giving evidence, in some circumstances, a direction can be given by the judge that hearing from a defendant who has a 'physical or mental condition' would be undesirable (s. 35(1)(b) of the Criminal Justice and Public Order Act (CJPOA) 1994). The frequency in

¹⁴ For instance, according to s. 80 of PACE 1984, the spouse or civil partner of a defendant is not a compellable witness unless the defendant has been charged with an offence specified in s. 80(3).

¹⁵ Criminal Justice and Public Order Act 1994, s. 35(3).

which this takes place is not known and the effectiveness of this direction is also questionable. Some constraints are that the direction is only relevant to those who suffer a physical or mental disorder, so the direction is not applicable to those who are vulnerable for other reasons; juries do not always follow directions and they take information into account that they should not; and the physical and mental conditions that qualify for this direction have been narrowly interpreted by the courts, excluding conditions like depression and anxiety that would render a non-defendant witness eligible for special measures (Fairclough 2018: 76-78). Thus, support should be in place, as it is for witnesses, to enable defendant participation.

The final reason provided by the Working Group as to why defendants should be excluded from being eligible for special measures was concerned with the purpose of the measures. The Report states that ‘many of the measures ... are designed to shield a vulnerable or intimidated witness from the defendant ... and so would not be applicable in the case of the defendant witness’ (Home Office 1998). Special measures may indeed be used for this reason, but they also have wider applicability. There are a number of special measures (for example, removal of wigs and gowns, use of an intermediary and aids to communication) that can be used in order to assist witnesses to provide their best evidence, by making the court less alien or unapproachable, for example (Fairclough 2018: 82-83). In these instances where they benefit a witness, they could also equally benefit a defendant.

2.3.2(b) Issues with special measures provisions

Case law and criminal practice provisions give courts significant subsidiary powers to implement special measures for the defendant. However, the scattered nature of these rules can cause confusion and uncertainty in relation to what provisions are available to which defendants and under what conditions (Fairclough 2018: 144). Furthermore, these measures are not as extensive as those that are available to witnesses. There is currently no provision in the common law, Criminal Practice Directions, Criminal Procedure Rules, or legislation, which says that defendants will be allowed to pre-record evidence in chief or have pre-recorded cross-examination. One key aim of pre-recorded examination (especially cross-examination) is to help aid recall by taking place before the trial (Baverstock 2016: 13). The second key aim is to improve the quality of evidence provided by making testifying a less traumatic and stressful experience, and to make it easier for witnesses to recount events

(Baverstock 2016: 1). Again, these same arguments apply to vulnerable defendants, given that defendants also tend to find the experience of giving evidence (and cross-examination) anxiety-inducing, and that trials happen just as long after the fact for defendants as they do for other witnesses (Jacobson et al 2014, 2015).

In order to be eligible for special measures, a defendant must meet a stricter test than witnesses do, and the provisions are more restrictive in relation to which defendants are eligible for the provisions. For example, child witnesses are automatically eligible, whereas child defendants are not – in these instances, the defendant must show that his/her ability to participate effectively in the proceedings is compromised by his/her level of intellectual ability or social functioning (s. 33A(4) YJCEA 1999). In relation to adult witnesses, he/she need only show that the quality of evidence would be diminished as a result of their incapacity (s. 16(1)(b)), whereas an adult defendant must show they are unable to participate effectively in the proceedings as a result of their incapacity (s. 33A(5)(b)). Furthermore, whilst intimidated non-defendant witnesses are eligible to use live links, defendant witnesses are not (s. 17); and although vulnerable defendants can now give evidence via live link (s. 33A), non-defendant witnesses who have a physical disability or disorder are regarded as being vulnerable for the purpose of using the live link, whilst this is not the case for defendants (s. 16(2)(b)). All vulnerable defendants must also show that it would be in the ‘interests of justice’ for them to use the live link (s. 33A(2)(b)), which witnesses do not have to do.

In addition, intermediaries for witnesses are registered and they must undertake particular training, undertake an enhanced Criminal Records Bureau check and they must comply with a code of practice and ethics (Talbot 2012: 13). This is to ensure that they are appropriately trained, are accountable, and uphold professional standards. However, vulnerable defendants do not usually have access to the registered intermediaries, and must generally rely on unregistered alternatives (Talbot 2012: 15; Victims Commissioner 2021). These intermediaries have not been trained or accredited by the Ministry of Justice and they are not monitored in the same way. Thus, it is unclear whether or not defendants receive the same standard of service (Talbot 2012: 15). Adult vulnerable and intimidated defendants are, therefore, at a potential disadvantage compared to such adult witnesses in relation to the statutory provisions that exist and the restrictions that are apparent regarding the intermediary scheme.

In this subsection, we have looked at and compared the various means of support available to witnesses/victims and defendants. In order to gain a further understanding of the area, a number of theoretical concepts and ideas are now going to be considered, which are relevant to these matters and the experiences that unrepresented defendants have at court.

2.4 The different models of criminal justice

The reforms described at the beginning of s. 2.3 (e.g. concerning the change to judge-led management and introduction of virtual hearings) resonate with the principles shown in Packer's crime control model. Their focus is on dealing with cases as efficiently as possible and consequently, the safeguards that exist to protect defendants have been reduced. The distinctions between defendants and other witnesses with regard to special measures and support could be argued to have a similar focus. Packer (1964/1968) developed two different models of doing criminal justice: crime control and due process. The former sees the repression of criminal conduct (in other words, controlling crime) as the most important function to be performed by the criminal process (Packer 1964). Crime is repressed when lawbreakers are arrested, convicted and punished, preventing 'the breakdown of public order' (Packer 1964: 9) and thereby avoiding increasing crime and higher levels of victimisation. In societies which have high crime rates and limited resources to deal with crime, cases need to be processed through the system as efficiently as they can be for crime control objectives to be achieved successfully. According to this perspective, this can be best achieved by, for example, granting the police wide powers, so that they can easily make arrests and investigate cases. After they have done their investigation, the police and prosecution make a distinction between those who are probably guilty and those who are probably innocent, and filter the latter out of the process. A great deal of trust is placed in the prosecuting authorities and the police's fact-finding ability (they are regarded as being 'reliable indicators of probable guilt': Packer 1968: 160) and, consequently, those who are not filtered out of the process are presumed to be guilty, thus putting pressure on them to make a confession or to plead guilty is not problematic. They are driven through the other stages of the process as quickly as possible, preferably without them having to go to trial because they have pleaded guilty. Once they have been convicted, to promote confidence in the system and for efficiency reasons, there will be minimal opportunities for the conviction to be challenged. Under this model, Newman (2013) argues that only defendants charged with certain offences should be allowed to be represented (in a minority of cases) and only during court

proceedings. If more people were represented, then this would hinder the court's ability to determine whether the defendant was guilty and convict them.

In contrast to the crime control model, the due process model is more concerned with upholding defendants' rights, minimising mistakes, and protecting the innocent from being wrongfully convicted. The provisions in place discussed in s. 2.3.1 and s. 2.3.2 (i.e. concerning how unrepresented and vulnerable defendants are supported at court) seek to uphold these values. This model lacks confidence in the capability of the police and prosecution agencies to separate those who are likely to be innocent and those who are likely to be guilty in a reliable and accurate way without 'hurdles' the prosecution case must jump. Various factors may result in a suspect being wrongly believed to be guilty. This was noted by Packer (1968: 163):

People are notoriously poor observers of disturbing events ... confessions and admissions by persons in police custody may be induced by physical or psychological coercion so that the police end up hearing what the suspect thinks they want to hear rather than the truth; witnesses may be animated by a bias or interest that no one would trouble to discover except one specially charged with protecting the interests of the accused (as the police are not).

Thus, this model presumes that defendants are innocent until proven guilty (both legally and factually¹⁶). It provides that an independent tribunal should hear cases publicly and the accused should be provided with an opportunity to discredit the case against them. Due to this model placing great emphasis on the possibility of error being made, those convicted should have the opportunity to challenge their conviction. Safeguards should be in place to prevent the police and prosecution from acting oppressively. This model also promotes the ideal of equality: all those charged with an offence should be treated equally and have the same ability to contest the charge(s) against them, regardless of their age, wealth, gender, and social status. Thus, when a defendant is entitled to be represented by a lawyer, but they

¹⁶ Legal guilt 'refers to the process by which determinations of guilt are made. Defendants are not deemed guilty unless the mandated procedures and rules designed to protect the rights of the accused have been followed' (Spohn and Hemmens 2009: 40). Factual guilt 'means that the evidence shows that there is a high probability that the defendant committed the crime of which he or she is accused' (Spohn and Hemmens 2009: 40).

cannot afford one, the state should pay for one for them. Legal representation is important to this model: in order to conduct an effective defence, defendants should be entitled to be legally represented. Defence lawyers also seek to ensure that the rights of defendants are upheld and when they are not, the appropriate sanctions and remedies are put into practice.

Alternatives to Packer's models have been put forward since they were first developed (Griffiths 1970; Bottoms and McClean 1976; Choongh 1998; McDonald 2008; Ashworth and Redmayne 2010; Sanders et al 2010). One criticism is that Packer's models only focus on defendants and they ignore the role of the victim in the criminal justice system (Sanders et al 2010). Choongh (1998) also argues that the models Packer developed do not explain the experiences of a significant minority of people, whom the police have arrested and detained, but the police do not intend to charge. On Choongh's account, Packer's models are unable to explain what is happening in those cases, and a social disciplinary model of policing is better able to do so. In such circumstances, Choongh suggests that the police do not use their powers to enforce the criminal law or begin the criminal process: arrest 'is not the stepping stone onto Packer's conveyor belt or the first stage of an obstacle course' (Choongh 1998: 625); rather they use their powers as a means to exercise control and punish and subject a particular group of people, who are regarded as being problematic, to surveillance (Choongh 1998: 627).

Bottoms and McClean (1976) also add an additional 'liberal bureaucratic' model, which better accounts for the actions of court clerks. They suggest that court clerks act in a way that is different from both the crime control and the due process model. Based upon their model, the protection of individual liberty is seen as being more important than the repression of criminal conduct but the model recognises that the protections defendants have should be limited for practical reasons: this is to ensure that the system does not become overwhelmed with cases and collapses as a result of this, and it is to prevent unnecessary cost to the state and time-wasting due to defendants using their rights carelessly or as a result of them 'trying it on' (Bottoms and McClean 1976: 229). An example of this model in action is the system of the early guilty plea (Welsh 2016: 91) and the choice that defendants who have been charged with a triable-either-way offence have to have their case heard either in the magistrates' court or the Crown Court. In both instances, defendants have the right to choose, in relation to their plea and where the case is going to be heard, but there is an inducement to plead guilty and to

select to remain in the magistrates' court due to them getting a lighter sentence as a consequence of them doing so (Welsh 2016: 91).

These models are useful for considering the different goals that exist in the criminal justice system and the discussion shows that there is disagreement over what aims and values the system should give priority to (Sanders et al 2010). The focus in this thesis is on Packer's models, though, rather than the others mentioned because this research focuses on defendants at court, so not, for example, the experiences of victims or suspects at the police station, which are better accounted for in some of the other models. Furthermore, in relation to what factors have influenced and shaped the criminal justice system, specifically the court process, due process values and crime control ones are the most relevant overall. Governments in England and Wales have been influenced by both due process and crime control values (Sanders et al 2010); though as mentioned most of the recent reforms that have taken place, in relation to criminal procedure and court practice, are more in line with the crime control model. This could have an effect on the experiences that defendants now have at court. Furthermore, although the increasing provisions that exist to support particular defendants to participate in court proceedings are in line with due process values, the extent to which these are put in place in practice, and the extent to which defendants are eligible to use special measures provisions may be influenced by crime control values (i.e. time and financial reasons). More research needs to be done to see whether this is the case.

2.5 Discretion exercised during the hearing (pre-conviction)

Governments, therefore, have discretion when deciding whether to implement reforms that will prioritise crime control values or due process ones. Discretionary decisions are also made by judges and magistrates during criminal proceedings, and it is valuable to consider what they are, whether they are restrained in any way when making these decisions and if so, in what way, since these discretionary decisions also have implications for the experiences that defendants have. Other court staff engage in discretionary decision-making, too, but the focus in this section will be on judges and magistrates, as there is a lack of literature examining discretionary decision making by court staff, and therefore it would be difficult to do more than just summarise the discretionary decisions that they make.

Discretion is difficult to define (Pattenden 1982; Gelsthorpe and Padfield 2003). For the purposes of this research, discretion is defined as being when a judge, magistrate, legal professional or court employee has to make a decision, and when making this decision, he/she has to weigh up different factors (Davis 1969; Pattenden 1982; Gelsthorpe and Padfield 2003). It will be argued that when making discretionary decisions, decision-makers are rarely totally constrained; though various sources exist which seek to guide them. More sources exist than used to be the case when most of the research was done examining the experiences of unrepresented defendants in the 1960s, 1970s and 1980s. Thus, this is one way this project differs from and advances those which came before it, as this literature can be taken into account in the research design and analysis in a way that it could not before. Nevertheless, as will be shown, court actors still have a considerable amount of discretion – as they did when the previous research was done - and how they exercise their discretion might have an impact on the experiences that unrepresented defendants have and on the outcome of their case and the sentence that they receive.

A considerable amount has been written, for example, about discretion in welfare law (Titmuss 1971; Freeman 1980; Alder and Asquith 1981); and the use of discretion by the police (Goldenstein 1960; Waddington 1999; Ericson 2007; Chan et al 2004; Lipsky 2010; Bronitt and Stenning 2011; Buvik 2016; Myhill and Johnson 2016; Skinnis 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 (all discussed below).

In relation to the former, on a day-to-day basis, judges and magistrates have to decide whether to grant the defendant bail (either conditional or unconditional) or whether the defendant should be remanded in custody. This is because not all criminal cases are disposed of at the first hearing. If the defendant pleads not guilty when asked to plead, then proceedings will be adjourned and a trial date set (to give the parties time to prepare their cases). If a defendant pleads guilty, then sentencing may be adjourned to take place on another day, due to lack of court time or so that sentencing reports can be prepared. There is a presumption that a defendant will be granted bail (s. 4 of the Bail Act 1976), but bail will be denied if the court believes that, if released, the defendant would: fail to surrender to custody; commit an offence while on bail; or interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person (schs. 1(2)(a)-(c) of the Bail Act

1976; Doherty and East 1985: 231). Furthermore, bail may be denied for the defendant's own protection; when the court is satisfied that it has not been practicable to obtain sufficient information for the purpose of making the decision; and when the defendant is in custody in pursuance of a court sentence (schs. 1(3)-(5) of the Bail Act 1976).

The decision as to whether to grant bail or not is an important one. If a defendant is remanded in custody, then this may have adverse effects on the defendant's family, living arrangements and employment; if the defendant is acquitted then they will have unnecessarily spent time in custody; being denied bail may have an impact on the likelihood that a defendant will be convicted at trial and on whether they will receive a custodial sentence; and it has wider financial implications for society because of the costs involved in detaining the defendant (Bottomley 1973: 85; Doherty and East 1985: 251). The factors which influence the decision as to whether to grant bail or remand a defendant in custody are: the seriousness and type of offence that the defendant has been charged with; the defendant's offending history; the defendant's age and sex; whether the defendant has got a fixed address; whether he or she has got community ties or not; whether the police granted bail or not; and the defendant's bail history (Hucklesby and Marshall 2000: 158; also, see; King 1971; Doherty and East 1985; Hucklesby 1997a, 1997b; Morgan and Henderson 1998). Due to the number of different factors and the possible different weightings put on them in different cases, different outcomes are likely to arise from case to case. Hence not only do judges have discretion, but also when that discretion is not strictly controlled by guidelines, it can lead to variable decision outcomes.

As well as determining bail, judges and magistrates have to decide on an array of other matters as well. Pattenden (1982, 1990) examined how judges and magistrates exercised discretion during criminal trials – both in the Crown Court and in the magistrates' courts. Discretion has always played a substantial part in trial procedure (Pattenden 1990: 15). The discretionary decisions that are made by judges and magistrates are of particular importance, given that these decisions can have an impact on the outcome or the sentence that a defendant receives (Pattenden 1990: 31). Quite apart from administrative procedural matters, in magistrates' courts, for example, judges and magistrates have to exercise discretion during proceedings to decide: whether to send a triable-either-way offence to the Crown Court, which has higher sentencing powers, or whether the case should remain in the magistrates' court; whether the defendant should be granted or denied bail (as above); whether or at what

point proceedings should be adjourned (e.g. so that legal representation can be arranged or so that further evidence can be obtained); and if the accused has failed to appear at court for his/her trial, whether the trial should continue in his/her absence. Some of the other discretionary decisions that judges and magistrates may need to be made include (there is not enough space to discuss them all): the decision as to whether the defendant may change his or her plea (i.e. from a guilty plea to a not guilty plea or vice versa) any time before he or she has been found guilty and sentenced; the decision whether to accept a plea or not - for instance, on the basis that an unrepresented defendant appears not to have understood their plea or the law; the decision as to whether they should question a witness or a defendant and the frequency and type of questions that they should ask; and finally, the decision as to whether a defendant, whose native language is not English, needs an interpreter or not, even if the defendant has not requested one (Pattenden 1990). Judges and magistrates, therefore, have a significant amount of discretion during criminal proceedings; although judges and magistrates in an adversarial system have less discretion during trial proceedings than they do in an inquisitorial system, where judges take a more active role in proceedings (Lind 1982). It is the judges (and not the parties) who must decide which witnesses should be called, for example, and in what order; and they must also question and cross-examine witnesses (Damaska 1973; Lind 1982).

Discretion is not necessarily a bad thing, or against the interests of justice. Discretion enables judges and magistrates to take into consideration the features of an individual case (Pattenden 1982: 35): thus, discretion allows for flexibility, as the results can be tailored in line with the unique facts and circumstances of the particular case (Davis 1969: 17; Pattenden 1982: 35). Discretion is also required or desirable in circumstances when a comprehensive rule that covers all possible situations and scenarios cannot be formulated; for when it would be difficult to define to whom and/or when a rule should apply; and in situations when there is a need to balance conflicting interests (Pattenden 1982: 37).

Despite the benefits that have been mentioned, however, there are also disadvantages to discretion: the creation of uncertainty for those affected by the decision; the possibility for inconsistent outcomes (similar cases may be dealt with in different ways); the possibility that decision-makers will be prejudiced by their own personal attitudes and biases when making subjective judgements; and the possibility that they may take into account irrelevant factors, such as the race, social class, language, sexual preference and sex of the defendant (Pattenden

1982: 39-40; Hawkins 1992: 15-16). This will result in people being treated unfavourably or unjustly. Furthermore, when exercising discretion, decision-makers may take into account information which is not relevant or accurate, or alternatively they may fail to take into consideration important information. With discretion also comes power, and there is always the potential for this power to be abused and for discretion to be exercised in undesirable ways; and when discretionary decisions are made in private, it makes decision-makers less accountable and it can result in those who are subject to decisions not knowing why or how the decision was made (Hawkins 1992: 16).

In order to ensure justice for individuals, unnecessary discretionary power should be eliminated, whilst necessary discretionary power should be confined, structured and checked (Davis 1969: 3). In order to do this, standards, plans, policy statements and rules should be established and used (Davis 1969: 102). Decisions should be reviewed by others and those affected by the decisions made should be able to appeal them - and they should be made aware that they can do this (Davis 1969: 142-161). Plans, policy statements, findings and reasons should all be open, to try and ensure that discretion is exercised justly (Davis 1969: 98).

Pattenden (1982: 39) states that whether discretion is justified depends upon whether the advantages outweigh the disadvantages; however, this takes a purely utilitarian approach which ignores the important role that rights play. In order for core principles to be upheld and to seek to ensure that all defendants have a fair hearing, defendants should have certain guaranteed rights that must be enforced by the judge (judges should not have complete discretion on all matters). This is because – as will be discussed in more detail (in s. 2.9) – the parties are not always equally well-equipped to prepare and present their cases. This is particularly so when the defendant is unrepresented given that they tend to have less legal knowledge and experience than the other party and they have fewer resources available to them (Transform Justice 2016). Thus, judges have a role in making the playing field more level and in supporting defendants to minimise the imbalance that exists.

As a consequence of the European Convention on Human Rights 1953 (ECHR) defendants have a number of rights (see s. 2.7). These rights were incorporated into English law as a result of the Human Rights Act ('HRA') 1998. The HRA 1998 - and other legislation (such as the CJA 2003) – constrains discretion, as do practice directions. Practice directions give

guidance on how the Criminal Procedure Rules should be interpreted, and contain directions as to what practice and procedure should be followed. When exercising discretion in court, magistrates and judges can, therefore, refer to them. They also tend to look for guidance offered by appellate courts to see how discretion has been exercised in previous cases (Pattenden 1982: 12). Guidance regarding discretion is provided in case law, legislation, and/or practice directions concerning, for example, bail; legal representation; the defendant's absence at trial; reporting restrictions; the use of interpreters for defendants and witnesses; the admissibility of hearsay evidence and bad character evidence; and the oral testimony of witnesses (see Richardson 2018 and Carr and Turner 2018). There are, therefore, a number of sources of guidance for judges and magistrates on discretionary decisions. There is, however, no unified 'code' or set of instructions that aims to cover all circumstances and decisions that need to be made pre-conviction. This is also the case when it comes to considering what sentence to impose post-conviction; though compared to when the majority of research examining unrepresented defendants was undertaken in the 1970s and 1980s, magistrates and judges do now have more aids available to assist them when it comes to sentencing.

2.5.1 Discretion exercised during the hearing (post-conviction: sentencing)

Given the tendency to add to judicial guidance over the years, it is worth rehearsing the history of sentencing guidance to see how the area has developed and to examine what the implications have been. In terms of individual offences, statutes do set out a maximum sentence that can be imposed for each offence; but before the 2000s, whilst formal sentencing guidelines were produced by the Magistrates' Association and whilst there were guideline cases from the Court of Appeal, these did not cover all offences. This section will discuss both of these forms of intervention, arguing that in practice, in England and Wales, there was little restraint on judges or magistrates when it came to sentencing (Pina-Sanchez 2015: 76; Ashworth 2015).

From the 1980s and 1990s, the Court of Appeal began to take a more active role in providing sentencing guideline judgments in relation to particular offences (Brown 2017). For example, the sentencing of robbery was considered in *R v Daly* (1981), and the Court of Appeal (COA) gave guidance on the sentencing of rape in *R v Billam* (1986) (Flood-Page and Mackie 1998: 8), kidnapping in *R v Spence and Thomas* (1983) and affray in *R v Keys and others* (1986). However, these guideline judgments were rare and when they were given, they usually

focused on the most serious cases dealt with at the Crown Court rather than those typically dealt with at the magistrates' courts (Flood-Page and Mackie 1998: 8). By the late 1990s, only a small proportion of offences were covered by these guidelines (Ashworth 2015: 23).

The Magistrates' Association did, however, produce guidelines for offences that tend to come before the magistrates' courts (Ashworth 2015: 69). So, for instance, in 1966 the Magistrates' Association first circulated a document, which set out sentencing suggestions for common road traffic offences; and in 1989 the Magistrates' Association issued a sentencing guide for criminal offences other than road traffic offences (Ashworth 2015: 69). These sentencing guidelines were last revised in 2004. The guidelines set out the starting points for typical offences (the most common offences) dealt with in the magistrates' courts and give a non-exhaustive list of factors that may call for an increased (aggravated) or decreased (mitigated) sentence in the relevant circumstance. Since magistrates and judges were under no legal obligation to follow these guidelines, compliance with them varied, depending upon the views of the individual magistrates and judges and the culture of the specific court (Ashworth 2015: 70; Flood-Page and Mackie 1998: 8).

The Sentencing Guidelines Council (which was an advisory non-departmental public body and was created by the CJA 2003) took over responsibility for developing sentencing guidelines. In 2008, new sentencing guidelines – called Magistrates Court Sentencing Guidelines - were introduced. The guidelines were updated by the Sentencing Council (which superseded the Sentencing Guidelines Council) in 2017. New guidelines were also published on sentencing children and young people (Sentencing Council 2017a) and offenders who plead guilty (Sentencing Council 2017b).

Unlike the earlier guidelines produced by the Magistrates Association, the 2003 CJA provides that courts must 'have regard to' the Sentencing Guidelines Council guidelines (s. 171(1)). It also reiterates the principle set out in the Human Rights Act 1998 that judges must provide reasons for imposing the sentence that they have (s. 174(2) CJA 2003). Regardless of whether they act within or outside of the guidelines, reasons must be provided in both instances as to why and how the sentencers came to the decision that they did (ss. 174(6)(a)-(b)). The Coroners and Justice Act 2009 went even further than the Criminal Justice Act 2003 and used more directive language (Roberts 2011: 42). In doing so, it imposed greater restraint on sentencers by stating that: courts must 'follow' Sentencing Council guidelines unless it

would be contrary to the interests of justice to do so; when this is the case, reasons must be provided (ss. 125(1)(a)-(b); Ashworth 2015: 31).

Whilst sentencing guidelines are important when deciding what sentence to impose, so are the sentencing philosophies of the individual magistrates and judges. Judges and magistrates have generally had a large amount of discretion to prioritise different sentencing philosophies. In response to this, the Criminal Justice Act (CJA) 1991 aimed to constrain sentencers' discretion to a greater extent than used to be the case prior to its enactment. The White Paper that led to the 1991 Act states:

The Government's aim is to ensure that convicted criminals in England and Wales are punished justly and suitably according to the seriousness of their offences; in other words that they get their just deserts ... punishment in proportion to the seriousness of the crime has long been accepted as one of the many objectives in sentencing. It should be the principal focus for sentencing decisions (Home Office 1990: 5).

Thus, the aim of the 1991 Act was to emphasise the just deserts sentencing philosophy, as being the primary rationale that the courts should take into account when sentencing (Ashworth and Player 2005). However, in the Act, the desert principle was not clearly declared as the primary rationale (Ashworth 2010: 100).

The 1991 Act was later replaced by the CJA 2003, which sets out a number of sentencing philosophies without imposing a set priority between them. Sentencers have freedom to choose between different sentencing philosophies (i.e. punishment, crime reduction, rehabilitation, public protection, and reparation) depending on the particular circumstances of the case and the sentencers' views (ss. 142(1)(a)-(e) CJA 2003; Von Hirsch and Roberts 2004; Koffmann 2006). There are, however, elements of proportionality and just deserts in the 2003 Act (Dingwall 2008). For example, before a custodial or community sentence can be imposed a seriousness threshold has to be met (see, s. 148(1) CJA 2003; and s. 152(2) CJA 2003). Furthermore, in relation to custody, community sentences, and fines, the sentence has to be in proportion to the seriousness of the offence (see, s. 148(2)(b); s. 153(2); and s. 164(2)). This implies that there is a level of proportionality in the system.

Nevertheless, over the last decade, in England and Wales, there has been an increase in the use of problem-solving courts, including drug courts, domestic violence courts, and mental health courts (Donoghue 2014: 4; Ward 2014). These courts aim to respond more effectively to specific types of offences and offenders, providing a tailored response to particular types of criminality, in an attempt to reduce reoffending and address the underlying causes of offending behaviour (Donoghue 2014: 31-44; The Centre for Justice Innovation n.d.). A problem-solving approach does not give primacy to just deserts; rather it prioritises rehabilitation of offenders, public safety, reducing harm to victims, and improving the support that is available to them (Berman and Fox 2009; Donoghue 2014). Problem-solving courts mean that offenders are treated differently, resulting in inconsistency, and potentially unfairness: for example, an offender with a drug problem may be punished differently to an offender who has not, despite them committing the same offence (Donoghue 2014: 7). If these problem-solving courts did not exist and if a clear sentencing philosophy had been promoted in the 2003 CJA, then this might have resulted in more consistent sentencing in England and Wales; so that similar cases were dealt with in a similar way and sentencing was not dependent upon the individual values and attitudes of particular judges or magistrates (Pina-Sanchez 2015: 76) or the specific circumstances of the offender.

Consistency in sentencing improves public confidence in the criminal justice system and promotes the legitimacy of it (Pina-Sanchez 2015: 76; Roberts and Plesnicar 2015). The current sentencing guidelines were introduced to promote more consistent sentencing in (magistrates') courts in England and Wales but the extent to which they have done this is not clear. There is a lack of comprehensive data that measure compliance with the guidelines and departure rates (Roberts 2013: 11). However, the introduction of the Crown Court Sentencing Survey¹⁷, in 2012, has promoted a number of studies being done which have looked at particular areas in relation to sentencing in the Crown Court (see, for example, Roberts 2013; Roberts and Bradford 2015; Pina-Sanchez and Linacre 2013; Pina-Sanchez 2015). There are high rates of judicial compliance with the guidelines (Roberts 2013). No equivalent data are available for proceedings in magistrates' courts, though.

¹⁷ Judges in the Crown Court complete this survey. The sentencing judge provides information on what factors they took into account when determining what sentence to impose and what sentence they passed.

In addition to the development of the guidelines, since the late 1990s, there has been an increase in the number of statutory mandatory minimum sentences. For example, courts have to impose minimum sentences for certain offences, including for a third Class A drug trafficking offence or domestic burglary, or for possession of firearms or bladed weapons in a public place, unless it would be “unjust to do so” (see, respectively, ss. 2-4 of the Crime (Sentences) Act 1997, re-enacted in ss. 110-111 of the Powers of Criminal Courts (Sentencing) Act 2000; s. 287 of the Criminal Justice Act 2003, which amended the Firearms Act 1968; and s. 139AA in the Criminal Justice Act 1998, as amended by s. 142(2) by the Legal Aid, Sentencing and Punishment of Offenders Act 2012). While some of these offences are indictable, others are triable-either-way and, therefore, potentially subject to a magistrate’s sentencing powers. However, in practice magistrates will have to send these cases to the Crown Court, as their restricted powers are too low to impose the minimum.

Thus, compared to the 1960s, 1970s and 1980s, sentencers have greater assistance when deciding how to exercise their discretion and are restrained to a greater extent when doing so, but whether this has resulted in defendants being sentenced in a more consistent way is unclear. Are unrepresented defendants sentenced in the same way as represented defendants, when they have committed the same offence in similar circumstances and have the same criminal record? In Transform Justice (2016: 18) – for more information about this study, see Chapter Three - the interviewed lawyers tended to think that unrepresented defendants were given harsher sentences than those who were represented; this is because generally unrepresented defendants did not know how to mitigate (Transform Justice 2016: 18). The discretionary decision as to whether the defendant is asked further questions (to gain more information or to clarify something) might have an effect on the quality of the defendant’s mitigation speech and the amount of information that he or she provides and thus the sentence that is imposed. The decision as to whether a pre-sentence report should be requested so that further information can be gained (about the circumstances surrounding the offence and the circumstances of the offender) might also have an influence on the sentence. Thus, whether unrepresented defendants do get harsher sentences or not is something that needs to be examined further (see Chapter Eight).

Discretion is also relevant to another key theory within criminal justice, which also shapes and helps to explain the experiences that defendants have: procedural justice theory.

2.6 Procedural justice

Procedural justice theory has emerged out of a number of studies. One of the earliest of these was done by Tyler and Folger (1980). 184 interviews were conducted with a random sample of residents in Illinois. It was found that the procedures used to resolve a dispute – in relation to police-citizen encounters - had an effect on levels of satisfaction (in particular, citizens' perception of the fairness of their treatment) which were independent of outcomes. In Tyler (1990), 1,575 residents in Chicago were interviewed, and the data suggested that views about how fair legal procedures were influenced by how legitimate individuals regarded them as being. If individuals perceived legal authorities to be legitimate then they were more likely to comply with the law as a result. Police legitimacy was measured in two ways. The first way was perceived obligation to obey the law (participations were asked if they agreed with a statement, for example, 'I always follow the law even if I think it is wrong') and the second way was support for legal authorities (participants were asked if they agreed with a statement, such as, 'I feel that I should support the Chicago police': Tyler 1990: 45-48). The factors which had an influence on assessments relating to procedural justice were: 'the authorities' motivation, honesty, bias and their ethicality; their opportunity for representation; the quality of decisions; and the opportunity for correcting errors' (Tyler 1990: 137).

A key result in Tyler (1990) was that fair treatment promoted views of the legitimacy of proceedings, but what does legitimacy mean in criminal justice settings and procedural justice theory? Jackson et al (2010: 4) define legitimacy as the 'widespread belief among members of the public (and inmates)' that legal authorities (including the courts and prisons) are 'entitled to make decisions and who should be deferred to in matters of criminal justice' (see also Tyler 2006a and Tyler 2006b). Legitimacy within procedural justice theory, then, is principally concerned with individuals' perspectives.

The findings from Tyler's (1990) study were also supported in Tyler's (2001) subsequent study when individuals evaluated the police and courts. The fairness of the procedures used by the police and courts was the key factor in influencing their views, rather than the fairness of the outcome or how favourable the outcome was. When considering procedural fairness (which is an important concept within procedural justice theory), individuals consider two things: how individuals are treated by legal authorities and whether individuals think that legal authorities make their decisions fairly. Tyler also set out the four key factors of

procedural justice: the opportunity to participate (or voice), neutrality, respect, and trust. These concepts concern two different things: the quality of decision making (neutrality and trust) and the quality of treatment (respect and participation/voice: Baker et al 2014). In Tyler (2001), participation was measured by asking respondents to rate whether: 'I was able to say what was on my mind', 'I was able to make my views known' and 'the court did not give people an opportunity to tell their side of the story'. Neutrality was measured by asking: 'judges were neutral in the way people were treated', 'a person's race or ethnic group made no difference in how the courts treated them', 'the court staff was neutral in the way people are treated', 'I was treated the same as everyone else', 'decisions were made based on facts' and 'my race or ethnic group made a difference in how I was treated'. Treatment with respect was measured by asking participants: 'people were treated politely', 'court staff showed concern for people's rights', 'people were treated with dignity and respect', 'I was treated politely', 'I was treated with dignity and respect' and 'judges did not show concern for people's rights'. Finally, trust was measured by asking participants: 'differing views of people were taken into consideration', 'my views were considered', 'my rights were taken into account', 'the judge and court staff did not care about my concerns' and 'the needs of people were not taken into account'.

Similar to the results in the above study, Tyler and Huo (2002) found that individuals were more likely to accept decisions made by police officers and judges if they regarded the police and courts as legitimate. Sunshine and Tyler (2003) and Tyler et al (2007) also concluded that legitimacy was primarily linked to procedural fairness and again legitimacy was connected to compliance and cooperation with the police.

Procedural justice theory has been applied in a range of different justice contexts, including to civil justice, criminal justice and restorative justice practices (Sherman et al 2015; Van Camp and Wemmers 2013). Similar results were found for each type of justice. There is, therefore, a significant body of literature which offers support to procedural justice theory. However, in some of the studies, which have been discussed above, the participants have been the general public, and an issue with this is that they may not have much or any recent direct contact with legal authorities, so their views may differ compared to those that have (Burdziej et al 2018: 2). The views of those who have direct experience should be privileged over those who have not given they are the ones who have had the interaction and been through the process. Furthermore, the majority of the studies discussed above were conducted

in the USA, and the majority of the research in the area has been conducted there. Thus, the impact and importance of procedural justice may differ in different countries due to cultural, political, geographic and institutional differences. Some other research has, however, been done in other countries which does generally support the findings discussed above, including in Australia (e.g. Hinds and Murphy 2007; Murphy and Churney 2011), the UK (e.g. Jackson et al 2012; Howard and Wakeling 2020) and Slovenia (e.g. Reisig et al 2014). There has been no research, however, considering procedural justice theory in the context of defendants' experiences within magistrates' courts in England and Wales, so empirical research cannot be cited here.

Nevertheless, as suggested at the beginning of this section, discretion is relevant to procedural justice theory and the experiences that defendants have, as decision-makers have to exercise their discretion when deciding how they are going to interact and communicate with the individual involved and this influences how fair defendants regard the process as being, and how legitimate they regard the criminal justice institution to be. The previous section (see s. 2.5(1)) discussed how discretion has been increasingly structured and constrained within the criminal justice system – due to legislation and guidelines, for example - but this is not something that is focused on in procedural justice theory. A key reform, which has been mentioned, but has not yet been discussed in depth relating to this is the introduction of the Human Rights Act (HRA) 1998.

2.7 Human rights

The Human Rights Act (HRA) 1998 restrains the amount of discretion that judges and magistrates have; and unrepresented defendants' experiences will be influenced as a result of this. The ECHR, as will be shown, favours due process principles and upholds the right to legal representation. This section sets out the rights in Art. 6 ECHR, on the basis that these rights are the most relevant to the experiences unrepresented defendants have at court. It will consider how the term 'effective participation' and art. 6(3)(c) (the right to legal representation) have been interpreted in the following subsections, along with discussion of the implications.

As a result of ss. 3-4 of the HRA 1998, the criminal courts should exercise their discretion in a way to ensure that UK legislation is interpreted in line with the rights set out in the

European Convention of Human Rights (ECHR).¹⁸ If a defendant thinks that there has been a human rights violation at first instance (and/or on appeal), then they may appeal nationally, and once domestic remedies have been exhausted, then they may apply to the European Court of Human Rights (ECtHR) in Strasbourg. Some of the principal rights that defendants have at court are either explicitly or implicitly set out in art. 6 of the ECHR, and include: the right to a competent, independent and impartial tribunal established by law (art. 6(1)); the right to a fair hearing and a public hearing (art. 6(1)); the presumption of innocence (art. 6(2)); the right to adequate time and facilities to prepare a defence (art. 6(3)(b)); the right to be tried without undue delay (art. 6(1)); the right to defend oneself in person or through counsel (art. 6(3)(c)); the right to be present at trial and appeal; the right to call and examine witnesses (art. 6(3)(d)); and the right to an interpreter (art. 6(3)(e)). These rights are in place to ensure that defendants have a fair trial. The ‘right to a fair trial is a fundamental safeguard to ensure that individuals are not unjustly punished’ (Amnesty International 1998: 1) and miscarriages of justice do not occur. Thus, European human rights laws serve to protect the rights and freedoms of individuals against the state and to protect democracy and the rule of law (Amnesty International UK 2018; European Commission 2019); by prohibiting innocent individuals from being wrongfully convicted, which could result in them losing their liberty or being subjected to some other type of penal sanction (Amnesty International 1998: 1). These values and principles are also evident in the due process model, discussed above. Unlike the due process model, though, the HRA 1998 imposes legal duties on court actors, by rendering the rights in the ECHR directly justiciable in English law.

Even when interpreting their obligations under the HRA, judges and magistrates still have to exercise a considerable amount of discretion, as does the state when introducing legislation, and the European Court of Human Rights when considering whether a breach has occurred or not (Greer 2000: 14). This is because the rights are loosely drafted, using general and vague language, and, thus, they often require interpretation in order for national and international courts to apply them to specific circumstances (Elliott and Quinn 2008: 257). One of the reasons for the loose terms and definitions used in art. 6 is because when the Convention rights were being drafted, it was recognised that although minimum standards should be maintained, different states have different national values, customs, policies and practices

¹⁸ Since the ECHR is part of the Council of Europe, a separate treaty organisation from the European Union, this will continue to be the case even now that the UK has left the EU.

(Gerards 2018: 495). In order for these to be respected, individual states should have an appropriate amount of freedom to be able to interpret the rights and apply the Convention – and the ECtHR should not seek to impose the same standard across all states and overly interfere with the decisions that they make (Donald, Gordon and Leach 2012: xi; Gerards 2018).

When interpreting Convention rights, magistrates and judges will have to take into account various different factual factors that are relevant to the circumstances of particular cases and also legal factors. In relation to the latter, national and ECtHR case law sets out what some of these factors are and will assist them when deciding how the rights should be applied to an individual case. For example, when considering the right to be tried without undue delay and the right to adequate time to prepare a defence, ‘undue delay’ and ‘adequate time’ are terms that are difficult to define. Judges and magistrates will have to determine what amounts to an ‘undue delay’ or ‘adequate time’ by considering a number of factors, including: the nature of the proceedings and the circumstances of the case, and national issues will also be taken into account, so for instance, art. 6(1) will be interpreted in the context of the individual state’s court system; and when deciding whether a trial should proceed in the defendant’s absence, the court will also consider how long the adjournment is likely to be, and the interests of the other parties (Amnesty International 1998).

2.7.1 The right to effectively participate

The focus of this research project is on defendants’ experiences at court, and in art. 6(3) of the ECHR, it is implicitly recognised that defendants should be able to effectively participate in court proceedings. These rights are set out above; including the defendant’s right to be present at their trial (*Colozza v Italy* 1985). This is relevant as attendance means that the defendant will be able to hear the case against him/her and give evidence and instruct their solicitor if he/she wishes to do so (Owusu-Bempah 2020: 3-4). The right to defend oneself in person or through a lawyer, and a right to examine witnesses and have an interpreter also seek to facilitate participation as they give defendants an opportunity to take part and follow proceedings and challenge the prosecution’s case. The right to participation is a long-recognised right (Owusu-Bempah 2018). In *R v Lee Kun* (1916), for instance, Lord Reading CJ said that: ‘the presence of the accused means not merely that he must be physically in attendance, but also that he must be capable of understanding the nature of the proceedings’.

In court, it is magistrates and judges who decide, with their discretionary power, whether defendants are able to participate effectively. In order to be able to effectively participate in court proceedings, defendants should be able to understand, follow, pay attention, see and hear court proceedings (Mulcahy 2013; Owusu-Bempah 2017).

In relation to case precedence, not many legal cases have discussed the meaning of ‘effective participation’. The most detailed definition was provided by the ECtHR in *SC v UK* (2005: [29]), which suggested that whilst defendants do not need to be able to understand everything, they should have a ‘broad understanding’ of the court process and ‘understand the general thrust of what is said in court’. Defendants should also be able to understand the significance of any penalty imposed, follow what prosecution witnesses say, and be able to make representations and give instructions to their lawyers. It is, however, unclear how to determine and monitor whether defendants understand proceedings. What level of understanding should be required in order for someone to be able to understand? How should this be assessed? Who should assess it? In addition, given that quite a lot of the focus is on the defendant’s ability to speak to their legal representative, it should be further clarified what is required from defendants who are not represented, and additional guidance provided (Owusu-Bempah 2018); as unrepresented defendants do not have a lawyer there to speak on their behalf, more is required of them in terms of understanding and what they are required to do. For defendants who are represented, it appears - based upon case law - that as long as their representative can hear and follow court proceedings, the defendants themselves do not necessarily need to¹⁹ (*Stanford v UK* 1994; *R v Hamberger* 2017). In *Stanford v UK* (1994), the defendant had problems hearing a witness giving evidence during his trial due to the defendant being sat in a glass dock. Even though the Court recognised that not being able to hear court proceedings could amount to a violation of Art. 6, there was no such violation in this case as the matter was not raised with the trial judge and it was suggested that the right to follow proceedings could be exercised by proxy - through his lawyer. This is objectionable as it marginalises and excludes defendants despite it being their case, and defendants need to be able to hear what is going on during proceedings in order to be able to communicate any

¹⁹ When referring to whether defendants can effectively participate or not, however, this research will relate to whether defendants can exercise this right independently, not through someone else (why this is important is set out in s. 2.7.2) and whether they can participate in all hearings, not just at the trial. All hearings are of importance to defendants and have implications for them.

wishes that they may have to their lawyers and provide them with any further instructions that they may have (Owusu-Bempah 2018).

In order to facilitate participation, the onus is placed on defence lawyers in cases where defendants are represented 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 may have the time, skills or motivation to always do this (Baldwin and McConville 1997; Newman 2013). Even if they do, when in the courtroom, defendants may forget what has been said prior to the hearing and/or they may need certain things clarifying further. In cases where defendants are not represented, they are reliant upon court staff to provide this assistance – and previous studies suggest that this is required, as although not all unrepresented defendants experience difficulties, they tend to do so (e.g. Carlen 1976, Transform Justice 2016). Even when this assistance is provided, though, they may still experience difficulties understanding the process and may still feel alienated and marginalised due to, for example, the language used in court, the formal clothes worn by court staff, and the use of the dock (Carlen 1976; Bottoms and McClean 1976; Kirkby 2017 – these studies are discussed in Chapters Three and Six).

2.7.2 The importance of defendants being able to effectively participate themselves in court proceedings

It is important that defendants are able to effectively participate at court, particularly unrepresented defendants, who have to take a more active role in proceedings due to their lack of legal representation.

The first reason effective participation is important is for procedural justice reasons. As discussed earlier on in this chapter, procedural justice is concerned with how fair individuals perceive processes to be and the impact this has on whether legal authorities are viewed as being legitimate or not (e.g. Tyler 1990; Tyler 2001). The four key factors of procedural justice are: voice, neutrality, respect and trust. Procedural justice, then, relates to the experiences that defendants have at court and their ability to effectively participate. If defendants are unable to understand, follow, and hear proceedings, for example, then their ability and opportunity to have a voice within it and participate will be undermined. Since trust, as discussed above, is based upon the extent to which a defendant feels that they had been listened to and their views had been taken into account, the inability of a defendant

(unrepresented or otherwise) to effectively participate due to an inability to be present at, speak in, or understand proceedings will negatively affect their perceived legitimacy of the process. Understanding is also connected with the perceived neutrality of the system – a further principle of procedural justice. In order for defendants to make an assessment in relation to how neutral the decision-maker was, the process and decision will need to be explained to defendants and they will need to be informed about what the decision maker is doing and on what basis. Finally, effective participation also concerns the treatment of defendants (whether they can see and hear proceedings, for example); and as suggested above, the respect element in procedural justice also relates to this as it is measured based upon whether defendants felt they were treated with dignity and concern was shown for their rights.

A separate theoretical reason as to why effective participation is important is because a key purpose of the criminal trial is for the state to be held to account when requesting that someone is convicted and punished for a criminal offence (Ho 2010). This is necessary in a society based upon liberal-democratic values, where liberty – the freedom of an individual to do as he/she wishes - is a core principle and should only be interfered with by the state when there is good justification for doing so (Ho 2010: 88). In order for the state to be held to account, defendants must have a right to participation, they should be treated fairly, and their autonomy must be respected (i.e. by allowing freedom of choice - Ho 2010: 99). Participation is necessary in England and Wales, for example, because defendants have a choice to have a trial, question witnesses, provide evidence in court, have legal representation, and appeal the decision made (Ho 2010: 99-100). Individuals have certain rights, therefore, as a result of them being part of a liberal-democratic society and these things must then be reflected in relation to the rights they have at court and their treatment within the process (Ho 2010). Treating people fairly does not necessarily mean treating everyone the same: equals should be treated equally and unequals unequally (Aristotle 1947). Provision of additional support and assistance may be required in order to ensure equality of access, as different defendants will have different challenges and circumstances to others. Different treatment is justified as a result to create a level playing field and to ensure that all defendants can participate on equal terms (Judicial College 2018: 20-22). The discussion regarding defendants' rights is different to the one above regarding procedural justice. This is because procedural justice is about perceptions of fair treatment by the defendant (and others) and is mostly a question of

legitimacy, whereas we are now considering the existence of legally enforceable rights to protect defendants and defend their human dignity.

Duff et al (2007: 153) also argue that defendants in liberal democracies 'ought to be respected as a participant rather than merely treated as an object' during court proceedings. Participation and communication with defendants should be the main focus of criminal trials, as individuals 'are criminally responsible, in a liberal democracy, to our fellow citizens' (Duff 2005: 441). Thus, within the theory of the criminal trial developed by Duff et al (2006: 3), defendants should play a central role within court proceedings and preferably an active role. This is because the trial should be regarded as a communicative process where defendants are called to answer a charge of alleged criminal wrongdoing. That answering involves:

Both answering to the charge, by entering a plea and (subject to whatever right of silence should be recognised) responding to the evidence adduced by the prosecution, and answering for such criminal conduct as she admits or is proved against her (Duff et al 2007: 108).

As well as holding offenders to account, in order to protect defendants from the state's oppressive power, the defendant also needs to be able to hold the state to account by challenging and responding in the trial to the accusations that have been made against him/her (Duff et al 2007: 3). If defendants cannot effectively participate in proceedings then their ability to do this will be hindered. Furthermore, defendants will only be able to answer for their wrongdoings, 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.

It is also important that defendants are able to participate and are supported at court from a due process and human rights perspective, so that they receive a fair hearing (Packer 1968). In adversarial proceedings, defendants must be able to participate in proceedings given that the onus is on the parties involved (the defence and prosecution) to gather, present and challenge evidence in court. When a defendant is represented, these things are generally done by their representative. As has been discussed above, it has been suggested that the right to effective participation can be exercised through proxy by the defendant's defence lawyer, as

defence lawyers seek to uphold defendants' rights and art. 6(3)(d) ECHR (the right to call and examine witnesses) can be exercised through a lawyer. However, as said above, in a liberal democracy personal autonomy is something that is valued (Pendlebury 2004: 45). Furthermore, again as suggested above a lawyer cannot do everything: a lawyer can only work through instructions from the defendant (Owusu-Bempah 2018). Defence lawyers are supposed to act and speak on the defendant's behalf and follow their wishes (Duff et al 2007: 97). If 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 thus, hold the state to account) will be hindered and the decisions that they make may not be the same ones that they would if they were better informed. They are the ones who have been accused of a crime, are facing a criminal conviction, will have to make important choices (for example, regarding their plea, how, and potentially where, they will pursue their case, and whether they wish to appeal a conviction and/or sentence), and they will need to serve any sentence that is imposed and live with the consequences of any decisions that are made. For those defendants who distrust the criminal justice system and distrust lawyers too, it will be particularly important for them that they can exercise this right personally. If not, then this will exacerbate feelings of distrust, proceedings are not likely to be viewed as being fair by those individuals and confidence in the system will, subsequently, be undermined. If defendants do not have a fair hearing, then wrongful convictions could occur as a result. This is because defendants may be pressurised to plead guilty, for example, or they may not be given the opportunity to challenge unreliable evidence against them. Wrongful convictions are not only harmful to the person involved but also to their family members and friends and also to the wider community (Grounds 2005; Naughton 2013). This is because, for example: the individual who has been wrongfully convicted will have been punished for something that they did not do; they may lose their job and experience emotional stress; and they may experience shame from the community as a result of the conviction (Naughton 2013). Their family members and friends may also experience this, relationships may break down; and the child (or children) of the person wrongfully convicted may have to go into care if the individual was sentenced to prison (Grounds 2004; Jenkins 2013). Furthermore, the person who did commit the crime will still be in society potentially putting the public at risk. Wrongful convictions also have a negative impact on public trust and confidence (Naughton 2013). A safeguard to prevent wrongful convictions is the presence of a lawyer, but since unrepresented defendants do not have a lawyer to represent them, other safeguards must,

therefore, be in place to prevent wrongful convictions from happening and to ensure fair hearings.

In summary, then, there are several theoretical purposes and explanations for why participation is important (i.e. procedural justice, liberal democratic, due process, and human rights) and these will be further pursued in Chapter Nine in light of the empirical results from the present study.

There has been some recent empirical research on participation by defendants in court. This includes, for example, how effective participation was defined by court users, and why it was seen to be important (Jacobson and Cooper 2020: discussed in s. 2.2 above). Court users being able to participate was seen by those interviewed to be important to enable court users to exercise their legal rights, to enable court decision making, to legitimise court processes and outcomes, and because of its potential therapeutic benefits (Kirby 2020: 87-95). The term effective participation was defined in a number of ways by interviewees. Participation was said to entail: the provision and elicitation of information for the court (e.g. giving evidence or submitting statements to the court or asking questions of other court actors); being informed (i.e. understanding the process and outcomes); being protected (i.e. feeling comfortable and free from intimidation to enable participants to be able to effectively participate); being managed (to avoid disruption); and court users being present at court proceedings (Kirby 2020: 77-86).²⁰ Furthermore, parties having legal representation to participate on their behalf/to assist them to participate was also seen to be an important factor in enabling court users to participate in court proceedings.

Within criminal proceedings, in England and Wales, defendants have a right to legal representation. Given the importance of this then in relation to the experiences that defendants have at court and their ability to participate, this is something that will be discussed further below. The history of legal aid and representation, the legal aid system in England and Wales, the advantages and disadvantages of legal representation, will also be

²⁰ This study is, therefore, useful to see how those involved in the court process defined effective participation. Nevertheless, the definition provided by the ECtHR will be used in this research, as this definition refers specifically to defendants in criminal proceedings; whereas the one provided in Jacobson and Cooper (2020) is a general one which refers to the participation of all lay users in a variety of court proceedings (although there will be some overlap, what is expected from different participants in different courts differs).

considered to show how the area has developed; and the implications that this has for defendants will also be set out.

2.7.3 *The right to legal representation*

Defendants' right to legal representation is contained in art. 6(3), which states that:

Everyone charged with a criminal offence has the following minimum rights ... (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

Like the other rights that have been mentioned above, these rights are not absolute. The European Court of Human Rights (ECtHR) has held that, despite the language of 'minimum rights' in art. 6(3) of the Convention, any of these rights can be interfered with in practice so long as the overall (art. 6(1)) fairness of the proceedings are not infringed as a consequence of this denial (*Ibrahim and Others v UK* 2016; *Simeonovi v Bulgaria* 2017). When considering the significance of this in relation to the right to legal representation, the ECtHR may find that even if an individual state has violated this right, a breach will not be found so long as art. 6(1) is upheld overall.

Furthermore, in relation to the right to 'defend himself in person', a lawyer can be appointed against the wishes of the defendant when it is required in the interests of justice (*Correia de Matos v Portugal* 2001). In addition, the phrase 'through legal assistance of his own choosing' does not mean that the defendant has the right to choose his or her own lawyer when the lawyer is being paid for through legal aid (Ashworth 1996: 60; *Croissant v Germany* 1992). The phrases 'not possessing sufficient means' and the qualification 'when the interests of justice so require' are also vague. The ECtHR 'has refused to identify any base level of income to tie into the former' (Newman 2013: 17), though the latter phrase has been interpreted in a number of cases. The factors that the ECtHR appear to give consideration to when considering when in the 'interests of justice' free legal representation should be provided include: the complexity of the case (how complicated is the case on the law and/or the facts?); the seriousness of the charge; and the seriousness of any sanction (*Quaranta v Switzerland* 1991; *Pham Hoang v France* 1992; *Benham v UK* 1996; *Twalib v*

Greece 2001; *Correia de Matos v Portugal* 2001). Again, therefore, discretion has to be exercised when deciding whether free legal representation should be provided.

Safeguards must be in place (in the form of a lawyer in this instance) in order to try and prevent the innocent from being found guilty and from being punished; so in *Benham v UK* (1996: 61), for example, the Court held that ‘where deprivation of liberty is at stake, the ‘interests of justice’ in principle call for legal representation’. Benham was imprisoned for failing to pay his poll tax, and the Court held that his being denied free legal representation amounted to a violation of art. 6(3)(c). Furthermore, in *Quaranta v Switzerland* (1991), the accused’s request for free legal assistance was denied, and he was found guilty of numerous drug offences; he was sentenced to 6 months imprisonment and a suspended sentence was also activated. The Court concluded that under ‘the Swiss Criminal Code, the maximum sentence was three years’ imprisonment ... In the present case, free legal assistance should have been afforded by reason of the mere fact that so much was at stake’ (*Quaranta v Switzerland* 1991: [33]). The Court also found a violation of art. 6(3) in *Twalib v Greece* (2001). In this case, the applicant was found guilty of importing and transporting drugs and using false documents. He was sentenced to life imprisonment and fined. On appeal to the Court of Appeal, his sentence was reduced to 12 years and three months, and his fine was reduced, too. He also lodged an appeal on points of law, but this was rejected. In relation to this, he argued that he had not been able to obtain free legal assistance, which he had requested to help him with his appeal. The ECtHR found that he should have been granted this. This case satisfied the ‘interests of justice’ test due to ‘the seriousness of the offence and the severity of the sentence as well as the complexity of the appeal procedure and the lack of language and legal knowledge of the applicant’ (*Twalib v Greece* 2001: [3]); significantly, he was of foreign origin, and he was not familiar with the Greek legal system or the language used (*Twalib v Greece* 2001: [53]).

These rulings were also supported in *Correia de Matos v Portugal* (2001).²¹ In this case, the applicant was appointed a lawyer even though he did not want one, as he wanted to represent himself. In Portugal, the law provides that defendants cannot represent themselves, in cases where they may be sentenced to a custodial sentence or a detention order. Portuguese courts,

²¹ This case went to the Grand Chamber, which reaffirmed by a narrow majority (9-8) the conclusion reached in the 2001 decision (see *Correia de Matos v Portugal* 2018).

in their case law, made it clear that the main aim of this was to protect defendants and ensure a fair trial (so it is in the accused's interest). The applicant argued, however, that he had not had a fair trial, as he had not been able to defend himself, contrary to art. 6(1) and art. 6(3)(c). The ECtHR found that there had been no violation. They held that it was for Portugal to decide when, in the interests of justice, a lawyer must represent a defendant in proceedings and they found that the justifications given were acceptable and relevant: defendants should be protected and required to be legally represented in certain instances, as they may be unable to act in their own best interests and defend themselves as effectively as an objective and trained lawyer would be able to.

In order for the 'interests of justice' test to be satisfied, imprisonment does not always have to be a possibility. In *Pham Hoang v France* (1992), for example, the applicant was found guilty of a drug offence, and he was fined. An appeal court dismissed his application for legal aid; he complained that he had not been helped by a lawyer during his appeal hearing on points of law (*Pham Hoang v France* 1992: [26]). Again, the Court found that there had been a violation: the consequences were significant for the applicant given that he had been sentenced to pay a large amount of money to the customs authorities (*Pham Hoang v France* 1992: [40]). The complexity of the case was also considered: the applicant intended to challenge the compatibility of the Customs code with art. 6(1) and art. 6(2) of the Convention. He did not have, however, have the legal training which would enable him to do that given the complex issues involved (*Pham Hoang v France* 1992: [40]). In contrast to this, however, in *Gutfreund v France* (2006), the applicant was charged with an assault charge, which carried a maximum fine of 5,000 French francs. His application for legal aid had been dismissed on the basis that it concerned a Class 4 minor offence (*Gutfreund v France* 2006: [12]). The Court found that there had been no violation of art. 6(3) and the applicant was not entitled to free legal assistance on this occasion, because of the 'limited amount at stake and the fact that the procedure was simple' (*Gutfreund v France* 2006: [40]).

As will be shown below, in England and Wales, whether a defendant is granted legal aid depends upon whether they satisfy a means test and a merits test ('interests of justice' test). These tests must be in compliance with the ECHR, because member states have significant discretion when deciding whether legal assistance should be provided and in what cases (Newman 2013: 17). In relation to the means test, free legal assistance may be refused to a defendant, even though they do not have enough money to pay for it themselves, but as stated

the ECtHR has not set a limit, so it is for the individual governments to decide when this will be the case. Furthermore, in relation to the merits test, the phrase ‘interests of justice’ used in art. 6(3) has been interpreted in accordance with the means and merits tests²² used in England and Wales (Sanders et al 2010: 505). Thus, defendants might be denied legal assistance despite them not: being able to afford the assistance of a lawyer; being able to understand the proceedings and the strength of their case; and knowing how to act during criminal proceedings. Nevertheless, this is likely to still be held to be a fair trial, due to the apparently simple nature of their case and the relatively minimal consequences involved for them. Whether a defendant receives a fair trial when they are unrepresented and appearing via video link, though, is a question on which there is no direct authority, as of yet.

In summary, then, European human rights laws seek to promote due process values, protect the rights of defendants and seek to ensure that the hearings they are subjected to are fair regardless of whether they are represented or not. This has an effect on the way in which court proceedings are set up and on the role of court personnel. The majority of previous research in this area was done prior to the implementation of the HRA 1998 and as a consequence of that, the experiences that defendants have during court proceedings are likely to differ from their findings. Art. 6 ECHR sets out a number of rights that defendants have, and legal action can be taken if they have not been abided by. Although judges and magistrates do have discretion when interpreting these rights, they have authority to refer to when doing so – both national and international case law. In relation to whether a defendant can effectively participate, and whether legal aid should be granted to pay for the cost of legal representation, the cases discussed above indicate the type of things that should be taken into account when deciding on this matter, including: whether they are able to make representations, follow what prosecution witnesses say, the seriousness of the case and the seriousness of the penalty and the relative complexity of the proceedings. This provides a pointer as to which defendants are likely to be said to be able to effectively participate²³ and which defendants will be granted legal aid, and therefore, are more likely to be represented, depending upon these factors. Whilst legal aid is something that the ECHR and the ECtHR promotes, it is not something that the Court has said that everyone should be entitled to. This, therefore, has implications for unrepresented defendants and for those in the courtroom

²² For information about the merits test see s. 2.10.

²³ Although the issues in relation to unrepresented defendants and assessing defendants’ ability to effectively participate have been discussed above (see s. 2.7.1).

whose role it is to ensure that all defendants get a fair hearing, which they are entitled to, as emphasised in art. 6 ECHR.

The Human Rights Act 1998 is important given the influence that it has over how court actors behave and how court proceedings are conducted, which ultimately impacts on the experiences that defendants have; as does the discretionary decisions that court actors make and the way in which they exercise that discretion – which has also been mentioned above.

2.8 The history of legal aid and representation

When the HRA 1998 was implemented the majority of defendants were represented in both the Crown Court and magistrates' court, and this continues to be the case. This was not so when Packer originally developed his models. This is because 'the appearance of lawyers in criminal cases in a relatively modern feature of the English criminal justice system' (Newman 2013: 19). The Poor Prisoners' Defence Act 1903 introduced the first paid legal aid scheme (Goriely 1996: 35) but in reality, it helped very few defendants. Legal aid could be granted to those who did not have the means to pay for representation, so long as it was 'desirable in the interests of justice' (McConville et al 1994: 2). It was only awarded on a discretionary basis, however, to those on trial in the Crown Court, and in order to be eligible for it, there was an obligation for the defence to disclose their defence. Most defendants did not know that this assistance was available, though, and neither did some magistrates (Goriely 1996: 37).

Due to the inadequacies of the Poor Prisoners' Defence Act 1903, various groups began to campaign and protest in the 1920s in an attempt to improve access to legal aid (the most active and effective lobby being the women's movement: Goriely 1996). In response to this, a committee was established in 1925 to examine the situation. The committee concluded that 'in criminal cases the present system works satisfactorily and that no alterations are urgently or imperatively required' (Finlay 1926: 10). They did not, for example, think that there was:

Any ground for supposing that in an appreciable number of cases a miscarriage of justice results from the fact that a prisoner is undefended [...because] in a large proportion of cases ... the prisoners are manifestly so guilty as to leave no room for doubt (Finlay 1926: 5).

They did recommend some improvements, however, and these were implemented in the Poor Prisoners' Defence Act 1930. This piece of legislation abolished the obligation to disclose the defence and it provided some help, albeit limited, in summary trials, where 'by reason of the gravity of the charge or of exceptional circumstances it is desirable in the interests of justice' (Poor Prisoners' Defence Act 1930, s. 2; Goriely 1996). Still, magistrates usually did not think representation was required and consequently rarely granted it (Welsh 2016: 112; also see Goriely 1996). The situation was still, therefore, largely unsatisfactory, in terms of the routine availability of legal aid. In response, the Rushcliffe Committee was appointed in 1944, whose recommendations were enacted in the Legal Aid and Advice Act 1949. This Act widened the scope for criminal aid, although for financial reasons this was not implemented in criminal cases until the 1960s (McConville et al 1994: 2; Goriely 1996). In 1960, the Government accepted the recommendation that lawyers should be paid a reasonable amount, and that they should not be paid hourly rather than fixed fees, drawn from a national (rather than local) fund (Goriely 1996: 44; Department for Constitutional Affairs 2005). The limitation to 'exceptional circumstances' or 'grave charges' was repealed in 1963.

As a result of these changes, by 1966 72% of defendants in the Crown Court received legal aid, compared to 39% in 1962 (Department for Constitutional Affairs 2005: 8). The number of people being granted legal aid increased even more substantially in the magistrates' court: 1.2% of defendants received legal aid in 1964, compared to 0.3% in 1955 (Widgery Report 1966). However, the vast majority of defendants in the magistrates' courts were still unrepresented, seemingly because magistrates and their clerks were still largely reluctant to grant legal aid (Department for Constitutional Affairs 2005: 8). The Widgery Committee, nevertheless, concluded that they were largely satisfied with the current position (Widgery Report 1966). They said that 'legal representation cannot be said to be a necessary condition for the effective defence of every criminal charge' (Widgery Report 1966: 14), because they considered that most defendants faced such straightforward cases that they could adequately deal with their own defence (Widgery Report 1966: 14). However, despite being largely satisfied with the pace of reform, they did seek to promote more consistent decision making. They provided guidance to help magistrates to decide when in the 'interests of justice' legal aid should be granted. These became known as the 'Widgery criteria' and are still used today. These criteria will be discussed later (s. 2.10).

Regardless of the Committee's intentions, in the fifteen years following the Widgery Report, there was a significant increase in legal representation in magistrates' courts and in the proportion of defendants in the magistrates' court who were granted legal aid: the number of grants increased by 45% between 1980 and 1989 alone (McConville et al 1994: 8). The cost of funding legal representation for magistrates' court defendants rose significantly: from £6.8m in 1966-67, to £115m in 1982-83, to more than £324m in 2004-05 (Department for Constitutional Affairs 2005: 9). Subsequently, 'representation grew from a rarity to the normal way in which serious summary trials were dealt with' (Goriely 1996: 45).

There were a number of different reasons for this. Firstly, during this period, research increasingly drew people's attention to the problems that unrepresented defendants experienced in court, as did pressure groups. The pressure group JUSTICE, for instance, directly disagreed with the Widgery Committee, stating that 'we have not found it possible to agree with the view that the system is working broadly as it should [, rather...] we feel that there is much that is seriously wrong' (JUSTICE 1971: 2). They based their viewpoint on the various studies that were undertaken after the Widgery Report, looking at the number of unrepresented defendants in the magistrates' courts and the problems that they faced (for example, Zander 1969, 1972; Dell 1971a). These studies were not available to the Widgery Committee, which reached its conclusions on the 'basis of memoranda submitted to it and on the evidence of witnesses, supplemented only by a study of a two-week sample of legal aid applications' (JUSTICE 1971: 2). The problem with this was that although the majority of legal aid applications were granted, very few defendants applied for legal aid in any case (around 4 per cent in 1969: JUSTICE 1971: 2). Thus, the inclusion of those 'defendants who do not obtain, or do not even apply for, legal aid explains the wholly different impression gained about the working of the system' (JUSTICE 1971: 2). JUSTICE (1971: 4) reported that although the percentage of defendants receiving legal aid had been increasing, it was still very low: only around 3.4% were represented in 1969. To correct this, JUSTICE recommended that the criteria developed by the Widgery Committee should be fully implemented across all courts, and that a duty solicitor scheme should be established (JUSTICE 1971: 23-32).

Secondly, magistrates and clerks became much more willing to grant legal aid applications (Smith and Cape 2017). One of the main explanations for this was because of the increasing number of people being charged with criminal offences in the 1970s and 1980s (Bridges 2002), which resulted in an increase in the number of defendants having to go to court (Smith

and Cape 2017: 65). Magistrates and clerks, therefore, began to welcome defendant representation as a way to save court time. The expansion was also due to procedural changes that were brought about as a result of the Criminal Justice Act (CJA) 1967 and the Criminal Justice Act (CJA) 1972. The CJA 1967 allowed defendants to be sent to Crown Court for trial without the evidence being tested beforehand in a magistrates' court, so long as the defendant agreed to this. To safeguard the defendant when making such a decision, it was said that they should be legally represented (McConville et al 1994: 4). Furthermore, s. 37 CJA 1972 provided that magistrates could not sentence a first time offender to prison if they were unrepresented. Duty solicitor schemes were also introduced on a voluntary basis in the 1970s; and the Legal Aid Act 1982 later 'laid down a statutory basis for organising court duty solicitor schemes and remunerating solicitors separately for participating in them' (McConville et al 1994: 7). Duty solicitors helped unrepresented defendants at their first hearing and assisted them in applying for legal aid so that they could be represented at other hearings (McConville et al 1994: 5). This resulted in higher rates of representation, and an increasing demand for legal aid (Bridges 2002), as did the introduction of the PACE 1984. This extended legal help to the police station, by providing a statutory guarantee entitling all police station detainees to free and independent legal advice.

The expansion in legal aid and representation was possible due to a growth in the number of solicitors: between 1955 and 2004 the number of solicitors holding a practice certificate rose from 17,969 to 96,757 – an increase of 438% (Department for Constitutional Affairs 2005: 10). As a consequence of this rise, as suggested, expenditure on legal aid significantly increased during this time period. This attracted the attention of policymakers from the 1980s onwards (Young and Wilcox 2007: 109): various different measures have been implemented by a number of governments in an attempt to reduce spending in this area or at least stabilise it. For example, fixed fees were introduced to cover magistrates' court work in 1993. This means that they are now paid case-by-case at a standardised rate and not hourly for the time that they have spent working on the case (Kemp 2010: 13). In 2009, fixed fees were also implemented in England and Wales to cover police station legal advice. Legal aid contracting was also introduced in 2010, which meant that only solicitors' firm with a contract could do legal aid work (Smith and Cape 2017: 66), and means testing was reintroduced for magistrates' court work in 2006 and Crown Court work in 2010. Before the means test was introduced, the Widgery Committee recommended that the courts should have the discretion to order a defendant to make a contribution towards their legal aid costs at the end of the

case. At the end of the case, though, it was difficult to collect money from those who had been sentenced to imprisonment, so the burden fell disproportionately on those who had been found not guilty (Kemp 2010: 61). Subsequently, in the 1980s a means test was introduced. Those who earned over a specified amount had to make a contribution. However, the scheme caused delays in the criminal justice system and it was also costly to administer (Smith and Cape 2017: 71).

Thus, the means test for criminal cases was abolished as a result of the Access to Justice Act 1999. After this happened, there were some concerns that wealthy defendants were getting legal aid when they could afford to pay for representation themselves (see, for example, BBC 2005). Furthermore, the legal aid fund had also increased from £1.5 billion to £2 billion between 1997 and 2004 (Kemp 2010: 61). In response to this, means testing was reintroduced first in magistrates' courts, and then in the Crown Court. Criminal legal aid fees for solicitors, who represent suspects in police stations and magistrates' courts, were also cut by 8.75% in 2014 (Smith and Cape 2017: 73). As a result of these changes, expenditure started to decrease in the mid-2000s and this decline has been consistent since 2003-04 (Smith and Cape 2017: 74).

2.9 The advantages and disadvantages of legal representation

The increase in legal representation was a positive development. In relation to criminal cases, the prosecution (usually a state-funded agency) and the accused are unequal parties, because of the vastly superior human and financial resources of the state, relative to the average citizen. Adversarial proceedings are perceived as being contests between the prosecution and defence and given the potential consequences of the contest for the defendant, the contest must be fair (Roberts and Zuckerman 2010). Thus, safeguards have been developed to protect the innocent from being wrongfully convicted and to reduce the 'inequality of arms' that exists (Young and Wall 1996; Roberts and Zuckerman 2010; Newman 2013). So, for example, it is for the prosecution to prove beyond reasonable doubt that the defendant is guilty, to a high standard.²⁴ Furthermore, to enable defendants to effectively participate in

²⁴ There are exceptions to this principle (see, for example, Ashworth and Blake 1997). For certain defences (like the defence of insanity), the burden of proof is on the defendant. When the onus is on the defendant, they are not, however, required to prove something beyond reasonable doubt, but on the balance of probabilities.

proceedings, and to protect them from any mistakes made by the police and prosecution agencies, and any potential abuse of power by the state, defendants are entitled to be legally represented as stated in the ECHR (Roberts and Zuckerman 2010).

Being legally represented does provide a number of benefits: defence representatives help their clients to understand the process and to make an informed decision (Cape 2014). They also help to put their client's case across and cross-examine witnesses more effectively than unrepresented defendants, due to their generally more advanced advocacy skills, and their typically greater procedural knowledge and experience. These are important matters, as the consequences of a defendant pleading (or being found) guilty are significant: they could have their liberty restricted; lose their job; be fined; and/or have their reputation tarnished (Ashworth 1996: 57).

Defence representatives also save the court time. This is something that the state values for both financial and administrative reasons, given the number of cases and defendants that the summary courts have to deal with.²⁵ Lawyers are more likely than laypersons to make sure that the court has all the necessary information; that all basic administrative tasks have been done before the hearing takes place; and that the defendant is forewarned as to how to speak and act during the hearing, resulting in the court process running more smoothly and efficiently overall (Transform Justice 2016). In Transform Justice (2016: for a discussion about this study's methodology see s. 3.2) it was suggested that unrepresented defendants at court slow the process down and delay proceedings due to a general lack of procedural and legal knowledge, which results in court staff having to explain things to them more often and in greater detail.

Although legal representation is important for the reasons that have been suggested, so is the quality of that representation. Baldwin and McConville (1977), for example, examined the practice of plea-bargaining in Birmingham Crown Court, and they focused on the number of defendants that had initially pleaded not guilty but later changed their plea to guilty. They interviewed 121 defendants who had done this, looking at the reasons for why they decided to change their plea. They found that 48 (35.4%) said that they did so due to pressure from

²⁵ For example, in 2020, 1.34 million defendants were prosecuted at magistrates' courts (Ministry of Justice 2020: 1).

their barrister to do so (Baldwin and McConville 1977: 110). Scare tactics and/or inducements were used to pressure clients into pleading guilty, even when some defendants persistently said that they were innocent (Baldwin and McConville 1977: 49-53). McConville et al (1994) also undertook an ethnographic study observing the practices of 48 firms of solicitors and interviewing solicitors working at those firms. They found that lawyers frequently treated their legally aided clients disrespectfully. They spoke negatively about them to others, describing them as being ‘thick, toe rags, bastards, liars, slimy, nuts, or insane’ (McConville et al 1994: 35). The lawyers did not usually spend much time with them and when they did, they spoke over them, or dismissed what they had to say, or spoke to them in an abrupt or sarcastic manner. They tended to presume that the defendants were guilty and tried to persuade them to plead guilty or put pressure on them to do so. They did not spend a long time reading their case files or preparing for the hearing; and there was also the problem of discontinued representation. Likewise, Newman (2013) undertook three months of participant observation across three firms, followed by a month of interviews at each and his findings supported the conclusions from the earlier research.

The studies discussed above recognised that not all of the lawyers who participated in the research acted in the negative way described though. Furthermore, whilst some of the observations of McConville et al (1994) and Newman (2013) suggested a poor solicitor-client relationship, they were not necessarily evidence of poor-quality representation, or that the solicitors were poor-quality representatives in court proceedings. Newman said himself that he had a lack of legal training (2013: 99), suggesting he was not in a position to judge this in any case. Furthermore, neither McConville et al (1994) nor Newman (2013) interviewed defendants, so their perspective was not gained; Bottoms and McClean (1976: 112) noted the main reason defendants gave for pleading guilty in their sample was because they were in fact guilty. Bottoms and McClean (1976: 231) also proposed that lawyers may advise (or put pressure on) defendants to plead guilty because they think it is in their clients’ best interests (in that they will receive a lighter sentence for pleading guilty, for instance) given the strength of the evidence against them.

However, recently, the Solicitors Regulation Authority with the Bar Standards Board commissioned an independent report, which examined the views of the judiciary in relation to the standards of criminal advocacy (50 circuit and High Court judges were interviewed). A thematic review into law firms’ practices was also conducted (Hunter et al 2018; Solicitors

Regulation Authority 2018). Whilst overall the two reports suggested that the quality of advocacy was generally competent, judges felt that standards had declined over time and this was particularly the case in relation to case preparation and advocates' ability to ask defendant and witnesses focused questions (Hunter et al 2018: iv). Furthermore, some of McConville et al's (1994) and Newman's (2013) observations suggested a poor solicitor-client relationship, which is likely to have an impact on defendants' experiences at court and how engaged they feel in the process.

There are also some other possible disadvantages to legal aid and legal representation. For instance, defence lawyers may not permit defendants to put forward the defence that they wish, and lawyers may take conflicts away from the lay parties involved, which prevents them from being able to fully participate in proceedings (Christie 1977). In spite of this, however, given the potential consequences of a defendant being convicted in an adversarial system, on the whole, it still appears more beneficial for them to be legally represented than for them not to be: fewer of the difficulties identified by unrepresented defendants appear to exist when defendants are represented (Welsh 2016). Represented defendants also appear to have a greater understanding of the proceedings and are more likely to understand what is going on (Kemp 2010: for a more detailed discussion of this study see s. 3.1).

2.10 The legal aid system in England and Wales

It has been said that England and Wales has 'one of the most comprehensive systems of criminal legal representation and legal aid in the world' (Bridges 2002: 137).

This system covers a range of state-funded services to those suspected or accused of crime, from advice and representation for those held for questioning by the police, through to representation at the various levels of court at which those accused of crime are tried, to assistance in preparing appeals against criminal convictions and challenges to miscarriages of justice (Bridges 2002: 137).

Currently all suspects at the police station are entitled to free legal advice, regardless of the suspect's income. However, since 2008, legal advice is only provided over the telephone to detainees detained at the police station for less serious (non-imprisonable) offences (Skins 2009: 402). Legal advice solicitors tender for the right to offer these services. When the

defendant's first hearing is via video link (from the police station to court) legal representation is non-means tested. Representation at a magistrates' court by a duty solicitor is also free; but based upon the interviews done in the current research (which will be discussed further in Chapter Four), it was reported that duty solicitors are only able to advise defendants if they are in custody or it is their first appearance and they have been charged with an imprisonable offence. Both a means test and merits test have to be satisfied in order for a defendant to qualify for full legal representation (i.e. representation at subsequent hearings and the trial and sentencing) at the Crown Court and magistrates' court.

Since 2013 the Legal Aid Agency (an executive agency of the Ministry of Justice) determines applications for legal aid. The Legal Aid Agency replaced the Legal Services Commission. The Criminal Defences Service Act 2006 transferred the power to determine criminal legal applications from magistrates or legal advisors in court to the LSC (Young and Wilcox 2007). Legal aid can fund either a publicly-determined or privately-selected lawyer, provided that the latter has a contract with the Ministry of Justice to provide publicly-funded legal representation (Cownie 2013: 320). The Agency's means test is based on the defendant's income, adjusted to take into account their partner's income and the number and age of any dependent children that they have (Legal Aid Agency 2020b). Legal aid is automatically available in the magistrates' court to those below a minimum threshold income (in 2020 £12,475p.a. or less) and is automatically unavailable past a maximum threshold income (in 2020, £22,325p.a. or more). Within this range, the Legal Aid Agency will provide legal aid only if the defendant's disposable income (after council tax, national insurance, childcare and housing costs, and other key expenses) is £3,398p.a. or less (Legal Aid Agency 2020b). In the Crown Court, there is a maximum threshold for the receipt of legal aid (in 2020, £37,500p.a.), but those who have a disposal income less than that (down to a minimum threshold of, in 2020, £3,398p.a.) must pay a contribution towards defence costs. Kemp (2010) argues that the financial threshold for means testing is too low, meaning that free legal assistance is refused to defendants even though some may be unable to afford legal representation.

In order to satisfy the merits test, the interest of justice test (the aforementioned Widgery criteria) must be satisfied. The factors to be taken into account include: whether the defendant is likely to lose his/her liberty or livelihood; whether his/her reputation is at stake; whether the proceedings may involve a substantial question of law; the defendant's ability to

understand the proceedings or to state his/her own case; and whether the proceedings might involve the tracing, interviewing or expert cross-examination of a witness or witnesses on the defendant's behalf (paras. 5(2)(a) – (e), Sch. 3 Access to Justice Act 1999). This list is non-exhaustive and does not prevent other factors from being taken into account (*R v Liverpool City Magistrates ex p McGhee* [1993]). Not all of the Widgery criteria have to be satisfied in order for legal aid to be granted: 'if one or more of these features is present there are grounds for thinking that representation is desirable' (Widgery Report 1966: 49).

Young (1993) and Young and Wilcox (2007) found that when clerks and administrative staff made decisions regarding legal aid applications in the magistrates' court, little weight was given to the Widgery criteria. Much of the decision-making was based upon how seriously they viewed the offence. Now legal aid applications are decided by the Legal Aid Agency, research needs to be done looking at what factors they take into account when making those decisions. Yet despite the decision maker changing, those who have been charged with a non-imprisonable offence, including driving offences, and drunk and disorderly offences, generally still do not satisfy the merits test (Kemp 2010). This is despite the fact that unrepresented defendants who have been charged with these offences may find it difficult to understand court proceedings and state their case; they may lose their livelihood if they are convicted; and/or suffer serious damage to their reputation (regardless of their social class or what job they may or may not have). When a defendant is charged with a non-imprisonable offence, the case is seen as being uncomplicated, so it is believed that unrepresented defendants are not placed at a substantial disadvantage compared to the prosecution when presenting their case (Legal Aid Agency 2013: 5). Nevertheless, they may still be placed at a disadvantage, if they are unfamiliar with court proceedings and the law, and this may have a negative impact on the outcome of their case and the sentence that they receive. This has been suggested in previous research that has been done looking at unrepresented defendants, which will be discussed in Chapter Three. This chapter has reviewed the criminal justice system in England & Wales, to set proceedings in the magistrates' courts in context and to indicate the history of and changes to legal aid. It has also discussed a number of theoretical principles and showed their relevance to unrepresented defendants and the experiences that they have at court.

3.0 Chapter Three: Literature Review - Unrepresented Defendants in the Criminal Courts and Unrepresented Litigants in the Civil and Family Courts

Chapter Two provided an overview of the criminal justice system and the legal aid system in England and Wales. This chapter explores the research that has been done in the area of self-representation, in order to show the gaps in this literature and to more clearly establish the research aims for this thesis. It examines the findings from major studies of unrepresented defendants' experiences, along with the methodological approaches they have used, and the limitations these carry. More research has considered self-representing parties in the civil and family courts than in the criminal courts. It is important to consider this, because it indicates the kinds of barriers or difficulties facing those without a legal background in the courts in general, as well as the recommendations and improvements that have been made there, but as will be shown the findings from these studies cannot entirely be applied to those self-representing in the criminal courts.

It is also important to note that the previous research that is discussed within this chapter has focused on England and Wales (with the exception of McBarnet 1981, which explored Scottish courts). This is because differences in court cultures, legal procedures, training and the prevalence of unrepresented defendants elsewhere means that the findings from previous studies in other jurisdictions would not necessarily be applicable to the experiences that defendants have in England and Wales (Church 1985; Dixon 1995; Mulcahy 1994; Cammiss 2007; Transform Justice 2017b). Also, for practical reasons the review had to be limited in this way: I had only access to certain publications and as I am not multilingual, I would have been unable to read sources published in languages other than English.

3.1 Unrepresented defendants in the criminal courts: a literature review

Why do defendants self-represent, and what are their experiences of doing so? If one asks unrepresented defendants themselves, they offer many reasons, including that: they did not think that they needed a lawyer (because the offence that they were charged with was too trivial, or because they said that they were innocent, or alternatively because they said that they were guilty); they did not want a lawyer (because they distrust lawyers, for example);

they could not afford to have one (some defendants were not eligible for legal aid and/or they did not apply for it); they did not want to delay proceedings by asking for a solicitor; and/or they thought they would be better at putting their own case across (Bottoms and McClean 1976; Kemp and Balmer 2008; Judicial College 2013; Transform Justice 2016; Thomson and Becker 2019).

Regardless of the reasons given, however, the experiences of unrepresented defendants in the magistrates' courts have tended to be largely negative. Dell (1971a: 17), for example, interviewed 565 women from Holloway prison, and she concluded that many of the participants 'who were unrepresented were seriously handicapped by the lack of legal help [, because they...] found it difficult to fend for themselves in court' due to their being nervous, and unable to hear what was being said, or to understand procedure (Dell 1971b: 454). The women expressed concern about not having known how to behave in court, when to speak, or who to address their answers to. Audibility, allied with nervousness and the dock being placed usually far from the magistrates, added in some cases to difficulties in understanding. Dell also found that unrepresented defendants rarely provided any mitigating factors, either because they did not understand what sort of factors were regarded as mitigating, or because they felt unable to speak about such matters due to the intimidating setting.

These findings are supported 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 ('they can't understand the jargon, the terms in which it is put to them': Carlen 1976: 22); the structure and architecture of the court building; the etiquette of ritual address (they did not know how to address others within the courtroom and whether to sit or stand when doing so); the formalities and procedures that go against conventional social practice (for example, in court the defendant has to address their answers to the magistrates or to the judge, regardless of who was asking the questions, whereas in everyday life, it is assumed that a person will direct their answer to the person who asked the question); and the formal environment (Carlen 1976: 18-37).

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; Eisenstein and Jacob 1977; 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 co-operative network that exists amongst those who work in the criminal courts is also strengthened by the practice of the limited forms of plea-bargaining, which occur in England and Wales (Welsh 2016). Sudnow (1965: 262), for example, noted that in the U.S. prosecutors and defence lawyers were on first-name terms with each other and over the course of their interaction and negotiation they ‘have developed a set of unstated recipes for reducing original charges to lesser offenses’. A similar degree of ‘chumminess’ is also evident in England and Wales (see Bottoms and McClean 1976; McConville et al 1994; Newman 2013; Welsh 2016).

The workgroup culture found in courts, described above, and the behaviour of those working there could affect the experiences that defendants, particularly unrepresented defendants, have. This seems to have the effect of excluding and marginalising defendants and preventing them from being able to effectively take part in proceedings and engage with the process (Carlen 1976; Newman 2013; Welsh 2016). In relation to plea-bargaining, for example, not all defendants will be aware that they could negotiate on certain things (on the sentence or charge or how the ‘facts of the case’ are presented, for example), or know how to negotiate or know what matters to negotiate on (Welsh 2016). Furthermore, due to court proceedings being so familiar to judges, ushers and lawyers, it was found they tended to use verbal shorthand to communicate with each other, which defendants may not understand (Welsh 2016). Unrepresented defendants may also cause problems for the court personnel and court process, as they are likely to disturb the normal and efficient routine.

Shapland (1981) also carried out semi-structured interviews and observed proceedings in magistrates’ courts and the Crown Court in London. She focused on the plea in mitigation

made by the defence in cases involving adult defendants (including, for example, the content of it, what factors were considered by the defence to be aggravating and mitigating, how the speech was prepared and how the information was gathered). Shapland (1981: 145) found that unrepresented defendants ‘say little if anything in mitigation’; unlike lawyers, they generally did not know what to include in the speech; which factors to emphasise; how to structure the speech; what the difference was between mitigating and aggravating factors; or what sentence to suggest to the judge or magistrates. Overall unrepresented defendants who pleaded guilty in the magistrates’ courts gave 1.71 mitigating factors per speech, whereas in the same type of case, represented defendants gave 8.23 (Shapland 1981: 75). Five out of 21 unrepresented defendants gave no mitigating factors at all (Shapland 1981: 75) and a sentencing suggestion was only made by one of that sample (Shapland 1981: 83).

Unrepresented defendants usually did not think to provide a sentencing suggestion or be in a position to be able to offer one, as to do so they would have needed to be aware of the court’s sentencing powers and sentencing guidelines (Shapland 1981: 83), which they were normally not aware of. The position seems not to have improved since the 1980s, as Transform Justice (2016: 18) concluded that unrepresented defendants do not know how to mitigate due to them either not saying anything in mitigation, or due to them not knowing what factors are relevant and what are not.

Furthermore, the literature suggests that unrepresented defendants do not always understand the sentence that they are given (Dell 1971a, 1971b; McBarnet 1981; Transform Justice 2016) – although at least defendants are now given a written record of their sentence and so are not left relying on their memory. The defence lawyer is the one who usually explains the sentence to their client. Therefore, in cases where they are not represented, defendants are reliant on others, like clerks, to do this. However, whether they explain the sentence in sufficient detail and in terms that can be easily understood, depends upon the training and attitude of the individual clerk and whether they have the time to do so, as has already been mentioned in s. 2.2.

Equally, McBarnet (1981) found, from observing court proceedings, that unrepresented defendants generally had a poor understanding of legal procedure and of the rules of evidence, particularly those relating to disclosure. She also found that they were typically unable to effectively present their case in court and cross-examine witnesses given that they usually did not have the knowledge of the law and the skill required to do so. Thus, when

unrepresented defendants asking the witness questions during cross-examination, with the aim of undermining the opponent's version of the case, most of them made statements instead. McBarnet (1981: 186) ultimately claims that such a defendant 'cannot participate in [their] trial' due to their failure to effectively cross-examine. This is significant as 'cross-examination is one of the essential weapons of the adversarial trial' (McBarnet 1981: 186); 'the adversarial system is based upon the assumption that vigorous advocacy is the most effective mechanism for testing evidence' (Ellison 1997: 238).

Souza and Kemp (2009) also observed court proceedings in two magistrates' courts in London and interviewed 58 defendants. In contrast to what has been suggested above, on average the defendants (both represented and unrepresented) said that they understood most of what was going on in court. Additionally, in Kemp and Balmer (2008: 16) and Kemp (2010: 79)²⁶, 767 defendants (again both represented and unrepresented: around 18% were unrepresented) were interviewed at six different magistrates' courts, and when they were asked whether they understood what was happening to them in court, the majority said that they knew exactly, or thought they knew, what was happening to them. Those who were legally represented had a greater understanding of what was going on than those who were not represented: 6% of the 767 participants said that they had not got any idea what was going on and of those 35% were not represented. In contrast, of those who said that they knew exactly what was going on at court (52%), only 15% were unrepresented. Due to the data collected from observing court proceedings, Souza and Kemp (2009: 10) and Kemp (2010: 80) questioned whether the defendants, particularly those who were unrepresented, truly did understand most of what was going on or knew exactly what was going on though. This was due to the complex nature of the proceedings observed and due to the language that was used in court (i.e. legal jargon). This made it difficult for defendants to follow proceedings, especially those who were not represented and those who did not have English as their first language. As a consequence of this, the magistrates often had to repeat information to them. Furthermore, unrepresented defendants frequently turned up to their hearing unprepared (they had not brought the required documents or had not filled out the correct forms). In Transform Justice (2016), it was also concluded that unrepresented defendants experience problems when attending court (e.g. in relation to knowing what to

²⁶ Kemp and Balmer (2008) and Kemp (2010) concern the same study. Interim findings are presented in Kemp and Balmer (2008). Kemp (2010) is the final report.

do). Furthermore, in research interviewing legal practitioners in the Crown Court (Thomson and Becker 2019), participants said that unrepresented defendants had a varied but limited understanding of the court process and as a result were less able to effectively participate (Thomson and Becker 2019: 1).

In relation to effective participation, Jacobson et al (2014) examined the ability of defendants to participate in court proceedings and Jacobson and Cooper (2020) examined the ability of all lay users to do this. In the former study, based upon observations of Crown Court hearings and interviews with a range of court actors (including defendants and criminal justice professionals), it was concluded that defendants' ability to participate effectively in court proceedings was often limited. Participants identified four main barriers to defendants being capable to participate effectively: a lack of understanding, exclusionary practices during court proceedings, denial of defendants' voices, and defendants' passive acceptance of the court process (Jacobson et al 2014: 2). In Jacobson and Cooper's (2020) study, which was touched upon in Chapter Two, interviews were conducted with court actors and a range of hearings in a number of different courts (e.g. criminal, civil etc.) were observed. It was found that although court staff made efforts to help lay users participate in proceedings, and policy initiatives have sought to improve participation (particularly relating to those considered to be vulnerable), other developments have undermined the ability of lay users to participate during court hearings and many barriers exist which impede participation (Jacobson and Cooper 2020: 11). These barriers arose from, for example, court users' vulnerabilities (e.g. mental health problems, and language barriers), and related to, for instance, the language used in court, the complex nature of court processes, and legal constraints on participation. Court closures and the reduction in funding for legal representation have also found to have an impact on the extent to which court users can effectively participate (Kirby 2020: 95).

In summary, therefore, the majority of studies in this area raise significant concerns about the ability of defendants to effectively represent themselves, which may have significant consequences for them. More recent work suggests that some aspects may have been ameliorated. Nonetheless, representation tends to be beneficial, as without it a significant number of unrepresented defendants either said they were unable to actively and effectively participate in the process, or were judged to be so by their observers. Hence, they tended to be at a disadvantage when attempting to represent themselves against trained professionals (Transform Justice 2016).

3.2 Methodological criticisms

It is important to recognise that the studies that have been discussed are not without their limitations. In relation to Dell's (1971a) study, for example, whilst the interview sample was a reasonable size, and in-depth data were collected, all of those interviewed were female prisoners from Holloway Prison. This limits the generalisability of the findings. The experiences of those who were found not guilty, who were not sentenced to custody, or who had not been remanded before trial or after conviction, may have been different. The experiences of men may also have differed. This is particularly likely to be the case given that women and men are, empirically, treated differently in the criminal justice system, including by the police and by the courts; although there is disagreement as to whether women are treated more harshly or leniently than men (see, for example, Carlen 1983; Heidensohn 1985; Worrall 1990; Hedderman and Hough 1994; Hedderman and Dowds 1997; Gelsthorpe and Loucks 1997; Wilczynski 1997). Dell's (1971a) interviews were also reliant on the prisoners' memory of events. Due to the time lapse between when the women were at court and when they were interviewed, and because of the stressful and pressurised environment of the courtroom, they may have been unable to accurately remember everything that took place, or how they or others behaved during court proceedings. They may also have failed to notice these things because they were not paying attention to them, or even if they were, they may have deliberately omitted certain things, or found it difficult to describe them (Foster 2006).

The researchers who used observational methods in their studies will not have experienced these problems, or at least not to the same extent (e.g. Carlen 1976, Shapland 1981; McBarnet 1981; Jacobson et al 2014; Transform Justice 2016; Jacobson and Cooper 2020). They would have been able to record 'information about the physical environment and about human behaviour' within it (Foster 2006: 59). McBarnet (1981), Shapland (1981), Jacobson et al (2014), Transform Justice (2016) and Jacobson and Cooper (2020) observed court proceedings, and conducted interviews. The data from the former was used to supplement the data obtained from the latter, and could also be used as a check on the information obtained from the interviews (Foster 2006). Unlike Dell (1971a) and Jacobson et al (2014), however, Shapland (1981) and McBarnet (1981) did not conduct any formal interviews with defendants, only informal ones (so in-depth data were not gathered), and Carlen (1976),

Transform Justice (2016) and Thomson and Becker (2019) and Jacobson and Cooper (2020) did not interview any defendants at all.

In relation to the interviews conducted, Shapland (1981) formally interviewed 32 barristers, 5 solicitors and 12 sentencers (49 participants in total); in Jacobson et al (2014; see also Jacobson et al 2015), interviews were conducted with 57 professionals and practitioners working in the Crown Court and 90 adult court users (including 41 criminal defendants – whether any were unrepresented is unclear); and Transform Justice (2016) interviewed ten prosecutors, four district judges and seven magistrates (21 participants in total; in addition, two online surveys were also completed by 96 lawyers). Jacobson and Cooper (2020) interviewed 159 practitioners (including lawyers, court staff and the judiciary), and 21 practitioners (Crown Court judges and Crown Prosecution Service (CPS) prosecutors were interviewed in Thomson and Becker (2019). In these studies, with the exception of Jacobson et al (2014) and Jacobson and Cooper (2020), the numbers of participants interviewed were relatively small. Dell (1971a) interviewed a considerably greater number of participants in her study. Although those interviewed by Shapland (1981) and Transform Justice (2016), for example, expressed similar views, it cannot be said that all courtroom personnel have the same opinion as them. Shapland (1981: 13) recognises this herself: ‘the views of those interviewed ... should not be taken as conclusive of the views of the whole profession’. Also, whilst it is important to consider the views of courtroom personnel, in order to gain a greater understanding of, for example, the experiences unrepresented defendants have, the impact that they have on proceedings and the way in which courtroom staff respond to them, it is important to hear the voice of the defendant. This is because defendants are less familiar with the courtroom environment than court personnel and their role in the courtroom also differs and, thus, they may have a different understanding of matters and see things differently to them (Bottoms and McClean 1976; Carlen 1976).

Through observing court proceedings, Carlen (1976), for example, was able to observe what happened in court, the interactions between the different people who were present, and their facial expressions and body language. By not interviewing defendants, however, she was only able to obtain information on the things that were directly observable, and could not find out about any other aspects of the case, such as the things the defendants did before the proceedings. She was also unable to observe ‘internal processes of cognition and emotion’ (Darlington and Scott 2002) and so she was not able to find out how the defendants actually

felt during court proceedings or why they felt that way. The assumptions she inevitably made may not have necessarily been correct, as observations are ‘inevitably filtered through the interpretative lens of the observer’ (Foster 2006: 59). Her research findings were, therefore, limited as a consequence of this, as she was only able to identify how defendants appeared to feel and whether they appeared to understand proceedings.

Furthermore, the findings from the observational studies discussed cannot be generalised to every single court in England and Wales (e.g. Carlen 1976; Shapland 1981; McBarnet 1981; Kemp 2010; Jacobson et al 2014; Transform Justice 2016; Jacobson and Cooper 2020), nor do they necessarily hold given that some of the studies are dated. For instance, Carlen (1976) observed proceedings in two London magistrates’ courts for 8 months in total; Shapland (1981) observed 100 Crown Court and magistrates’ court cases in London; and McBarnet (1981) observed 105 cases in the sheriff and district courts of Glasgow (obviously not in England & Wales: Scottish courts have different terminology and some different procedures). These figures are a very small proportion of magisterial justice overall: there are around 240 magistrates’ courts across England and Wales and around 1,163,000 defendants were prosecuted for summary offences in 2016 (Ministry of Justice 2016b). Again, this is something that the researchers acknowledge themselves (see, for example, McBarnet 1981:181; Shapland 1981: 13).

In addition, academics doing research on unrepresented defendants in the 1970s and 1980s were mostly liberal, left-leaning, and paternalistic (e.g. Dell 1971a; McBarnet 1981). The attitudes that the researchers had would have shaped how they went about conducting their research, their observations during it and how they interpreted their findings. As mentioned already, in the majority of studies the defendants themselves were not interviewed. Anti-paternalists would see it as important to hear the defendant’s voice, regardless of the outcome; as would feminists (McHugh 2014: 147). Anti-paternalists reject the silencing of the research subject because when this is done, in their view, it leads to research subjects’ opinions and thoughts being dismissed; whilst other voices are privileged (the researchers, for instance). It is assumed that the privileged participants are capable to speak on the research subjects’ behalf, which anti-paternalists would disagree with. Feminists also argue that participants’ voices, particularly female voices should not be ignored or silenced, as this is a form of suppression and females being able to speak about their experiences may be a form of empowerment (Davis 1994).

Moreover, when considering the reasons why defendants self-represent, it may be their choice to act without a lawyer or it may not be. Defendants who choose to be unrepresented were not obvious in the studies that have been discussed above, and those who had a more positive experience were also rarely, if at all, mentioned. In Dell's (1971a) study, for instance, as has been said all of those interviewed were prisoners. One could presume, therefore, that they are less likely to be happy with the outcome given that they have been sent to prison: our experiences of processes are likely to be more positive when the outcome is one that we want and are happy with (although procedural justice theory suggests process is more important than outcome: Tyler 2003). It is important to recognise, though, that unrepresented defendants have different experiences and circumstances. Defendants self-represent for a variety of reasons: whilst some unrepresented defendants will be unrepresented because they are unable to pay for legal representation and are not entitled to legal aid, this will not be the case for everyone. Some unrepresented defendants will choose to self-represent throughout the whole of the proceedings, despite them being financially able to pay for legal representation or being entitled to legal aid. Others will be legally represented for some appearances (which they will either pay for themselves or through legal aid) but this will not be the case for others (sometimes this will be through them choosing to do this and other times it will not be: Civil Justice Council 2011). Thus, the findings from the studies discussed cannot necessarily be generalised to all self-representing litigants, as they are not one homogeneous group; although to what extent and why the differences in terms of why defendants self-represent affect their experiences is not clear, as this has not been examined in the previous literature.

Finally, the majority of the research that has been discussed specifically focusing on unrepresented defendants is dated. Court and criminal procedures have changed since these studies were done, as have legal aid and levels of legal representation (many defendants were unrepresented in the magistrates' courts in the 1960s and 1970s: see s. 2.8). As a consequence of this, more recent research is needed to confirm whether these studies are still applicable to unrepresented defendants today. The most recent study focusing on those who self-represent in the magistrates' court is that by Transform Justice (2016), but as has been said already, unrepresented defendants themselves did not participate. Defendants were not interviewed in the latest study which specifically looked at unrepresented defendants in the Crown Court either, as the focus of this research was on the perceived effects of unrepresented defendants on the Crown Court, based upon practitioners' perspectives

(Thomson and Baker 2019). Furthermore, the findings from that study may not necessarily be applicable to the magistrates' court, as there seems to be fewer unrepresented defendants in the Crown Court: (Kemp 2010; Magistrates' Association 2015; Transform Justice 2016; Ministry of Justice 2018a). Furthermore, the procedures at the Crown Court are different from those at the magistrates' court, so it cannot be concluded that experiences will be the same as in the magistrates' court.

Unrepresented defendants were interviewed in studies by Souza and Kemp (2009) and Kemp (2010), for example; though in the former study the response rate was low (11 out of 56 defendants in Court One were interviewed, 6 of whom were unrepresented; and 47 out of 145 defendants were interviewed in Court Two, 28 of whom were unrepresented), and in the latter study, the majority of those interviewed were represented.²⁷ In both studies, if a defendant had been charged with minor offences including a minor road traffic offence or being drunk and disorderly (and were, therefore, more likely to be unrepresented), they were excluded from taking part, so their views were not obtained. Furthermore, the questions the defendants were asked were mostly closed meaning that there was no opportunity to ask participants why they gave the response that they did or why they felt that way. Kemp's (2010) study was also about legal advice and representation and not about defendants' experiences, so minimal information was obtained in relation to this. Thus, whilst the studies mentioned do provide an insight into the experiences that unrepresented defendants have at court, the limitations that have been discussed need to be borne in mind when interpreting their findings.

In summary, then, more up-to-date research needs to be done in the criminal courts that combines self-representing defendants' own accounts of criminal proceedings and their experiences of them with observations and discussions with others including legal professionals and court personnel. Unfortunately, as will be shown in s. 4.4.2 despite the attempts that were made to interview defendants in the present research, all attempts that were made were unsuccessful. Permission to interview the judiciary was also denied. Thus, whilst this research does not provide a full insight into the area – and some of the criticisms described above will be equally applicable to this study – it still does provide a partial insight and a partial insight is better than no insight at all. Furthermore, it does fill a gap in the

²⁷ 82% of the court sample said that they were using a solicitor.

literature in the sense that it provides up-to-date information on the magistrates' courts and unlike the Transform Justice study, defence solicitors were interviewed and so were ushers, legal advisors and judicial prosecutors; the use of video technology/live links were also considered to examine the implications that this has on unrepresented defendants' experiences; and theories were also used to explain and help understand the results from the empirical study.

3.3 Unrepresented litigants in the family and civil courts

More in-depth research has been done on self-representation in the civil and family courts than in the criminal courts in England and Wales (see, for example, Genn and Genn 1989; Baldwin 1997; Genn 1999; Moorhead and Sherr 2003; Pleasence et al 2004; Moorhead and Sefton 2005; Lewis 2007; Moorhead 2007; Williams 2011; Trinder et al 2014; Lee and Tkacukova 2017). There has been particular interest in those self-representing in the civil and family courts since significant cuts have been made to legal aid, far more severely and frequently than in a criminal trial context. Accordingly, there has been more concern about the rise in the numbers of those self-representing. Research was also encouraged in this area by recommendations made by Lord Woolf (1996). Woolf argued that the system was too slow, complicated and expensive. The Access to Justice Act 1999 and the Civil Procedure Rules 1998 gave effect to the main recommendations in his report, resulting in major systemic changes, and providing another subject for research in this area.

Based upon the research that has been done, people in the civil and family courts self-represent for a number of different reasons (these are similar to the reasons that have been given by unrepresented defendants in the criminal courts, see s. 3.1). They may have been unable to afford legal representation (this was usually the main reason); they may have had problems with legal aid (for example, they might have had to attend a hearing without a representative because they had not yet received a decision on their legal aid application); or they may have chosen to self-represent (they may not think they need a lawyer, for example, because in their view the case is uncomplicated and they can deal with it on their own, or they may not trust lawyers: see generally Genn 1999; Moorhead and Sefton 2005; Williams 2011; Lee and Tkacukova 2017).

Those self-representing also had different experiences and expectations. Trinder et al's (2014) research provides the most recent and in-depth study of this area, and so it is worth discussing in detail. Their study focused on the experiences of self-representing litigants in family law cases, which were examined through a range of interviews with self-represented litigants and court personnel, observations at court hearings, and documentary analysis of case-files. Self-representing litigants were asked, amongst other things, about what expectations they had before going to court. The majority had no expectations, although those who did often found that proceedings were not as formal as they expected them to be. In spite of this perceived informality, most of those interviewed still found it a difficult experience. This was a result of the time-consuming and slow nature of preparations for hearing(s) and having to wait for hearing(s) to take place and due to fear, bewilderment and the feeling of marginalisation that proceedings engendered (Trinder et al 2014: 80-82). Not all those self-representing said that they had a negative experience, though. Those who had a more positive experience were those who had been to court before and those who felt that they were treated well by the judges, court staff, and opposing lawyers (Trinder et al 2014: 82-83). How fairly litigants perceived they were dealt with, therefore, had an impact on the experience that they had. This also has an effect on how likely litigants are to cooperate with legal authorities whilst they are at court (Tyler 2003: 286).

The experiences of those self-representing were, therefore, mixed, reiterating the findings of Baldwin's (1997) earlier study. Baldwin looked at litigants' experiences in small claims hearings and compared them with litigants' experiences in open court procedures in the county court. The former had a much more positive experience than the latter. This was partly because the procedure for small claims was more informal and relaxed; the process had been simplified to help those who are self-representing (Baldwin 1997; Elliott and Quinn 2010). Despite this, however, those self-representing in the civil and family courts generally found it to be an intimidating experience and experienced difficulties when attempting to self-represent (Moorhead and Sefton 2005; Trinder et al 2014). There were unrepresented litigants who appeared to possess a reasonable understanding of the process and knew what was expected of them and appeared confident and calm and able to present their case and cross-examine witnesses reasonably well; but this was not the norm (Williams 2011; also see Moorhead and Sefton 2005; Lewis 2007; Trinder et al 2014). Even when they did appear this way, self-representing litigants tended to overestimate their abilities and made mistakes (Trinder et al 2014). In the majority of cases observed in Trinder et al's (2014) research, for

example, the litigant in person had failed to follow court procedures in relation to obtaining the correct forms and completing and filing them on time.

Self-representing litigants may also experience an array of other problems: they may have difficulties with understanding the strength of their case and knowing whether it is worth pursuing in court (Baldwin 1997). They may have problems with understanding what is required of them in a hearing and be unable to present their case and cross-examine witnesses (i.e. formulate questions and focus on the legally relevant issues: Baldwin 1997; Genn and Genn 1989; Moorhead and Sefton 2005; Lewis 2007; Williams 2011; Trinder et al 2014). They may not understand the purpose of disclosure and they may not know that in civil cases parties are expected to talk to each other and negotiate with each other prior to the hearing (Trinder et al 2014). Litigants in person who were vulnerable (for example, those who had a history of imprisonment, were mentally ill, were illiterate, had dyslexia, or had a physical disability) were more likely to experience problems such as these. As a result, self-representing litigants could create problems for the court process and create additional work for court personnel (Moorhead and Sefton 2005; Trinder et al 2014).

There is, however, mixed evidence as to the impact that self-representation has on the duration of civil and family court proceedings (Williams 2011). Whether a case takes longer when one or both parties are unrepresented depends upon the nature of the case, whether both parties are unrepresented or just one, how active the parties are and how many mistakes are made by those who are self-representing (Moorhead and Sefton 2005; Trinder et al 2014). Self-representing can also have a negative effect on the outcome of the case as far as that party is concerned (Genn and Genn 1989; Moorhead and Sefton 2005), although the studies cited did not control fully for how complicated the cases were (Williams 2011).

3.3.1 How do court personnel treat unrepresented litigants?

As has been suggested (see s. 3.3 above) the ways in which court staff and judges respond to self-representing litigants can have an effect on those litigants' experiences. Court staff and judges have different approaches to dealing with litigants in person (Genn and Genn 1989; Moorhead and Sefton 2005; Moorhead 2007; Trinder et al 2014). This is because judges, for example, do not always know how to balance the tension that exists between remaining neutral and impartial, on the one hand, whilst also supporting unrepresented litigants such

that they have dealt with the case justly and fairly, on the other. For example, one judge from Moorhead and Sefton's (2005: 186-187) study of unrepresented litigants said: 'It's not my job, to, to fight their corner for them, but it is my job to try to make sure that they get a fair hearing. And yes, it's difficult'. Another described the difficulties that judges experience when dealing with litigants in person, noting the limits surrounding what they can do to assist them; whilst another expressed doubt as to whether such help could effectively mitigate the power imbalance that exists between a litigant in person and their opponent.²⁸

Thus, different judges responded to unrepresented litigants differently and gave them different levels of help and support (Moorhead and Sefton 2005; Moorhead 2007; Trinder et al 2014). Some judges appeared to intervene more and take a more active role than others. In relation to cross-examination, for instance, in Trinder et al's (2014) study, judges adopted a number of different approaches: some judges gave self-representing litigants no help with formulating questions or focusing on the relevant legal issues; others gave them guidance about what topics to ask about; some did this as well as assisting them to formulate questions; and in other cases, the judge asked the questions themselves. This is problematic as it results in inconsistencies: how litigants in persons are dealt with appeared to vary from 'judge to judge and case to case' (Moorhead and Sefton 2005: 192).

3.3.2 Problems of generalisation

Although civil and family trial procedure is similar to trial procedure in the criminal courts, one cannot generalise findings simply from one to the other. It cannot be said that the findings from the studies done in the family and civil courts will be exactly the same for unrepresented defendants in the criminal courts, due to the number of differences between these courts' procedures. For example, cases heard in the civil and family courts often concern disputes between individuals and institutions, rather than between citizens and the state. The purposes of civil law (some of the main areas of civil law include employment law, contract law and tort law) and family law (divorce, child custody cases etc.) are to settle disputes and provide remedies for harms; unlike in the wrongs-focussed criminal courts, 'it is

²⁸ This power imbalance is not necessarily the same as in criminal law, though. Unlike in criminal proceedings, in civil and family proceedings the parties are assumed to be equal (Dwyer 2008: 32): in criminal proceedings, one party is (usually) the state and the other is an individual; whereas in civil and family proceedings, one or both parties may be individuals or businesses etc.

not concerned with punishment as such' (Slapper and Kelly 2010: 8). Thus, these cases have different outcomes and implications for the parties: in a civil case, for instance, if the claimant is successful then the court may award damages (i.e. financial compensation) and/or another remedy (i.e. an injunction and specific performance in contractual disputes) (Gillespie 2015). However, it is not possible to conclude that outcomes in civil or family cases are less significant for the unrepresented litigant, as they may involve loss of contact with or custody of children or loss of employment.

In the family and civil courts, the number of self-representing litigants is also higher than in the criminal courts (see, for example, Moorhead and Sefton 2005; Comptroller and Auditor-General 2014; House of Commons Justice Committee 2015). Moorhead and Sefton (2005) analysed the records for 2,432 cases, both civil and family. In addition, they observed a range of hearings and conducted interviews with unrepresented litigants, judges, legal representatives, and court staff. They found that unrepresented parties were common: in relation to family cases, for example, 75% of adoption cases and 69.2% of divorce cases involved one or more adult unrepresented litigants (i.e. the litigant was unrepresented at some stage during the proceedings). Furthermore, nearly half (47.5%) of injunction cases involved an unrepresented party. In relation to civil cases, around 85% of individual defendants in County Court cases were unrepresented at some stage during their case, as were 52% of defendants in the High Court.

The Ministry of Justice keeps a record of legal representation in the civil and family courts, and the number of parties who are legally represented at at least one hearing varies considerably by case type (see, Ministry of Justice 2017b). A greater proportion are unrepresented in adoption cases than in public law cases, for instance (Ministry of Justice 2017b: 4). Since the Legal Aid, Sentencing and Punishment of Offenders Act 2012 was passed, the Ministry of Justice has also started to publish the number of claims defended in the civil courts and the proportion of claimants and defendants that were legally represented. Between July to September 2017, 76,000 claims were defended and 56% of claimants and defendants had legal representation (Ministry of Justice 2017c: 5). Based upon these statistics, a greater percentage of people were represented during this time period in the civil courts than in Moorhead and Sefton's (2005) study. Merely from looking at the official statistics, however, it was not clear what proportion of business litigants, or public institutions, for example, were unrepresented. This may be lower or higher than the

proportion of individual litigants in person. Representation not only varies depending on the type of case but also the type of litigant (Moorhead and Sefton 2005). There are also other limitations with the official statistics, as the Ministry of Justice (2017d) acknowledges. In relation to civil cases, for example:

The legal representation status reflects whether the claimant/defendant's legal representative has been recorded or left blank within Caseman, the county court case management scheme. A blank field is assumed to indicate that no legal representation has been used. However, the representation data held may be incomplete, and may not reflect any changes that occur as a case progresses, also not all cases defended would go to trial (they can be settled or withdrawn prior to this). Therefore, the absence of recorded representation in the dataset does not necessarily indicate a self-represented party... (Ministry of Justice 2017d: 11).

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 has reduced the areas of civil and family law for which legal aid is available and changed the financial eligibility criteria. As a result of this, there has been an increase in the number of those self-representing in the civil and family courts (Comptroller and Auditor-General 2014; House of Commons Justice Committee 2015; Grimwood 2016). Hence there are differences in the extent of representation and aid available for representation between the civil/family courts and the criminal courts.

3.3.3 Reforms in the civil and family courts for the unrepresented

Perhaps driven by the recent financial changes, however, more legal and practical help is available to help those self-representing in the civil and family courts compared to the criminal courts (Transform Justice 2016). It is helpful to examine these reforms and see whether they might be pertinent in the criminal courts. In the civil courts, a litigant in person can get practical and emotional assistance from the Personal Support Unit (PSU) and free advice from advisers from the charity Citizens Advice Bureau (CAB), Law Centres, university clinics and other advice clinics (Transform Justice 2016). Some law firms offer free legal advice sessions as well, and self-representing litigants in civil and family cases are usually allowed to be accompanied by a so-called 'McKenzie friend' in court (see, Moorhead 2003; Moorhead and Sefton 2005; Trinder et al 2014). McKenzie friends are also available to

unrepresented defendants in the criminal courts, though they are used less frequently (Transform Justice 2016). McKenzie friends may be individuals who charge for their services or they may work or volunteer for an organisation or they may be friends or family members (Trinder et al 2014: 94). Although McKenzie friends usually cannot address the court or examine witnesses (unless they formally request rights of audience to do so), they can take notes for the litigant and offer them emotional support (Courts and Tribunal Judiciary 2010). Trinder et al (2014) found that informal McKenzie friends (i.e. those who were friends, family members etc.) were generally a good source of support for those self-representing, though the contribution made and the quality of service provided by those who had been paid for their service (professional McKenzie friends) varied.

In Lee and Tkacukova's (2017) study, self-representing litigants completed 193 questionnaires and 25 were interviewed. Approximately one third of those who completed the questionnaire said that the PSU, for example, or the leaflets provided at court or the court staff (i.e. some court based resource) were important sources of secondary advice (Lee and Tkacukova 2017: 9). The PSU, for instance, is a charity that is based in various different civil and family courts in England and Wales. They are made up of 40 staff members and 700 volunteers and whilst they do not offer legal advice, they offer free practical and emotional support to those who are attending court without a lawyer. PSU volunteers can, amongst other things, provide moral support to unrepresented litigants and explain court proceedings to them (Personal Support Unit n.d.). Volunteers can also show unrepresented litigants around the court building, so that they can become familiar with it, and help them to organise their paperwork and legal documents. The PSU is not available in all courts, however, and is limited in terms of the advice that they can offer (i.e. they cannot offer legal advice: Trinder et al 2014). Nevertheless, the scheme appears to be welcomed by those self-representing: in 2016, the PSU had a 97% satisfaction rate from service users (Personal Support Unit 2016); although this is not evidence of quality of the service provided, only perceived quality.

In relation to seeking advice from CAB, in Moorhead and Sefton's (2005: 54) study, court staff, solicitors and litigants in person spoke about how CAB offices were not open long enough and sometimes people faced difficulties when ringing them up (see also Genn 1999; Moorhead and Sherr 2003; Pleasence et al 2004; Johnstone and Marson 2005). CAB also did not always have the expertise or resources to deal with a client's particular issues (CAB 2011; Trinder et al 2014). When this was the case, those self-representing might be advised to

see a lawyer but this was something they usually could not afford to do (Trinder et al 2014). Despite this, though, ‘even quite basic advice about keeping records of events was a substantial help’ (Moorhead and Sefton 2005: 55). The majority of the 58 clients interviewed in Johnstone and Marson’s (2005) study also said that they were satisfied with the advice that they had received from non-legally qualified advisors working in advice centres; they found the advisors to have good communication skills and to be knowledgeable; they felt that they had been listened to and supported; and they would recommend the advice centre to someone else.

In regard to other sources of advice, the judiciary has published an online handbook to help those self-representing in the civil and family courts (see Bailey et al 2013). Other detailed online guides also exist (see, for example, Bar Council 2013 and Advicenow 2018). Guidelines have also been developed for lawyers in cases involving self-representing litigants (Bar Council et al 2015). It is important to note, however, that in relation to the online resources that have been made available for litigants in person, not everyone has access to the Internet or knows how to access this material (Trinder et al 2014). There is the issue that litigants may not always know which websites to get their information from due to the sheer quantity of online sources on civil and family matters, all varying in levels of accuracy and quality (Lee and Tkacukova 2017). The ability of self-representing parties to effectively search for information also varies (Trinder et al 2014). Those self-representing are still, therefore, likely to experience problems and whilst the new aids may be helpful in assisting litigants in person, an evaluation of them needs to be done to see if this is the case or not. Thus, reforms have taken place to improve the resources that are available to help those self-representing in the civil and family courts.

There have been a number of relatively recent suggestions to improve the position of unrepresented litigants. In response to some of problems mentioned above, Trinder et al (2014) recommended that the court should send an information pack to a litigant in person prior to them coming to court. This could have information about the layout of the court, how to address court personnel, what will happen during proceedings, what they will need to bring etc. Videos could also be made available on social media platforms, such as YouTube, covering similar matters (Trinder et al 2014). At the start of each hearing, they suggested that the judges should set out the ground rules and they should provide an explanation to the litigant in person about the purpose of the hearing, what will happen in it, and what will be

expected from them (Trinder et al 2014). Court staff could also be given training and guidelines, so that they are aware of the difference between information and advice (Trinder et al 2014; Moorhead and Sefton 2005). Personal Support Units could be expanded, so that they are available in all courts dealing with family and civil matters; and more free and low-cost legal advice could be made available, so that more self-representing litigants are able to get specific legal advice about their case (Trinder et al 2014). Thus, improvements could still be made in relation to the assistance that is available to litigants in person but, nevertheless, the sources of advice (both online and face-to-face) that currently exist are important and, in general, are helpful to those who are unrepresented (Lee and Tkacukova 2017).

3.4 Would the civil and family court reforms be useful in the criminal courts?

The resources that are currently available in (or have been recommended in the context of) the civil and family courts may also be helpful to those in the criminal courts. So, for instance, an online handbook could be written by the judiciary to assist those self-representing in the criminal courts; videos could be developed; and the equivalent of the PSU could also be established. There is currently no equivalent of the PSU for defendants in the Crown Court or magistrates' court; though the Witness Service, which is a free and independent service, is available to the criminal courts (both in the magistrates' courts and in the Crown Court). Witness Service volunteers provide practical and emotional support to witnesses, both prosecution and defence, and to those who accompany them to court. Volunteers show witnesses around the courtroom, sit with them in a separate room away from the defendant and others, and volunteers explain to witnesses what is going to happen during court proceedings. This service, however, is only available to witnesses and not to defendants. Thus, whilst it has been recognised that witnesses might be vulnerable and may find providing evidence a difficult and worrisome experience and consequently may require some extra assistance when attending court, this recognition has largely not been extended to defendants.²⁹ Assistance like that provided by the PSU, for example, if implemented in the criminal courts, may help unrepresented defendants to have a greater understanding of court procedures and enable them to take a more active role in the process.

²⁹ As discussed in s. 2.3.2, s. 2.3.2(a) and s. 2.3.2(b), the special measure provisions that were initially introduced to help vulnerable witnesses are not immediately obviously available to defendant, though defendants can receive some assistance in the form of special measures under the Youth Justice and Criminal Evidence Act 1999 (s. 33A and s. 33BA).

Simple guides to what to do for defendants and the meaning of legal terms used in court are available on the web from both non-government and government sources in England & Wales (e.g. Gov.UK 2019a); but what resources self-representing defendants use and what their experiences are of using them are largely unknown. This is why it is important that research is done on this, to gain a greater understanding of such matters and to address a gap in the literature. As shown the existing research on self-representing litigants in the civil and family courts has looked at these issues in some depth, as well as finding out litigants' motivations for self-representing (in civil and family cases); their experiences of doing so; what impact they had on proceedings; their support needs; and how those within the courtroom responded to them. Whilst the sizes of the samples do vary in the studies that have been discussed, on the whole the case samples that were used were small and this limits the extent to which the findings are representative or generalisable (Comptroller and Auditor-General 2014). In spite of this limitation, though, the results do still provide an indication of practice and an insight into these areas. The studies were also useful to consider as they provide helpful indicators to some of the things that could and should be researched in the context of self-representing defendants in the criminal courts. There will of course be differences, but also similarities - those self-representing in both courts have to follow court procedures and practice and they may also have to present evidence and cross examine witnesses, as well as managing their case. Whilst previous research has looked at some of these matters, this research is either now dated, or was not done in depth, or the methodology/sample differed to the research being discussed in this thesis. The aims and objectives of this study are set out in Chapter Four, whilst Chapter Four also provides a detailed discussion of the study's methodology.

4.0 Chapter Four: Methodology

The researcher's choice of the methods that they use to generate data will depend upon the aims and objectives of the project, the amount of time and resources that they have, and the researcher's own values and theoretical perspectives. These decisions about methodology are important, as they will have an effect on how the research is carried out and the type of data that is gathered; and, therefore, the analyses and conclusions that are possible to draw out of the data. This Chapter will first set out the study's aims and objectives followed by an examination of what methods were used. An overview of the ethical issues that arose whilst doing the research will then be provided, before setting out the methods used to analyse the data and the difficulties that were encountered.

4.1 Research aims and objectives

As set out in Chapter One, the research aims to:

- Explore the experiences of adult unrepresented defendants in the magistrates' courts;
- Examine the reasons why defendants self-represent;
- Identify the resources used by self-representing defendants to assist them; and
- Investigate the impact that unrepresented defendants have on court proceedings and on the role of the judge, magistrates, lawyers and other court staff.

4.2 Methodology overview

This research takes an interpretivist stance, which lends itself to qualitative research, where 'the stress is on the understanding of the social world through an examination of the interpretation of that world by its participants' (Bryman 2012: 380). A discussion about epistemological issues is important as 'a researcher's epistemological position will influence the methodological choices s/he makes' (Crow and Semmens 2008: 23). It will also have an effect on the way in which data are analysed. A positivist perspective to studying defendants and court actors was rejected on the grounds that it is impossible to research the subject matter in a way that is totally objective and neutral and conducted in a way which is free

from the biases of the researcher (including their social class, gender, age and education level). Interpretive researchers do not agree that there is an objective reality that exists separate from the researchers who observe it; rather they believe that ‘social reality is socially constructed and the goal of social scientists is to understand what meanings people give to reality’ (Schutt 2006: 43). Meanings were, therefore, constructed by the participants who were interviewed. In relation to the observations conducted, however, it was me who constructed meaning based upon my own interpretations of what I observed, although these interpretations were crosschecked with the interview findings. Observations were a valuable way to understand the context of the phenomenon that was being studied and to become familiar with the environment being discussed in the interviews in order to assist me to understand the meanings behind the behaviour, words and subjective experiences of those being researched.

In this study, quantitative and qualitative data were gathered through observing court proceedings and interviewing a number of different court actors (i.e. defence lawyers, legal advisors, ushers and judicial prosecutors). The study therefore pursues data triangulation, which involves ‘using more than one method or source of data in the study of social phenomena’ (Bryman 2016: 386). Triangulation is an approach, which uses ‘multiple observers, theoretical perspectives, sources of data, and methodologies’ (Denzin 1970: 310). By acquiring different types of data, from multiple perspectives, this research attained a more comprehensive understanding of the area (Robson and McCarten 2016: 25). Interpretivist researchers recognise that different actors interpret and understand things in different ways. Data triangulation is useful in the interpretivist paradigm because for interpretivist researchers, multiple understandings and interpretations from different sources demonstrate the study’s validity (Roberts-Holmes 2005: 40). Furthermore, for interpretivists, ‘knowledge is valid if it is the authentic and true voice of the participants’ (Hughes 2001: 36); and as has been said above, by triangulating data, the authenticity of the presumptions that I made when observing could, therefore, be checked.

Observing court proceedings helped me design the interview schedule and the information that I gained from conducting observations also supplemented the data collected from the interviews. Through using multiple methods, data were gained that would not have been gathered by using one means alone. For example, through observing court proceedings, I was able to observe how the space was used, how those in court interacted with each other, what

their body language was like and what was said. This helped to construct unrepresented defendants' experiences because these matters would be likely to have an effect on defendants and at least suggest what experiences they have. These are things that the participants may not think to mention when being interviewed, or they may not have noticed these things because they were not paying attention to them or they may have forgotten about them. This is therefore a way in which the observations triangulated the interviews. The interviews also triangulated the observations: if I had only observed court proceedings, then I would have only been able to obtain information on things that were directly observable, so I would not be able to find out, for example, about the things that happened before or after proceedings and the inner thought processes of the various actors to the extent that these were not made explicit during court proceedings themselves. Whilst interviewing, I was also able to ask the participants about things that I had observed in court to clarify things or to attain more information. By adopting this approach, therefore, a more holistic overview of unrepresented defendants' experiences in the magistrates' courts was gained.

Across two courts, and over a 9-month period I observed 403 court hearings (not including those observed during the pilot study) and interviewed 20 participants in total – defence lawyers, ushers, legal advisors and judicial prosecutors. The methods used will now be discussed in more detail.

4.3 First stage of fieldwork: observations of courtroom proceedings

This 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 9-month period, between 2018 and 2019. I spent around 100 hours observing at Court A (over around 19 days) and 126 hours observing at Court B (over around 23 days) - excluding time/days spent at each court for the pilot study, which is discussed later below. A range of hearings was observed, including plea hearings, sentencing hearings and trials. For a breakdown of the hearings observed and the characteristics of the sample, see Chapter Five.

4.3.1 Practical issues, sampling techniques and limitations

One of the courts that I observed in was situated in a city (Court A), whereas the other one was in a town (Court B). These courts were chosen due to practical and financial reasons.

Due to the frequency with which I needed to visit the courts, it was important that they were easy to travel to and not too far away, and that it would not be too costly to get there and back. The two courts were chosen because they operated in different local justice areas and Crown Court areas, with potentially different social problems. Observing two courts also allowed different court ‘cultures’ to be represented, as different courts may have dissimilar practices, approaches and procedures (Church 1985; Dixon 1995; Mulcahy 1994; Rumgay 1995; Hucklesby 1997b; Cammiss 2007). The data from both cannot though be unified. It is possible to make some comparisons because both courts are magistrates’ courts in England and Wales and operate under the same legislation and rules. However, details of procedure and practice were not always exactly the same. For example, in Court A, judicial prosecutors³⁰ were present, but this was not the case in Court B.

Before attending court to observe, I sent a letter to the managers at both Court A and B, explaining my research and what I intended to do. Given the courtrooms are open to the public, I had no problems gaining access to the court. Whilst observing court proceedings, though, there were some practical problems, which I had to overcome. For instance, in England and Wales it is an offence to record proceedings in court (s. 9 of the Contempt of Court Act 1981). As a result, I was unable to use an electronic recording device to record spoken information during observations. Instead, I completed an observation schedule and made handwritten notes. It would not have been possible to write down every single thing that I observed, so I focused on collecting data that were most relevant to my research aims. I also used a pilot study and previous literature in the area to determine what things I needed to prioritise.

As part of the pilot study, I observed 28 hearings at Court A over two days. The pilot study data are not included in the main data. The pilot study gave me the opportunity to get used to the courtroom environment, the types of cases and hearings typically heard in each courtroom, and the typical court schedule. It also gave me the opportunity to test my

³⁰ Judicial prosecutors are different to CPS prosecutors. Judicial prosecutors are employed by the relevant local police force, whereas CPS prosecutors are employed by the Crown Prosecution Service. Based upon my discussions with judicial prosecutors at court, it does not appear that judicial prosecutors have to be qualified lawyers, whereas Crown prosecutors do. Judicial prosecutors at Court A were based in the traffic court (which dealt with minor traffic offences). Judicial prosecutors dealt with all types of hearings with the exception of trials (which they did not have the authority to deal with for this particular force). CPS prosecutors were present in all of the other courtrooms, prosecuting all other types of cases.

observation schedule. Over the course of my main observations, I refined my observation schedule by adding new questions to it (the initial schedule can be seen in Appendix 7 and the later schedule can be seen in Appendix 8). This allowed me to collect additional quantitative data and gave me extra time to take down more detailed qualitative notes on other things that were happening during the proceedings, which I did not have time to focus on before. As time went on, though, and I became more familiar with the surroundings and proceedings, I was able to complete the observation schedule, and write down the relevant qualitative data, more quickly. As new questions were added later to the schedule, however, this does mean that in those hearings where the initial schedule was used, some data are missing. When discussing my results, this will be noted when this is the case. Where the new questions were added to the quantitative section but I was already collecting the data qualitatively (in the notes), these data have been added into the quantitative framework.

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 (see the observation schedules in the appendices). 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. If I missed certain things (because I did not hear the answer, for example) or if I did not understand something that had been said or done in court, then I asked another court actor at an appropriate time if they would provide clarification.

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 and magistrates/judges. However, for ethical reasons, I did not record any names of legal advisors or magistrates/judges or any information which could identify them or any other participants, so I cannot say how many different personnel were observed in total. For the purpose of this study, no types of offences were excluded from the court and interview samples; although I deliberately did not observe any cases involving young defendants (under 18 at the time of their trial), given that the focus of my study is on adult defendants. I observed appearances involving both unrepresented defendants and represented defendants to be able to make a comparison between their experiences.

Non-probability sampling methods were used to identify which hearings I was going to observe, in which courtroom, and on what day. Given that unrepresented defendants seemed to be a minority in some types of hearings, I aimed to maximise the number of hearings involving unrepresented defendants and also see all the different kinds of hearings which might feature unrepresented defendants. When I arrived at court, I asked the usher whether anyone was unrepresented in their court or if they knew of any courtrooms where a defendant was unrepresented. I either sat in their courtroom – if someone was appearing unrepresented – or went to another courtroom, if they said that they knew or believed that someone was unrepresented in that one. If more than one courtroom had unrepresented defendants appearing in them, then I selected the hearing type that I had not seen as frequently, or which I considered to be rarer based upon my impressions gained from previous observations, and from discussions with court staff. The rarity of the hearing seemed to depend upon the type of hearing and/or the nature of the offence the defendant had been charged with. For example, I found it difficult to observe unrepresented defendants at trials, particularly when they had been charged with a non-traffic related offence, so I considered this hearing to be rarer than first hearings, for example, where self-representation was more common. If no defendants were unrepresented on the day that I attended court, then I observed the hearings that I had not seen as many of and, therefore, did not have as much data on.

In relation to trials, which are rare in magistrates' courts, whether the defendant is represented or unrepresented, I turned up on 'trial days' (days set aside by the court to run trials) to see if anyone was unrepresented. In addition, if I had previously observed an unrepresented defendant enter a not guilty plea, or there was some suggestion that they were going to be unrepresented at trial, then I wrote their trial date down and attended on that day. A specific positivistic formula or sampling technique was, therefore, not used to select the hearings that I observed at court but due to practical issues, this would not have been possible. I did not have access to a court list; it is not always known until the day of the hearing whether the defendant is going to be unrepresented or not so I would not have been able to construct a sampling frame in advance of attending court; and even if there were and I had been able to arrange to observe certain hearings in advance, scheduled hearings do not always go ahead for a number of different reasons (e.g. the defendant pleaded guilty on the day of trial or did not turn up), and thus, data would not have been collected on these occasions.

A well-documented limitation of observational research is that it is time-consuming and costly (Foster 2006). As a result of these factors – and the time restraints that I had to complete this project - as stated only two courts were observed. The observation sample cannot be said to be representative or generalisable in a statistical sense. However, this is not something that qualitative researchers using an interpretivist perspective necessarily aim for or desire (Mason 2002; Silverman 2006).

Time can also be wasted when carrying out observations. This is particularly the case for this study, again because there was no way of knowing in advance of the day of the hearing if any of the defendants would be self-representing (this is of course also potentially a problem for those running court proceedings). Thus, frequently I travelled to court to ask the ushers whether there were any defendants self-representing on that day to find out there were not. I had to arrive at court at 10am to see if anyone was self-representing in the morning session and I had to wait until 2pm to find out if there were any in the afternoon. On occasions, hearings were also delayed, so there were long waiting periods, something which defendants will also experience (Jacobson et al 2015).

Another limitation of observational research is that if someone knows that they are being observed, then as a consequence, they may change their behaviour (Foster 2006: 59; Gibb 2008: 694). This is the problem of reactivity. Reactivity may have limited the validity, and overall utility, of the findings, given that the behaviour recorded may not be an accurate reflection of participants' usual behaviour. I did, however, take steps to minimise this. Specifically: I sat at the back of the court or in the area reserved usually for probation staff and journalists, where other people were sometimes present; I dressed in conservative clothes to blend into the courtroom environment; whilst listening to court proceedings I did not make facial expressions expressing approval or disapproval of what I was observing; whilst in court I sat quietly; and I left the courtroom at appropriate times (when the hearing had finished, for example, or when there was a delay), so I did not cause any disturbances. Over time I began to see the same judges and magistrates, and legal professionals, and other court staff so they may have got used to my presence.

4.4 Second stage of fieldwork: interviews with court actors

In the second stage of fieldwork, qualitative interviews were conducted. Qualitative interviews allow for an in-depth discussion enabling the interviewee to discuss their own experiences, and unlike other methods that could be used (e.g. questionnaires), semi-structured interviews are flexible, and thus they allow the respondent to reply in a way that is suitable for them (Bryman 2012: 470). Hence, they were chosen over structured interviews, for example, which are more rigid and usually consist of closed questions, which would limit the amount of detailed qualitative data that would have been collected. Structured interviews also do not allow the interviewee to depart from the interview schedule to explore new themes and ideas that may have emerged during it or to ask questions that follow up interviewees' replies (Bryman 2012: 470). Furthermore, semi-structured interviews were preferable to unstructured interviews due to the particularly time-consuming nature of the latter, the specific skills required in relation to conducting that type of interview and analysing the results (analysis would have been more difficult due to participants' answers not necessarily being comparable), and the specificity of the topics and questions I wanted to cover.

My interview schedules favoured open-ended questions, which allowed the participants to go into as much detail as they wished and to discuss topics for as long as they liked. The interviewees were able to speak about things that I had not thought to ask about before designing the interview schedule (see a copy of the schedules used in the appendices). At times participants did discuss matters that were not directly relevant to the study's aims and objectives. For example, one participant was talking about police officers appearing via video link, and the issues associated with that – something that is not necessarily directly relevant to this research. However, this led on to a discussion of the reforms that were taking place at the time of the interviews in certain courts, relating to defendants appearing from police stations to court via video links, which is relevant.

Participants were not stopped or interrupted when deviating from the interview schedule, as they did not discuss these matters for an unreasonable length of time. In addition, given that the interviews were semi-structured, this allowed me where appropriate to adapt the interview schedule so that I could clarify things and develop new ideas that were obtained from previous participants (Fairclough 2017: 214). The interviewees mainly discussed the direct

experiences they had had, although some at times they mentioned their colleagues'/anecdotal experiences.

4.4.1 Interviews and interviewees

Twenty participants were interviewed in total – defence lawyers, ushers, legal advisors and judicial prosecutors. I initially intended to interview a wider range of court actors to be interviewed. Those in the best position to answer my research questions were: defendants; judges; legal advisors; ushers; probation workers – who write pre-sentence reports at court; prosecutors - CPS prosecutors and judicial prosecutors; and defence lawyers. Given that my thesis is about the experiences of unrepresented defendants, the most important group to interview were unrepresented defendants themselves. The other individuals mentioned were also appropriate potential participants, given that all of them have daily experience with court proceedings and will have either directly come into contact with unrepresented defendants or observed them in a professional capacity.

I interviewed a total of 12 defence lawyers, with a mean number of 23 years' experience of working as a solicitor. Interviews with defence lawyers lasted between 12 and 42 minutes, with a mean length of 28 minutes. Nine of the interviews were conducted face-to-face and three were conducted by telephone. Five of those interviewed worked at Court A, two worked at Court B, and five worked at both Courts A and B. One of the interviewees mainly worked at Crown Court centres in various different locations. However, I still interviewed him, as he had experience of appearing in magistrates' courts and he was familiar with magistrates' courts' proceedings. Another interviewee spent most of her time at police stations and preparing cases for the Crown Court (she was not an advocate). Nevertheless, although she had not spent time at either of the magistrates' courts being studied, it was still valuable to interview her, as she did have a lot of contact with defendants and the insight that she had gained from being involved with Crown Court cases were of some relevance to the magistrates' courts.

In order to recruit defence lawyers, I initially contacted around 40 potential participants in the areas of Court A and B, after finding their contact details online. I also used snowball sampling to recruit further participants after interviews (Bryman 2012: 118), asking participants to pass along my participant information sheet to any other defence lawyers who

might be interested in participating. Although snowball sampling is a non-probability sampling technique, it was the best approach to take under the circumstances given the difficulties that I would have encountered creating a sampling frame of participants without knowing their specialisms and practices.

I also interviewed three ushers and three legal advisors from Court A. The mean number of years that the participants had worked as ushers/legal advisors was 11 years. The three legal advisors who were interviewed had roles acting as legal advisors in court and they had managerial roles as well. The average length of the six interviews done with court staff was 45 minutes, ranging between 16 and 75 minutes in length. Four of the interviews with court staff were done face-to-face at Court A, whilst two were done over the phone. The face-to-face interviews with all these professional participants either took place in defence solicitors' offices or at court. This meant that the power balance was tipped in favour of the participant (as the interviews took place in a familiar environment for them), and meant that any disruption to their working routine and day was reduced. For practical reasons, all interviews were recorded using a tape recorder (which all interviewees consented to).

In relation to recruiting court staff, I asked the court managers whether they would email court staff on my behalf asking them if they would like to take part. Both court managers agreed initially to do this, but there proved to be subsequent difficulties with Court B (see below), so court staff were only interviewed at Court A. At the end of each interview, I also asked participants if they knew anyone else who they thought might be interested in being interviewed and if they did, if they could ask them to get in touch with the manager so that an interview could be arranged. Again, a snowball sampling method was adopted.

Finally, I interviewed two judicial prosecutors. The mean number of years that the participants had worked as a judicial prosecutor was four years. The interviews lasted between 26 and 55 minutes. The mean length was 41 minutes. The interviews took place over the phone. Judicial prosecutors were only based at one of the courts I was researching (Court A and not Court B) and there were few of them (only three judicial prosecutors were working at Court A when the research took place). Whilst observing I asked one of the prosecutors who worked at that court whether she would like to take part in my study, and gave her an information sheet about the study to pass onto one on to two of her colleagues as well. I

received an email from one of their work colleagues saying that they would be happy to take part and their contact details were provided.

As well as a snowball sampling strategy then, a purposive sampling strategy for the interviews was also used. Purposive sampling is a form of non-probability sampling. When purposive sampling is used, participants are selected based upon their relevance to the research questions (Bryman 2012: 418). I therefore decided who I wanted to interview by deciding who would be in the best position to provide data to meet my research aims and objectives. To ensure I obtained a range of views and perspectives, I wanted to interview a wide range of participants, with a similar number of participants from each court being studied. Given the difficulties I encountered accessing and recruiting participants to take part, though, this was not possible.

4.4.2 Issues experienced in relation to interviewing participants

Defence lawyers can decide for themselves, sometimes after consulting their firms, whether they wish to take part in research. Interviewing other court participants, however, requires the researcher to go through formal processes to obtain permission for them to be interviewed. Most criminal justice and court agencies have national processes for researchers to seek interviews, with the body or person granting permission being essentially the ‘gatekeeper’ to any interview with these court personnel. A gatekeeper is someone who decides whether to allow a researcher access to undertake research (Jupp 2006: 126). In any research project, there may be more than one gatekeeper that needs to be negotiated with (Bryman 2012: 151). Gatekeepers in formal organisations usually hold a senior position and as a result, they have the power to either grant or deny physical access to the organisation – and thereby also control over how much is known about the organisation and its work. They can also have an effect on the willingness of potential participants within the organisation to take part in the research (Jupp 2006: 126). Gatekeepers may not allow the researcher access if they are not persuaded that the research is particularly valuable, given what they know about research methods, if they do not think the organisation is going to benefit from the research, or if they are concerned about the researcher’s motives (Jupp 2006: 126; Bryman 2012: 151) – or possibly if they feel defensive about research. They may also refuse access if they are concerned about confidentiality, if the topic is particularly sensitive, or because of reasons relating to time and resources (Jupp 2006: 126; Bryman 2012: 151).

In this research, I had to seek permission from a number of bodies to interview the court actors that I wished to speak to. For permission to interview judicial prosecutors, I had to gain permission from the relevant individuals who worked at the police force where the prosecutors were based. Permission was needed from the Judicial Office (JO) to interview the judiciary, from the Crown Prosecution Service (CPS) to interview prosecutors, from HM Courts and Tribunals Service (HMCTS) to interview court staff (ushers, legal advisors etc.) and through that body and from Her Majesty's Prison and Probation Service (HMPPS) to gain access to probation staff who work at court. In order to obtain permission from HMCTS it is necessary to go through the Ministry of Justice research access process. At the time, and in addition to the scrutiny of proposed research methods, this involved seeing whether policy civil servants would be prepared to support the research as sponsors in terms of whether it would contribute to policy development. This means that the executive was controlling access to research on the courts. Essentially, access to the experiences and views of most court personnel is controlled by state or judicial bodies. These national processes are often onerous for the researcher and take a long time and will of course be decided in relation to the benefits and potential costs of granting access as far as the relevant national policymakers are concerned, rather than reflecting local staff views and needs, academic merit, or providing transparency/accountability mechanisms in relation to the court system or criminal justice. The implications of this for the study, the previous literature and ideas of justice are discussed at the end of this chapter.

The JO did not grant me permission to interview judges. The main reason they gave was that because only a small number of judges would be interviewed – given that it is a small-scale study – the ‘value of the exercise for greater judiciary benefit’ was questioned, with the decision-maker clearly preferring larger, more quantitative work.

HMCTS also initially did not grant me permission to interview legal advisors or ushers on the grounds that previous research has already been done in the area (citing two studies - Transform Justice 2016, and Thomson and Baker 2019). They concluded that the ‘MOJ [Ministry of Justice] does not think this will add any value to the existing public evidence base’. However, in the Transform Justice (2016) study, the researchers were not given permission to interview legal advisors. Furthermore, in Thomson and Baker (2019) the study focused on unrepresented defendants in the Crown Court and as legal advisors do not work in

the Crown Court, they were not interviewed in that study either. Nor were ushers interviewed in either study. Findings from the Crown Court are also not directly generalisable to the magistrates' court (for example, the proportion of unrepresented defendants appears to differ, with fewer appearing at the Crown Court: Kemp 2010; Magistrates' Association 2015; Transform Justice 2016; Ministry of Justice 2018a; and the procedures at the Crown Court are different from those at the magistrates' court, so it cannot be concluded that experiences will be the same as in the magistrates' court). Without knowing about the experiences and perceptions of legal advisors and ushers, it is difficult to know how best to support them in their work when dealing with unrepresented defendants (who are service users of the court). Fortunately, though, with assistance from my supervisor, I was able to convince HMCTS to reconsider my application, and access was granted. The whole process took about 13 months from when I first submitted my application to when permission was finally granted.

As well as requiring national permission for any interviews with court staff, it became clear that in fact permission from the local court administrator as gatekeeper to contacting local staff also was necessary. As noted above, in relation to the ushers and legal advisors, I asked the court managers (one was based at one of the courts and the other was an area manager) whether they would email court staff on my behalf asking them if they would like to take part. The manager at Court A speedily did this and 6 interviews (the number requested) were arranged. The area manager at Court B said he had done this too, but no prospective participants came forward. I then decided to go to Court B to see if I could persuade anyone to take part and I handed out a number of information sheets out (staff were familiar with me from the observation period). I asked a few of the court staff if they had received an email about my study but they said they had not. I attempted to find out if there were a legal advisor or usher team manager based at Court B and who that person was, so that they could help me to arrange the interviews. As noted above, I had permission from the national body in charge of court staff to interview legal advisors and ushers but it was a requirement that they were done during court working hours, so a manager needed to be involved to help arrange them. However, I received no response from Court B or the area manager. My contact from HMCTS who had initially provided me with the court managers' contact details also contacted the area manager on my behalf, asking the manager to get in touch with me, but the manager did not initially respond. He did, however, respond several months later saying that no participants had come forward to be interviewed, but he did not provide me with the contact details of any managers based at the court being researched, so I was not able to ask

them if they could drum up any interest and assist with organising the interviews. Having liaised with HMCTS, it was apparent that there was no more they could do to persuade compliance with their decision to grant access. Given that by this time, national lockdown provisions were in force in relation to the coronavirus epidemic³¹, I decided it was not possible to get information about the study to staff at Court B. Hence it was only possible to interview staff from Court A.

I also applied to HMPPS to gain permission to interview probation workers who prepared pre-sentence reports at courts. They responded by saying that I would first need to apply to HMCTS and gain permission from them. Due to the ongoing issues that I had with HMCTS during that period regarding legal advisors and ushers, the time it took to gain the first response (around 7 months), and the expected amount of time required to obtain subsequent permission from HMPPS (from previous researchers' experiences), I decided not to pursue this.

I also sought to interview CPS prosecutors. I sent a few letters by post addressed to the court where the prosecutors worked and I handed some information sheets out to some prosecutors at court (around 5 were asked in total). I heard nothing back from them. I emailed the CPS enquiring about any process that I would need to go through to seek to gain permission to interview CPS prosecutors, and was informed that it was a formal and very lengthy application form. It emerged that a national team used to be responsible for dealing with requests relating to research, but that individual CPS Areas now have to consider them. Although they 'would like to be able to support projects' such as mine, they did not at the time have the resources in their Area to support external research so 'there would be very little point in submitting a formal application'. As a consequence, this was not pursued. As

³¹ From March 2020 to the current time of writing, government advice was that people should avoid social gatherings and crowded places and were encouraged to work from home where possible to reduce the transmission of coronavirus (Gov.UK 2020a). Many court buildings were closed and a backlog of cases rapidly built up, with the government, by the beginning of May 2020, trying to increase rapidly the use of video hearings for all matters, civil and criminal (Acland-Hood 2020). Operationalising these measures was clearly proving difficult for the court system and court staff, which may also have been a contributory factor in their reactions to the research after March 2020. The University stopped all fieldwork which would be difficult to carry out using social distancing from March 2020 – and this obviously included observation in the courts and face-to-face interviewing, though the observations had been completed by this time.

has already said, though, I did manage to interview judicial prosecutors at Court A, so the application to interview them was successful.

Attempts were also made to interview defendants themselves given the centrality of their experiences to this study's research questions, but these were unsuccessful. Defendants on the whole are a vulnerable and disadvantaged group, and access, recruitment and engagement of defendants are difficult for a number of reasons (Noaks and Wincup 2004: 37-52). I chose to go through gatekeepers in an attempt to identify and recruit defendants. My initial plan was to recruit defendants by approaching them at court – after their hearing - as long as they did not appear to be distressed or irritated, but I did not get permission from the court managers to do so. Nor was I given permission to put posters up about my study in the court buildings for the purpose of recruiting defendants. One court manager explicitly said that I did not have his permission to approach defendants on HMCTS premises; whereas the other when I informed her about my research directed me to submit an application to HMCTS and the Judicial Office. I did this, and received permission to approach defendants at court many months later from HMCTS (at the time when they also granted me permission to interview legal advisors and ushers). However, when I emailed one of the court managers several times explaining, I had now received permission and asked the manager if the manager's stance had changed in relation to this matter, 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, finally, 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 a number of contingency strategies to try and recruit defendants. In the first instance, I twice sent an email out via a volunteer mailing list for staff and students at a British university, seeking potential participants with experience of representing themselves in criminal trials directly or via snowball sampling. I did not, however, receive any responses.

Second, I sent a letter to 11 Citizen Advice Bureaus (CABs) in the two areas being researched (6 in the area of Court A and 5 in the area of Court B) 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 (Citizens Advice 2020) 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. However, in the event I did not know if every Bureau actually did display the posters. I did attempt to contact them but I did not receive a reply from all of them - though one CAB did email me back to say that they would put the poster up for me. Ultimately, however, no defendants came forward as a result of this recruitment technique.

Third, I 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 who they knew had appeared at court unrepresented sometime in the last two years. This explicitly included those who had been unrepresented at one hearing, but then represented at others for the same case, as well as those who had been unrepresented throughout. One solicitor replied saying if she came across any clients who had represented themselves then she would mention my research, but she could not think of anyone at that moment. Ultimately, I did not hear back from any solicitors in this regard.

My final idea to recruit defendants was through probation workers. I intended to ask them if they would pass on one of my information sheets to any unrepresented defendants that they may come into contact with, so long as it would be appropriate for them to do so. As it proved to be impracticable to gain access to probation staff, though, this was not possible. Therefore, defendants were not interviewed despite many attempts to pursue this.

4.4.3 Limitations of the interviews

The views of the participants in this study, being a limited sample from two courts, clearly cannot be taken as representing the views of those professions in general. Moreover, a potential limitation of the data is that defence lawyers 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. These issues were considered when analysing the results. As will be apparent in the results chapters, some defence lawyers interviewed did show a degree of reflexivity and representation was not always said to be necessary in all cases. Staff at HMCTS may also have wished to promote their employer and

their court in a particular light – seeking to avoid criticism (especially of their own work) - particularly the legal advisors, who also had managerial responsibilities. This must also be borne in mind when reading the results of this study.

Furthermore, the aims and objectives have been answered in the research findings from the perspective of professional service users and court staff (defence lawyers, ushers, legal advisors and judicial prosecutors) 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 second-hand 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. I have also tried to use exact quotes from defendants where possible, so that their own words have been used, mitigating the effect of their absence from the interview data.

4.5 Ethics

The methods described above give rise to a number of ethical issues. These centre on informed consent and confidentiality/identifiability, though data security and data protection issues were also present. In general, this research was conducted in line with the University of Sheffield Good Research and Innovation Practices policy (University of Sheffield 2020) and the Economic Social Research Council's framework for research ethics (Economic Social Research Council n.d.). Research ethics approval was sought from and granted by the University of Sheffield School of Law's Research Ethics Committee.

The most problematic issue in this research was informed consent in relation to the observations. For practical and legal reasons, I did not and could not gain informed consent from everyone whom I observed at court, though of course both courts knew that I was

conducting this research. It would have interrupted court proceedings to seek this consent, which could have amounted to contempt of court. Proceedings against adult defendants in magistrates' courts are open to the public and the press (unless the magistrates' clear the court and restrictions are put in place) for open justice and transparency reasons. Thus, it is common practice for researchers to observe in court and so essentially obtain data about the case, witnesses, defendants and victims in court without obtaining informed consent (see for example, Carlen 1976; Bottoms and McClean 1976; Shapland 1981; McBarnet 1981; Hall 2009; Souza and Kemp 2009; Kemp 2010; Transform Justice 2016). Moreover, although I did not seek informed consent from every person in the courtroom, I did generally tell the usher and/or legal advisor what I was doing, as a courtesy, and they sometimes passed this information on to the magistrates or the judge who were sitting for that session. Furthermore, when anyone enquired about who I was, or what I was doing, I informed them. I did not feel it was appropriate to tell defendants, victims or witnesses about my research on the day of their hearing, as I did not want to add to any confusion or exacerbate any anxiety that they may have already felt; although if they would have asked me what I was doing, then I would have informed them. Observing participants whilst not gaining explicit informed consent from all individuals present does raise some ethical concerns, then, but for the reasons already discussed, this was unavoidable, and only took place in an otherwise public forum.

I did obtain informed consent from all those whom I interviewed. When I approached potential participants at court, I passed them an information sheet (see a copy of this in the appendices). As noted above, I also asked court managers to email staff on my behalf with a copy of my letter and information sheet, which had information about the purpose of the study and what would be expected from them. When I wrote to potential participants, I also included the information sheet. I set out the potential benefits of my research, too, but when doing so, I was careful not to promise too much as I did not want them to have unrealistically high expectations, or to make promises that I would not be able to keep. Just before the interview took place, when the interview took place face-to-face, I gave the participant another information sheet and asked them if they wanted to reread it, and ask me any questions about it. If they were being interviewed face-to-face, to document their consent they were asked to sign a consent form. If the interview was being conducted over the phone, for practical reasons the participant was asked to give verbal consent. Consent was gained to record the interviews and there were no objections to this from any of the participants involved.

When conducting research, the researcher must take steps to minimise the possible risk of harm to research participants. There was a risk that interviewees would experience distress or discomfort as a result of them being interviewed. If this were to have happened then I would have asked them if they would have liked to take a break and/or for the interview to be stopped. However, this did not occur during any of the interviews that were conducted.

Whilst observing, as discussed above, there was also the possibility that my presence would increase any anxiety that the defendant or victims or witnesses may have felt as a result of being at court. I took steps to minimise the impact of my presence as stated above. I also looked out for any signs that my presence and note taking was making others in court feel uncomfortable. If there had been any signs, then I would have left. There were no signs, however, that my presence in court did cause any additional discomfort. This may have been due to the factors that I have discussed above. It may also have been because sometimes others were in court watching and taking notes, and given the nature of the court setting, those present in court were likely to be aware that there would be a range of different people sat observing in the courtroom - so my presence might not have been particularly noticeable.

The research also raised some issues around my own personal safety. As discussed, for convenience and practical reasons the semi-structured interviews with court personnel took place at their offices and I observed in court. Courts are not considered to be safe environments with there being issues relating to intimidation, for example (Shapland and Bell 1998); though they do have their own security personnel, which minimised the risks that I faced. Whilst in Court A and B, I also minimised the time that I spent in public corridors. Before hearings had started or if there was a delay in between or during hearings, I waited in the courtroom itself - where at least one member of staff was present – rather than sitting in the court corridor. Furthermore, to minimise risks, I only interviewed during daytime hours. I experienced no problems in relation to personal safety when conducting this research.

In order to maintain non-identifiability and confidentiality, pseudonyms were used for all of the participants and for any other individuals or places that were named during the interview. The courts where I carried out my observations, were referred to as ‘A’ and ‘B’. When observing I did not note down identifiable personal details of any individual or business, such as names or addresses. Each interview transcript and observation schedule was equipped with a unique

ID, so as to ensure identification of a particular transcript/schedule within the sample, but it did not contain participants' names or their initials. The data collected from the interviews and observations were transcribed as soon as possible after conducting them. Any personal details about the offence were not transcribed and neither were personal data on any consent forms.

A master copy of my research data was stored on the University Networked Filestore. It was secure, password protected and backed up regularly. I also kept further copies of my research data on a USB drive, and my own personal laptop. The computers, where the data were stored, were password protected to prevent unauthorised people from gaining access to the data and all sensitive research information (personal information) was encrypted. When I was not using the laptop, and/or the USB stick, they were stored in a locked cabinet, in a locked room, as were any paper copies that I had.

4.6 Data analysis

The fieldwork produced primarily qualitative data (apart from basic data on numbers of types of procedures observed, types of offences, types of personnel etc.) so qualitative methods were mainly used to analyse the data. The data were analysed thematically (Bryman 2016: 585). This involved coding the data by organising them into thematic categories (Bryman 2016: 585). Themes emerged and were developed as I transcribed and read through the data – in line with an inductive approach; and thus, a primarily grounded theory approach was taken to analyse the data (Glaser and Strauss 1967), though my analysis was also informed by previous literature. Grounded theory is 'theory that was derived from data, systematically gathered and analysed through the research process' (Strauss and Corbin 1998: 2).

When a grounded approach is taken, data should be collected until no new or relevant data emerge in relation to a category (Bryman 2012: 421; Strauss and Corbin 1998: 212). This process is called 'theoretical saturation' (Strauss and Corbin 1998: 421). In this study, the number of participants interviewed and the type of participants who were interviewed were limited as a consequence of time constraints; the denial of permission to interview judges and the issues experienced with interviewing probation workers and defendants, as well as with court staff at Court B. Furthermore, the numbers of some of the hearings observed were limited due to, for example, time constraints and the low frequency of some types of

hearings. Thus, whilst the results are still valuable, more data could potentially have been collected to further develop some of the categories - though in relation to interview data, the access negotiations required rendered that impossible in this study.

In any event, I also took a deductive approach to analysing the data generated from the observations and interviews, in the sense that I looked to see if the themes that were evident in the previous studies were present in this research (pre-determined themes). Pre-determined and emerging themes arose as I read through the previous research and the transcripts and observational notes. Themes were mostly identified based upon topics and ideas that I noticed reoccurring (Bryman 2012: 580). Some of the themes related to understanding, ability to effectively participate and vulnerability. I also looked to see how the answers that the interviewees provided were similar or dissimilar and I compared the findings from the interviews to what I had observed in court.

Thus, analysis was also informed by the previous literature on representation and defendants – which has been discussed in Chapter Two and Chapter Three. Human rights concerns have had an effect on the way in which courtroom proceedings are set up and the role of court personnel: for example, the presumption of innocence, the right to legal representation, and the ‘equality of arms’ principle have all had an impact on the procedures and institutions of English criminal justice (see Chapter Two). Defendants’ experiences have also been influenced by the use of discretion by courtroom actors; and understandings of crime control, due process, and the status of the criminal court. These theoretical strands, therefore, informed the analysis, so there are some deductive elements, too; although as stated a mainly inductive approach was taken, given the lack of recent research done in the area, which meant that this research project was in some sense exploratory. The theories identified in the previous literature could not be used to explain everything that arose in the research, since levels of legal representation, and regimes for criminal legal aid, as well as criminal procedure and court practice have changed since these theories were developed. Analysis of the data was, therefore, not wholly deductive, inductive, or grounded.

I transcribed and coded the data manually, as opposed to using software, as I found it quicker and easier to do it that way. As stated, I recorded notes by hand during the observations but I later typed them up on a computer. This enabled me to copy and paste sections, which made analysis easier.

In the findings sections, direct quotes will be cited, and summaries will be provided of what the interviewees and those observed during hearings said. The quote will be direct when apostrophes enclose it or when it is indented. Dates, names, and locations have not been written down for anonymity reasons, but next to each interview quote, I have written down the role of the participant (e.g. defence lawyer) and I have included their transcript number (interview number participant 1, interview number participant 2 etc.). When observations are being discussed, specific case numbers have been written at the end of the passage, so that the reader knows which specific case is being considered and referred to (again no dates or identifiable information have been included, although the offences that defendants were charged with have been included).

4.7 Overview/implications of national access negotiation

In this current research project, 20 participants were interviewed and 403 magistrates' court hearings were observed. As has been discussed, whilst conducting this research project I experienced significant barriers when seeking to interview court staff and interview defendants, which affected both the number of participants that I could interview and the groups from which I could recruit.

This is an issue as little research has been done recently examining practices in magistrates' courts in England and Wales (namely, Kemp 2010; Transform Justice 2016; Welsh 2016; Jacobson and Cooper 2020). Furthermore, similar access problems seem to have dogged the work of some of those researchers who have studied this area, preventing access to the views of some court staff altogether. In Transform Justice's (2016) study, for example, although the Judicial Office granted access for the researchers to judges, permission to interview legal advisors and CPS staff was withheld. In Welsh's (2016) study permission to interview legal advisors was also denied. This is concerning as it demonstrates a lack of transparency as to what happens in magistrates' courts and a lack of accountability in relation to those who work in them. It is important that all court actors are heard, as different court actors play different roles within court and would not be expected to have identical professional views. Furthermore, as some court actors are employed by different organisations, which are supposed to be independent of each other, this is a way in which they can be held to account and scrutinised (by each other and others).

Open justice, accountability and transparency in criminal justice institutions are important for public confidence and legitimacy reasons (Tyler 2007; Jackson et al 2013). It is also important that there is independent research, given the public nature of criminal proceedings. If research access to court processes is (even inadvertently) systematically denied, at the same time as those processes are changing, then the implications of change cannot be properly considered. Of course, magistrates' courts are open to the public and court observations can be done, but this research method has its limitations, as for example, information can only be attained on things that are directly observable and the views of court staff will not always be able to be obtained through conducting observations alone. Knowing what happens in courts and in relation to vulnerable populations like unrepresented defendants is really important for justice. Making sure what we know is up-to-date is equally as important as procedures change. The ability of researchers to propose solutions which would be helpful to different participants in a court setting is also restricted. Thus, for the reasons discussed, the issues around access and the restrictions that are in place are problematic.

Nevertheless, after a considerable amount of effort, some court professionals were interviewed for this research project and the findings that emerged from the study and from analysing the data will be discussed in the following chapters. The demographics of those who self-represent, whether there has been a change in the number of defendants self-represent and the reasons why some defendants self-represent will be considered in the next chapter (Chapter Five). Chapter Six will focus on the experiences that unrepresented defendants have when they appear at person in court, Chapter Seven will discuss the experiences that defendants have when appearing virtually and Chapter Eight will explore the impact that unrepresented defendants have on court proceedings and how things could be improved for them (from the perspective of those interviewed).

5.0 Chapter Five: Who Self-Represents and Why?

The first part of this chapter discusses the nature and type of hearings that were observed in this study, the characteristics and number of defendants who self-represent in the magistrates' court, and how often the interviewees have encountered unrepresented defendants in different types of hearings. The differences in the observational data will be explained and the first section will set the scene for the following sections and chapters. As said above, whether there has been any change in the number of defendants self-representing will then be reflected upon within this chapter (in s. 5.2), as will the reasons why defendants self-represent at court and the implications that this has on their experiences (in s. 5.3).

5.1 Characteristics of unrepresented defendants and their cases

5.1.1 Interview data: prevalence of unrepresented defendants

Interviewees were asked how often they encountered unrepresented defendants in the magistrates' court. The majority said that they did so on a regular basis, even every day. A few court staff suggested that how often they did so varied depending upon which courtroom they were sitting in/working in. So, for example, more unrepresented defendants would be seen in the traffic court than in the remand court (in the traffic court, defendants are not usually eligible for legal aid/to see the duty solicitor). Some of those interviewed suggested unrepresented defendants are encountered at all stages of proceedings in magistrates' courts – and even those charged with imprisonable offences may appear unrepresented. However, none of the unrepresented defendants observed had been charged with an indictable-only offence. In relation to this, one interviewee said:

I don't think I can think of an instance where we've dealt with any indictable-only offence without a solicitor present. (Interview participant 17 – LA³²)

Furthermore, in only two observed hearings in which the defendant was unrepresented, the cases were sent to the Crown Court for sentencing. In contrast, cases were sent to the Crown

³² LA stands for legal advisor. This is the job that the interviewee had at the time the interview took place. U, DL, and JP are the other abbreviations used to identify the job role of the interviewee. U stands for usher, DL stands for defence lawyer and JP stands for judicial prosecutor.

Court for plea/trial/sentencing in 35 of the observed hearings involving represented defendants.

5.1.2 The nature of hearings observed

A range of hearings were observed for this study. Tables 1 and 2 show the number and types of hearings that were observed at Court A and Court B.

Table 1: The number and types of hearings observed (divided between unrepresented and represented defendants – Court A)

<u>Hearing type</u>	<u>Unrepresented</u>		<u>Represented</u>	
	<u>N</u>	<u>%</u>	<u>N</u>	<u>%</u>
Sentence passed	40	50	53	38
Adjournments	17	21	41	29
Case management	11	14	27	19
Trials ³³	9	11	4	3
Other ³⁴	3	4	15	11
	80	100	140	100

³³ Trials where the defendant did not turn up to court but their trial went ahead anyway have been included. In Court A, the defendant was present in all trials observed, but in four trials in Court B he/she was not (one was represented and three were not – in the sense that a legal representative was not present in court to make representations, and the legal advisor said that the defendant had intended to represent themselves). In relation to the other hearing types listed, the defendant was present in all of them – either in person or appearing via video link. Furthermore, when a pre-sentence report was requested at the end of a trial, or sentencing was adjourned for another reason, I still classed the hearing as a trial rather than an adjournment. For all other hearing types, they were classed as adjournments.

³⁴ 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 (divided between unrepresented and represented defendants – Court B)

<u>Hearing type</u>	<u>Unrepresented</u>		<u>Represented</u>	
	<u>N</u>	<u>%</u>	<u>N</u>	<u>%</u>
Sentence passed	11	44	69	44
Adjournments	5	20	44	28
Case management	0	0	23	14
Trials ³⁵	8	32	11	7
Other ³⁶	1	4	11	7
	25	100	158	100

I observed 220 hearings in Court A and 183 hearings in Court B. The impression that I gained from observing was that Court A seemed to be a busier court than Court B - in that Court A tended to have more courts running and had more cases to deal with. There are no statistics available, at the time of writing, relating to the number of hearings that occur in each magistrates' court. However, other statistics provide some support for my assumption, though they are older and relate to the whole criminal justice area, not just these courts. For example, the number of people convicted and sentenced for all offences in 2009 at Court A was around 1.75 times the number in Court B (Ministry of Justice 2009: 64). The number of trials that went ahead at Court A was around 2.2 times the number that went ahead in Court B in January-March 2010, and 2.1 times in April-June 2010 (Ministry of Justice 2018b).

In Court A, in 80 out of 220 (36%) of the hearings observed, the defendant appeared unrepresented, and in Court B, in 25 out of 183 (14%) hearings the defendant was unrepresented. Thus, defendants appeared without legal representation in 105 out of 403 (26%) hearings observed in total. How these figures compare to other courts is difficult to say given that no national statistics are available; though as suggested in Chapter One and Three, findings from research studies give an indication of the number of defendants unrepresented in different magistrates' courts. These findings do vary, though. In Souza and Kemp's (2009) study, out of 201 cases observed, 96 (48%) defendants were unrepresented. In Kemp (2010), 139 out of 767 (18%) defendants were unrepresented and in Welsh (2016), 40 defendants

³⁵ See footnote 33.

³⁶ See footnote 34.

appeared unrepresented out of the 183 (22%) hearings observed. In Kemp (2010), however, if a defendant had been charged with minor offences including a minor road traffic offence or being drunk and disorderly, they were excluded from taking part; whereas this was not the case in the current research. Furthermore, none of the studies cited identified at what stage defendants were unrepresented, which prevents the data being compared in this way.

In relation to the type of hearings observed, sentencing hearings were observed most frequently. The plea rate at the magistrates' court is high (66% guilty plea rate for all offences: Ministry of Justice 2019b; Welsh 2016). In relation to pleas entered in the current study, guilty pleas were entered, or had been entered in a previous hearing in 144 (65%) of hearings observed in Court A and in 116 (63%) of hearings observed in Court B; and not guilty pleas were entered in 55 (25%) of hearings in the former court and 45 (25%) in the latter. In the remaining hearings/cases, no pleas were entered or mixed pleas were entered (i.e. different pleas were entered for different charges). In relation to pleas entered then, overall a greater proportion of defendants in observed cases pleaded guilty. The percentage of represented defendants entering guilty pleas was higher than unrepresented defendants, though. In Court A, in instances where the defendant was represented, guilty pleas were entered or had been entered previously in 66% of hearings (93 hearings), compared to 64% of hearings (51 hearings) involving unrepresented defendants. In Court B, again 66% of hearings involving represented defendants featured a guilty plea (104 hearings), compared to 48% (12 hearings) involving unrepresented defendants.³⁷

In Court A and in Court B, the majority of defendants – both represented and unrepresented – had been granted bail by the police or the court and turned up to court when required and were not serving prisoners; and therefore, were not detained in the court cells or in prison prior to their hearing. In Court A, in only 7 out of 79³⁸ (9%) hearings observed involved an

³⁷ A chi-square test showed that there was a significant difference between representation and guilty and not guilty pleas in Court A and Court B (chi-square = 5.018, $p = 0.025$). Represented defendants were more likely to plead guilty than unrepresented defendants. There was no significant difference in Court A (chi-square = 1.699, $p = 0.192$), but there was a significant difference in Court B (chi-square = 5.264, $p = 0.022$). The current study was not able to control for other potentially relevant variables that could influence the defendant's plea (other than representation) including the strength of the defendant's cases, however.

³⁸ In 5 out of 7 (71%) of these hearings, the defendant appeared via video link whilst detained in prison. Data were also missing for one hearing out of 80 (1%), so these have not been included.

unrepresented defendant who had been detained; this was the case in 2 hearings out of 25³⁹ (8%) hearings in Court B. Represented defendants were detained in 30 out of 135⁴⁰ (22%) hearings in Court A, and in 66 out of 154⁴¹ (43%) hearings in Court B.

5.1.3 Practical issues when observing

A range of practical issues may explain the low number of observations involving unrepresented defendants making bail applications or at trial hearings, as well as the low number of these defendants who had been detained prior to their hearing. For instance, multiple courtrooms in one court building were usually open at the same time meaning that whilst observing in one, it was not possible to observe in another. Moreover, it was not possible to attend court on every day during the observation period to observe every hearing involving an unrepresented defendant, due to availability issues (as discussed in s. 4.3.1). Based upon the interviews conducted with legal advisors and defence lawyers, though, it seems that it is rare for a defendant who appears in custody to appear unrepresented, as he/she will be likely to be entitled to see the duty solicitor/legal aid in these circumstances. In the instances where a bail application needs to be made, the defendant will have usually been charged with a serious offence, entitling him/her to at least see the duty solicitor at that hearing. However, since defendants are entitled to refuse the assistance of a solicitor, they may still be unrepresented during these stages of the trial.

I also experienced some difficulties in relation to observing trials. As discussed in the methodology section, my approach to observing trials was that I turned up at court on the days trials were likely to go ahead or had been scheduled to go ahead, to see if any of the defendants were unrepresented. The problem, however, was that the trials frequently did not always go ahead as expected, for example because: the defendant had changed their plea to guilty on the day; the defendant and/or witness(es) had not turned up; or the defendant had sought legal advice and were then represented at the trial. Furthermore, in relation to trials one legal advisor said:

³⁹ No unrepresented defendants appeared via video link and there were no missing data in relation to these hearings.

⁴⁰ In 13 out of 30 (43%) hearings, the defendant appeared via video link and in 5 hearings out of 140 (4%), data were missing, so these have been excluded.

⁴¹ In 15 out of 66 hearings (23%), the defendant appeared via video link and in 4 out 158 hearings (3%), data were missing. These have been excluded.

Apart from motoring offences and we don't do a lot of trials in those ... very few people are unrepresented at trial in my experience. (Interview participant 17 – LA)

The majority of observed trials involving unrepresented defendants involved charges for driving offences (11 out of 17 – 65% - of the trials observed). The remaining trials concerned charges for a public order offence, theft offence, or a violence against the person offence.

5.1.4 Offence type

As tables 1 and 2 show, there was a greater number of unrepresented defendants in Court A. This might be because I observed defendants in the traffic court in Court A (where most people are usually unrepresented) but I did not do this in Court B (where there was no dedicated courtroom for traffic offences). The majority of those who were unrepresented had been charged with a driving offence (78% - 62 hearings in Court A and 40% - 10 hearings in Court B). In contrast, the majority of represented defendants had been charged with a violent offence ('violence against the person': 26% - 36 hearings in Court A and 28% - 45 hearings in Court B). Other charges included offences relating to violence against the person, theft, fraud, drugs, and public order type offences (see tables 3 and 4 below for more information).

Table 3: The main offence types alleged against defendants (both unrepresented and represented – Court A)

Main offence type	Unrepresented		Represented	
	N	%	N	%
Violence against the person	3	4	36	26
Sexual offence	0	0	3	2
Burglary/robbery	0	0	7	5
Theft	1	1	19	13
Fraud	1	1	0	0
Criminal damage	4	5	11	8
Drugs offence	4	5	10	7
Public order offence	5	6	11	8
Driving offence	62	78	37	26
Other ⁴²	0	0	5	4
Unknown	0	0	1	1
	80	100	140	100

⁴² This includes, for example, breach of a restraining order, breach of a molestation order, possession of an offensive weapon, and non-payment of fines.

Table 4: The main offence types alleged against defendants (both unrepresented and represented – Court B)

<u>Main offence type</u>	<u>Unrepresented</u>		<u>Represented</u>	
	<u>N</u>	<u>%</u>	<u>N</u>	<u>%</u>
Violence against the person	7	28	45	28
Sexual offence	0	0	1	1
Burglary/robbery	0	0	3	2
Theft	1	4	24	15
Fraud	0	0	2	1
Criminal damage	1	4	14	9
Drugs offence	1	4	9	6
Public order offence	3	12	10	6
Driving offence	10	40	35	22
Other ⁴³	2	8	15	10
Unknown	0	0	0	0
	25	100	158	100

5.1.5 Virtual hearings, who heard the case and interpreters

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 virtual hearings in Court A and 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.

The majority of hearings took place before magistrates in both courts (155 hearings - 70% - in Court A and 164 hearings – 90% - in Court B).⁴⁴ 81% of cases involving unrepresented defendants in Court A (65 hearings) were heard by a bench of magistrates, compared to 92% of hearings in Court B (23 hearings). In relation to represented defendants, in Court A, 64% of hearings (90 hearings) were heard by magistrates; and in Court B, 89% of hearings (140 hearings) were heard by lay magistrates.⁴⁵ Overall a greater percentage of hearings were

⁴³ See footnote 42.

⁴⁴ A chi-square test was done and it was found that there was a significant difference (chi-square = 21.996, $p < 0.001$) between these factors (where the hearing occurred and whether it was heard by a judge or a bench of magistrates). Although in both courts a greater number of hearings were heard by a bench of magistrates than a judge, in Court A they were more likely to be heard by a judge than it was in Court B.

⁴⁵ When considering Court A alone, there was a significant difference between representation and whether the hearing was heard by a judge or bench of magistrates (chi-square = 7.038, $p = 0.008$). A

heard by a bench of magistrates when the defendant was unrepresented; whereas a greater percentage of hearings were heard by a district judge when the defendant was represented.⁴⁶ An interpreter was present in a very small number of hearings: 7 (3%) hearings in Court A and 7 (4%) hearings in Court B.

5.1.6 Defendants' gender, age and offending history

Both female and male represented and unrepresented defendants were observed (see tables 5 and 6 below). A greater proportion of male defendants was observed in both courts. This, however, is in line with national statistics that show that the majority of defendants who come to court are male (Ministry of Justice 2017e).

Table 5: Gender distribution of the defendants observed in court (Court A)

	Unrepresented		Represented	
Gender	N	%	N	%
Male	72	90	114	81
Female	8	10	26	19
	80	100	140	100

Table 6: Gender distribution of the defendants observed in court (Court B)

	Unrepresented		Represented	
Gender	N	%	N	%
Male	22	88	136	86
Female	3	12	22	14
	25	100	158	100

greater number of hearings were heard by magistrates than expected when the defendant appeared unrepresented (65 compared to 56) and a smaller proportion were heard by a judge than expected (15 compared to 24). The opposite was the case for represented defendants – a greater proportion of hearings were heard by a judge than expected (50 compared to 41) and a smaller proportion were heard by magistrates (90 compared to 98 for the former). However, when considering Court B alone, there was no significant difference (one cell had an expected count less than 5, so a Fisher's exact test was conducted instead of a chi-square test: $p = \text{greater than } 0.9999$).

⁴⁶ Although note, when considering both Courts A and B together there was no significant difference between representation and whether the hearing was heard by a judge or bench of magistrates (chi square = 2.050, $p = 0.152$).

The age distribution of the sample is set out in Table 7 and Table 8. Most of the defendants were aged between 18 and 45 years. A very small minority were aged 56 years or older. Again, this is consistent with previous findings/studies (see, for example, Bottoms and McClean 1976; Kemp and Balmer 2008).

Table 7: Age distribution of observed defendants (Court A)

<u>Age</u>	<u>Unrepresented</u>		<u>Represented</u>	
	<u>N</u>	<u>%</u>	<u>N</u>	<u>%</u>
18-25	19	24	27	19
26-35	19	24	44	32
36-45	14	17	25	18
46-55	6	8	20	14
56 +	4	5	3	2
Missing/unknown	18	22	21	15
	80	100	140	100

Table 8: Age distribution of observed defendants (Court B)

<u>Age</u>	<u>Unrepresented</u>		<u>Represented</u>	
	<u>N</u>	<u>%</u>	<u>N</u>	<u>%</u>
18-25	3	12	35	22
26-35	7	28	50	31
36-45	4	16	28	18
46-55	3	12	11	7
56 +	1	4	3	2
Missing/unknown	7	28	31	20
	25	100	158	100

Information about defendants' previous offending history had to be acquired from court observations, since I did not have access to the criminal records of those I observed. When in court, it is not always said in open court when the defendant has or does not have previous convictions and it may not be clarified in relation to which offence/s, or whether they are similar or dissimilar to the offence for the case. Consequently, there were a lot of instances therefore where this information could not be obtained. This is reflected by the large amount of missing data on convictions (177 hearings: 44%). Nevertheless, based upon the data

collected – which I recognise is not entirely complete due to the reasons discussed – more defendants (both represented and unrepresented) had previous convictions, in both Courts A and B, than did not (see Table 9).

Table 9: Whether defendants were said to have previous convictions by main offence type (both represented and unrepresented defendants – Court A and B)

Main offence type	Previous convictions (represented and unrepresented)			
	Yes		No	
	N	%	N	%
Violence against a person	27	15	14	28
Sexual offences	1	1	0	0
Burglary/robbery	5	3	1	2
Theft	28	16	2	4
Fraud	2	1	0	0
Criminal damage	14	8	1	2
Drugs offence	10	6	3	6
Public order offence	13	7	4	8
Driving offence	64	36	23	46
Other	12	7	2	4
	176	100	50	100

In Court A, in 32 (40%) hearings it was said that the unrepresented defendant had a previous conviction compared to in 8 (10%) hearings where it was said they did not. Furthermore, in 58 (42%) hearings, it was made known that the represented defendant had previous convictions whilst in 22 (16%) of hearings, it was said that they had no previous convictions. Similarly in Court B, in 12 (48%) hearings unrepresented defendants had previous convictions - in 3 (12%) hearings it was said that they did not; and in relation to represented defendants, in 74 (47%) hearings it said they did, whilst in 17 (11%) hearings it was said they did not. A greater number of defendants were said to have previous convictions than not, and this was true of all main offence types (except sexual offences). Those with previous convictions will have had previous contact with the criminal justice system and this may have affected their decisions on representation. Furthermore, it may have affected the experience that they had whilst self-representing, since their prior involvement with the criminal justice system (unless they were dealt with through the Single Justice route⁴⁷) would tend to make them more knowledgeable about the process than someone who has not been through the

⁴⁷ For certain minor offences and cases, defendants can enter a guilty plea online or by post and a magistrate will deal with their case without the defendant having to go to court (see, s. 2.3).

process before. However, without interviewing the defendants themselves, it is only possible to speculate on this matter.

5.1.7 Summary

Unrepresented defendants are not one homogenous group. A variety of hearings types (both virtual and non-virtual) were observed in this study, defendants' age and previous offending history varied, and they had been charged with a number of different offences; although the majority of unrepresented defendants observed had been charged with non-imprisonable offences. There has been concern about the number of defendants self-representing and whether the number has been increasing (Magistrates' Association 2015; Welsh 2016; Transform Justice 2016) and court actors interviewed were asked about this.

5.2 Interviewees' views as to whether there has been a change in the number of defendants self-representing in recent years

Interviewees were asked about whether they thought there had been a change in the number of defendants self-representing in recent years. The findings from this study largely reflect those from previous qualitative research (Magistrates' Association Survey 2014; Transform Justice 2016): the majority of those interviewed thought there had been an increase in the number of those self-representing. Only one defence lawyer, one usher, two judicial prosecutors and one legal advisor said that they did not think there had been an increase; although the legal advisor did think there had been in relation to certain types of offences:

No, I don't think there has really because in a typical – what people think of as a court session – so you know, shop lifters, low level domestic violence – the kind of thing that magistrates' courts routinely deal with, we probably see slightly more unrepresented defendants; but a lot of the big bulk prosecutions, where we used to get quite a few so road traffic, education matters, that kind of thing have largely gone down the Single Justice route⁴⁸, so they are dealt with on the papers – and so we'd have far fewer people attending at all given the number of cases that we deal with. I think Single Justice accounts for about 50% of our workload so that doesn't even go into a courtroom.
(Interview participant 11 – LA)

⁴⁸ See footnote 47.

The reasons given for why those interviewed thought that there had been an increase varied. One reason suggested by two of those interviewed was that it was because the means test had not, at the time of writing, changed since it was re-introduced in 2006, resulting in an increasing number of defendants being ineligible for legal aid, because of inflation:

A combination of the reduction in the scope of the duty solicitor scheme and the legal aid means test which has not had its financial parameters changed for well over ten years; so financially the means test is working on the same figures now that existed when it was first introduced. (Interview participant 4 - DL)

One defence lawyer (interview participant 3) also said that ‘a general downturn in the economy’ may mean that ‘people who perhaps paid privately previously can’t afford to’. Furthermore, a couple of ushers and legal advisors and most defence lawyers said that they thought there had been an increase due to changes to legal aid making it more difficult for defendants to obtain it. One of the legal advisors said that as of the ready availability of resources on the Internet might also have had an impact. Additionally:

So yes, as a result of the changes to legal aid I would definitely say yes because it’s become harder and stricter on the requirements for legal aid so a lot more people are being refused legal aid so what we have seen an increase in in recent years is a lot more court appointed solicitors so for trials; so what tends to happen is in a case which [a defendant] is going to not guilty, they may qualify to see the duty solicitor at the first hearing, but then they’ll not qualify for legal aid, so the solicitor won’t then be able to take on the case - but if it’s particularly a domestic violence case or a case that, potentially harassment or where there’s been violence then the court can actually court appoint a solicitor for cross-examination purposes, so that means that the solicitor will not represent them but they will attend court at the court’s request and cross-examine the witnesses themselves in person, so that protection is in place for the witnesses so that they are not being cross-examined in person by a defendant who by the nature of the allegation has caused them or put them in fear of violence. (Interview participant 18 – LA)

There were suggestions by two defence lawyers and a legal advisor that legal aid had changed as a result of the interest of justice test being interpreted more strictly than used to be the case:

There probably has because in the magistrates’ court there’s a strict means test for legal aid; so if you earn more than about £220 a week then you don’t get legal aid and also

legal aid is less widely available than it used to be, so you really don't get legal aid unless you're facing imprisonment or you're pleading not guilty. They are interpreting the interests of justice criteria more strictly which means if you're not in danger of prison then they are reluctant to grant you legal aid. (Interview participant 1 - DL)

Three defence lawyers interviewed also discussed the negative effects that re-introducing the means test has had on levels of legal representation – legal aid is harder to obtain as a result.

Once upon a time legal aid was purely based on merits, interests of justice. Now it's based on finances and there are a lot of boxes that need to be ticked for legal aid to be granted in the first place. It is harder to get legal aid than it used to. (Interview participant 2 - DL)

The reasons given largely relate to the number of reforms that have occurred, particularly over the past two decades, with the aim of reducing costs and although they are in line with crime control values, this gives rise to concern about the extent to which these changes undermine due process values and hinder a defendant's ability to effectively participate in court proceedings (something that will be discussed further in Chapter Nine). The qualitative data that have been collected in this study – and in other research – provide an indication that there has been an increase in self-representation.

The Magistrates' Association Survey (2014) reported that there had been an increase in the number of unrepresented defendants in the magistrates' courts from 23% in February 2014 to 27% in November 2014. Furthermore, in Transform Justice (2016: 5) 90% of those who responded to their poll felt that there had been an increase in unrepresented defendants in the previous two years. Only 8% thought that there had been a decrease. All prosecutors who were interviewed and surveyed thought that the number of defendants in the magistrates' courts had increased in recent years. The reasons for this were similar to the reasons provided by participants in this current study. Reasons mentioned for the increase included: financial factors and changes to the way that legal aid had been managed. There is still though a need for quantitative data to be gathered so that the extent of any change can be established. As shown in Chapter One, quantitative data are collected in the Crown Court on this matter but not – at the time of writing – in the magistrates' court.

5.3 Why do defendants self-represent?

The reasons why some defendants self-represent – either throughout the whole of court proceedings or for just one or two hearings - were touched upon in the discussion above. A number of reasons emerged from the observations and interviews with defence lawyers (which were conducted before interviewing any other participants). In the following interviews, ushers, legal advisors and judicial prosecutors were asked if they had ever come across any self-representing defendants for some of the reasons given, whether they were rare or common reasons and whether they could think of any other possible reasons.

5.3.1 What did the observations/interviews show?

Based upon the interviews conducted and observations of defendants' statements in court, it appears defendants self-represent for a variety of reasons, which may arise independently or alongside one another, across one or more hearings.

5.3.1(a) No point in having a solicitor because guilty/innocent

In two cases that I observed, when the defendant was asked by the legal advisor/magistrate why they were not represented and/or why they did not want to be represented by a lawyer, their answers suggested that they did not see the value of having a solicitor because they thought they were guilty or, paradoxically because they thought they were innocent.

In Case 239, the defendant had been charged with assault occasioning actual bodily harm. He repeatedly refused the offer of legal representation, both from the usher and from magistrates, on the basis that he was guilty and 'nothing is going to change if I do speak to one'. In Case 340, the defendant had allegedly breached his bail conditions. The legal advisor said to him: 'do you want the court to appoint a duty solicitor to represent you or do you just want to represent yourself?' and he replied saying: 'I have not done anything wrong so I will just represent myself'.

This was also recognised as a reason by a few interviewees. A defence lawyer (interview participant 7) said that: 'some of them don't think they need a solicitor because they don't think they've done anything wrong'. Another defence lawyer (interview participant 2) echoed this: 'Nine times out of ten, some defendants think, "I've done nothing wrong so I won't have

one anyway””. A judicial prosecutor (interview participant 19) also suggested that defendants might self-represent when they have been to court before and know that they are guilty of the offence and ‘perhaps realise that there’s not much point in having any legal representation because they know they are going to be found guilty anyway’.

5.3.1(b) Not appreciating the consequences

In another hearing observed, the defendant was charged with criminal damage that he had committed whilst on licence, which he pleaded guilty to (Case 269). When asked what he had to say before he was going to be sentenced, he provided minimal information. The magistrates asked him if he would speak to the duty solicitor, and he said ‘what for?’ and they said ‘to put forward some mitigation/an explanation as to why this happened. We are considering imposing a custodial sentence’. It is difficult to know in this case, without talking to the defendant directly, whether he was unaware of the potential consequences of the court appearance. However, my interpretation of the events suggests that he was either not fully aware, or did not understand the importance or point in having one. In response to the magistrate, he said, ‘if you want’, to which the magistrate replied ‘It is not if we want. You’ve got to try and convince us not to send you to custody’. The defendant then said ‘I don’t know what you want me to say. I’m not a danger to the public. You’re not going to believe me over them anyway’, which suggests he may have been aware of the consequences, but did not think that representation would make any difference to the outcome.

A couple of defence lawyers also expressed concern about defendants not always appreciating the consequences; and a legal advisor said that this may particularly be the case for defendant who have mental health problems. For example:

I think I would say that quite often people with mental health difficulties would either not appreciate – this probably falls within one of those reasons, but tied in to those reasons, if someone is struggling to understand the process then I think the value of them being represented might escape them sometimes maybe; but again you would have that conversation if it was clear that someone was struggling to self-represent, if they are eligible for the duty, I would always signpost them to the duty and we have got liaison and diversion which helps people with either learning difficulties or mental health conditions or something along those lines. (Interview participant 16 – LA)

When legal advisors, ushers and judicial prosecutors were asked whether they had come across defendants who were unrepresented because they did not see the value in having a solicitor, they all said that they had. There was not a clear consensus, though, in relation to how frequently defendants appeared unrepresented because of this reason (answers varied from it being very rare, to it being a common reason).

5.3.1(c) Time and delay

Time considerations also appeared to be a factor that defendants take into account when deciding whether to self-represent or not. In one instance, the defendant had been charged with fraud. He wanted to go ahead without a solicitor, because he said he was guilty, suggesting that he did not need a solicitor as a consequence but also because he wanted to save time, due to him having other commitments in the afternoon:

Legal advisor to defendant: Have you seen a duty solicitor?

Defendant: No, I'm guilty. I just want to get over with.

Legal advisor to defendant: This is a very serious charge so I'm going to stand this case down for you to see a duty solicitor. I strongly advise you to take advice from a duty solicitor.

Defendant: I just want to plead guilty now. I've got surgery later so I haven't got time to wait. (Case 197)

Time also seemed to be an influencing factor for a defendant who had been brought to court for non-payment of fines (Case 307). The defendant was brought up to the courtroom from the cells. He had requested to see the duty solicitor, but the duty solicitor was busy dealing with other cases at that time – so he would have to wait longer if he still wanted to be represented by him/her. He, therefore, decided to represent himself.

Time was also recognised as a motivating factor by two defence lawyers interviewed:

Well, some people are quite happy to represent themselves if they understand the system and they know what's going to happen to them because the decisions the magistrates make say if someone pleads guilty are fairly straightforward and the sentencing guidelines set out what's going to happen so people know. If someone knows they are just going to get a fine for a small shoplifting then they'll just go in and do it themselves because it's quicker. Often if you want to see the duty solicitor you have to wait so it's quicker. (Interview participant 1 – DL)

Most of the ushers, legal advisors and judicial prosecutors interviewed suggested this was quite a common reason why defendants self-represented.

5.3.1(d) Financial factors

Another main reason provided by defence lawyers was the inability or unwillingness of defendants to pay for legal representation when they are not entitled to legal aid:

Can't pay, won't pay, if they're refused legal aid. (Interview participant 4 - DL)

Two of the participants said that defendants may choose not to pay for a lawyer due to the expenses involved and them not requiring one:

Most people [in the traffic court] will just do it themselves. It's too expensive to have a solicitor, especially ... if they know that originally the red-light offence that they did was a £100 fixed penalty. (Interview participant 20 – JP)

Financial factors were also identified as a common reason by the ushers and legal advisors and prosecutors interviewed.

5.3.1(e) Limitations of the duty solicitor scheme

A further explanation as to why defendants self-represent, suggested by some interviewees - was the fact that defendants are limited in relation to how many times and when they can see the duty solicitor. If the defendant is entitled to see the duty solicitor and has two hearings on the same day, for example, one hearing for the plea and one for sentencing, for example, then the duty solicitor will tend to represent them in both hearings. If, however, they are on different days, then they will not:

I mean in [Court A] they try and get the probation reports on the same day and if they do then it means that the duty solicitor can carry on representing them to sentence but it makes a big difference. If it's put off to another day then the duty solicitor can't represent them again unless they're eligible for legal aid and so, I think, that's not very fair because it means an unrepresented defendant can be represented by a duty solicitor as long as there's enough court time and there's enough probation officers around to

prepare a report; whereas if there isn't then it has to go to another day. (Interview participant 1 - DL)

All legal advisors and ushers said that they had come across defendants self-representing for this reason and again most suggested that it was common.

5.3.1(f) Managing to find and instruct a solicitor/disagreements with solicitors/engagement issues

Another defendant whom I observed said that the only solicitor he trusted to represent him was on holiday so was unable to represent him for that hearing (Case 118). In contrast, another said he had not managed to instruct a solicitor before appearing in court (Case 155). A defence lawyer said:

There are some who just lead chaotic sort of lives and whether it's through mental health problems or addiction problems, they just can't get themselves together and sorted to instruct someone. (Interview participant 6 - DL)

This supports the suggestion that defendants do not always manage to instruct someone to represent them. For example:

I suppose the other one we do get, which is relatively common, is people who will come to a first hearing plead not guilty and it will go off for a trial, they will say that they are going to get a solicitor and then don't – and that's usually because they realise that they have to pay, they were just putting it off in the first place in terms of what is perhaps going to be an inevitable guilty plea, or some people just don't seem to be able to deal with that kind of organisation. (Interview participant 17 – LA)

Defendants can also appear unrepresented as a result of them having a disagreement with their solicitor, though this was not seen to be a common reason. A defence lawyer (interview participant 12) interviewed said that people with mental health problems and also freemen on the land⁴⁹ may self-represent because he suggested that they can be 'difficult to engage with'. In relation to the latter, he said that they: 'just don't accept the laws and when they're told by solicitors that that's not a defence, they don't like that so they self-represent'.

⁴⁹ Freemen on the land are those who do not believe they are bound by current law, as they have not consented to them (Transform Justice 2016: 8).

5.3.1(g) Ignorance of one's entitlements

A further reason given in interviews by a few defence lawyers was that defendants do not always know that they may be entitled to see a duty solicitor or that they may be eligible for legal aid:

I think sometimes people aren't aware of the right to a legal aid lawyer and they think that they will have to pay considerable amounts of money. They've read about Mr Loophole charging people £50,000 for a breathalyser and they think, 'oh I better not'.
(Interview participant 8 - DL)

The ushers and legal advisors interviewed suggested that when defendants arrive at court they do not always know that they are entitled to see a solicitor, but then this is something that court staff would usually inform them about.

Unrepresented defendants can also turn up on the day of the court hearing thinking they are entitled to see the duty solicitor when they are not:

That sometimes crops up on the day of the court hearing when they think they are going to come and see the duty solicitor and they will be advised that unfortunately for the offence that has been committed, they don't qualify for legal aid and they don't all understand the legislation behind that. (Interview participant 19 – JP)

This will mean that they will have to represent themselves or ask for an adjournment in order for them to be able to organise representation.

5.3.1(h) Wanting to do it oneself

As well as this, defendants may be motivated to self-represent by their desire to be more involved in their case and to talk to the magistrates/judge directly, rather than through a solicitor/barrister. This occurred in a drink driving case that I observed (Case 27). When the defendant was asked if she would like to say anything before being sentenced, she said how much losing her licence would affect her and how she 'chose to be unrepresented because I wanted the magistrates to hear it through me and not someone else' (Case 27). Both of the

judicial prosecutors also said that some defendants want to represent themselves for this reason and said how some are capable of doing so:

There's some very diverse people and clever people [who want to represent themselves] and they are quite able to represent and put their case forward on their own back so we do see that and I fully accept that as well. (Interview participant 19 – JP)

Furthermore, it was mentioned by a few defence lawyers that some defendants do not think they need a lawyer because they know the law and can do it themselves; or because they want to say things which a lawyer would not be allowed to say, to show off in the dock and make political points. The answers from interviewees as to how common defendants self-represented because they wanted to speak for themselves were mixed. It does happen, though they thought it was less frequent than some of the other explanations provided.

5.3.1(i) Treated more leniently

One usher also mentioned how some defendants self-represent because they will be sentenced more leniently as a result:

Sometimes, they don't come with anyone because they think, they actually believe that if they don't have a solicitor, they can't be sent down, especially in probation, they think, 'if I haven't got a solicitor, I can't be sent to prison' – but that's not true. (Interview participant 14 – U)

5.3.1(j) Changing police procedures

Finally, two defence lawyers noted that there has been a change to the charge procedure, which may have an influence on the reason as to why a defendant may be unrepresented. This is because people tend now to be released under investigation, as opposed to being placed on bail, where they are required to return to the police station at a later date. When someone is released under investigation, they have no bail conditions, the police will investigate the matter, and they may decide to send that person a postal requisition depending upon the outcome of their investigation. The result of this is that:

You might have been out of the system three or four months to get that and then it's gone to the back of your mind and you don't think about it because when you're at the

police station, they tell you, you can have a duty solicitor or you can have solicitor so solicitors in your mind. Three, four months later when it comes down the line, not necessarily in your mind. (Interview participant 2 - DL)

5.3.2 Overview

There are many different reasons, then, as to why a defendant may self-represent. They may self-represent due to one of the reasons discussed above or it may be due to a combination of them. In other research that has been done, many of the reasons for self-representing were similar to those that have arisen in this study (Bottoms and McClean 1976; Kemp and Balmer 2008; Transform Justice 2016; Thomas and Becker 2019). In this research, though, there appeared to be more emphasis on those defendants who wanted to and chose to self-represent because they wanted to be the ones who spoke in court and put their case forward, for example, and they did not want to wait around or spend a lot of money doing something that they viewed themselves as being capable of doing. Some of those interviewed also agreed that some defendants in certain cases were able to adequately represent themselves with the assistance of court staff (i.e. legal advisors and magistrates/judges) and, thus, a lawyer was not always required. This is likely to have an impact on a defendant's experience at court – whether they were happy to represent themselves and they made that decision themselves or if they were forced to self-represent due to them having no other choice.

In Thomas and Becker (2019) a distinction was made between defendants who self-represent because of funding issues and those who do so for non-financial reasons. Such a clear distinction was not evident in this research, as a defendant may have had more than one reason for self-representing and financial and non-financial reasons may both be relevant and overlap. Thomas and Becker (2019) identified two categories of self-representing defendants: either they were perceived as having mental health issues or were determined to represent themselves regardless. Defendants in both categories were said to be unrepresented because, for example: they thought they knew better than lawyers did; they had sacked their lawyer; or because of mistrust issues. Those who chose to represent themselves in this study were seen as being problematic, then. Defendants who chose to represent themselves were not mentioned at all in the Transform Justice (2016) study. Some interviewees in the current study, however, recognised that some unrepresented defendants may wish to self-represent, and this was not always regarded as being problematic by court professionals. This may be

due to this research concerning the magistrates' court and, thus, less serious offences and less complex hearings than in the Crown Court, where Thomas and Becker (2019) conducted their study.

In the latter two sections (s. 5.2 and s. 5.3), one of the main points of discussion was the concern around financial factors and the reforms that have been implemented which are in line with crime control values and the implications that this has for defendants and their ability to participate in proceedings (as examined in Chapter Two and to be further discussed in Chapter Nine). The data collected suggest that although in Chapter Two it was said that the legal aid system in England and Wales has been described as 'one of the most comprehensive systems ... in the world' (Bridges 2002: 137), the system is being eroded as a result of financial cuts. Consequently, it is becoming more and more limited, which changes the experiences that defendants have at court due to the impression that more defendants are now required to self-represent than in previous years. The experiences that unrepresented defendants have when representing themselves will be discussed in the next chapter (Chapter Six).

6.0 Chapter Six: Unrepresented Defendants' Experiences at Court

This chapter considers the experiences that unrepresented defendants tend to have when representing themselves at court. We start by looking at preparation for hearings (s. 6.1) and case paperwork (s. 6.2), followed by experiences at different kinds of hearings (s. 6.3, s. 6.4, and s. 6.5), unrepresented defendants' levels of understanding at court generally (s. 6.6), and then general treatment of defendants at court (s. 6.7) and finally whether unrepresented defendants experience any advantages (s. 6.8). In each section, the findings from this research study will be compared with findings from the previous research done in the field.

6.1 Preparation – knowing what evidence to bring

In the previous chapter, some examples were given which showed that defendants sometimes fail to sort out legal representation. This section focuses on a similar concept: defendants' ability to prepare for their hearing and bring all of the required evidence to court.

The observations suggest that unrepresented defendants do not always know how to prepare for court hearings or know what evidence to bring, which can lead to adjournments and hence additional hearings. The court did tend to adjourn proceedings for defendants to get the required evidence in the observed cases. An example was Case 73, where the defendant had pleaded guilty to driving without insurance. The defendant was asked to attend court as the magistrates were considering disqualifying the defendant. When asked by the legal advisor, the defendant said he wanted to put an exceptional hardship plea⁵⁰ forward as he needed his licence to take his mother to hospital appointments because she was not very well. He had not brought any evidence, though. The magistrates provided some examples of the things that the defendant could bring as evidence and the case was adjourned for him to do this. A practically identical situation played out in Case 205.

Case 167 provides another example where a defendant did not adequately prepare for their hearing. The defendant had pleaded not guilty to the charge of failing to provide driver's information, and he had appeared at court for his trial. The legal advisor said to the defendant

⁵⁰ In certain cases, if a defendant incurs 12 or more penalty points, the defendant or his/her legal representative will be able to make an exceptional hardship argument to try and avoid being disqualified from driving (Sentencing Council 2020).

that he had previously pleaded not guilty to the matter and ‘a trial date was set and adjourned previously so you could get information from the police. Have you got the information?’ The defendant said he had rung the police and they said that his car had been cloned – but he had no written evidence of this or proof that the conversation had taken place. He thought he could just verbally say that to the court and that would be sufficient. The legal advisor told the defendant he would ‘need to ask the policeman to come to court to give evidence’ and the legal advisor said what the defendant would need to do, if the policeman says he is not going to. The defendant then asked the legal advisor another question to clarify what he needed to do and the legal advisor wrote down what he needed to do (ask the police officer to fill out a written statement and attend court. If he does not do this, then the defendant needs to contact the court to let them know) so that he did not forget and come to court again in the same situation.

The examples discussed provide support for the point that unrepresented defendants find it difficult to know what to bring to court to support their case. They are then reliant upon those within the court to adjourn proceedings for them to get the required evidence and to provide advice as to what evidence they will need to bring to the next hearing. In the above examples, the court did tend to adjourn or delay proceedings and did tell them that they would need evidence to back up what they were saying. However, this was not always the case and it will not be the case every time. For example, in Case 212, the defendant had pleaded not guilty to the offence of failing to provide a specimen of blood. The defendant asked for his trial to be adjourned, as he had failed to arrange his witness. When asked why he had not done so, he replied ‘no reason’. The judge decided to proceed with the trial: ‘you entered a not guilty plea three months ago. You’ve been given plenty of time to sort your witnesses out’. The defendant was acquitted based on the fact that one of the prosecution’s key witnesses was not there to provide evidence that the defendant was suspected of driving whilst under the influence. Although the prosecutor asked for the trial to be adjourned, the judge refused the request – like he refused the defendant’s – on the basis that the trial would not take place until another ‘several months down the line’.

In Case 387, though, the defendant’s failure to adequately prepare and bring the required evidence did have clear negative consequences for her and the outcome of the case. The defendant had pleaded not guilty to speeding and alleged that it was not her who was speeding; it was someone else. She said she was at work on the day. She had brought a letter

from her employer saying she was at work – but it had the wrong date on it and it was not signed. The legal advisor asked her if she had anything else to prove she was at work on that day, but she had not brought anything. She had not brought her diary, for example, or any witnesses. The defendant was found guilty of the offence, but once the defendant had left, I heard the magistrates say to the legal advisor that they believed the defendant, but she had not brought the required evidence on the day, so they had to find her guilty of the offence based upon what they had heard.

An usher (interview participant 13) also mentioned this difficulty: ‘they are probably not aware of what to bring with them, so evidence wise’. A defence lawyer (interview participant 1) shared this sentiment, observing that defendants ‘probably don’t understand what evidence they need to get to defend themselves properly at the trial’, so ‘it means when they get to court they haven’t probably got what they need’. She also recognised that despite court staff informing unrepresented defendants that they need evidence, they still might not understand fully what that means and how to go about getting that evidence:

I was in court yesterday and there was a motoring case that was adjourned for a trial on a technical issue and he’s unrepresented and I would be very surprised if he manages to sort out the evidence he needs. In say a motoring case where you’re saying you couldn’t blow into a machine because you’ve got breathing difficulties. I mean the district judge did make it quite clear that he needed to get medical evidence and it would have to be in the proper form but I don’t think he really understood.

A judicial prosecutor discussed how some defendants turn up unprepared to do an exceptional hardship argument:

Some people perhaps don’t even know about exceptional hardship argument until they get to court. I don’t know how they are told. I don’t know if the court send a letter. I know they have to write to the defendant to warn them that they are going to be disqualified, but I haven’t seen that letter and I don’t know – but I wonder, it would make sense if it included on there that they could do an exceptional hardship argument. But a lot of the unrepresented people turn up, you tell them they are going to be disqualified and the legal advisor naturally just goes into ‘do you need your licence for work’. ‘Is it going to cause you any serious detriment, if you cannot drive?’ and then usually it does. It will affect most people and they say ‘do you want to do an exceptional hardship argument’ and they usually just go ‘yeah, alright’. Some people aren’t as prepared. (Interview participant 20 – JP)

This is not to say, however, that all defendants will fail to understand, and certainly not all unrepresented defendants I observed failed to prepare adequately for their hearing. In Case 209, the defendant had pleaded guilty to a speeding offence and was making an exceptional hardship plea. The defendant had brought various documents to give to the magistrates and the magistrates positively commented on that. He had brought a letter from his employer, a letter from his community centre, evidence of monthly mortgage payments, evidence that he was paying child maintenance and sending money to his wife who lived in another country, and a letter from his doctor, which provided confirmation of a health condition. His exceptional hardship plea was successful and he was not disqualified.

In another case (Case 366), the defendant had been charged with driving whilst using a mobile phone. His defence was that he was not using a mobile phone on a public highway – when the officer saw him. He had been using it previously when he was on private land. The call had ended before going on the public highway but his phone was still in his hand when the police officer saw him. At the trial, the defendant had brought a witness with him to give evidence (he was his neighbour who had seen him make the call and end the call before driving onto the main road). The defendant also adduced a map of the area, which he showed the magistrates to demonstrate where he was when he took the call. His witness also pointed out where the defendant was on this map. Nevertheless, the defendant was found guilty on the basis that he was holding his phone when he was driving on a public road and the magistrates agreed with the prosecution – that this amounted to him using his mobile phone on a public highway. Thus, unrepresented defendants are not one homogenous group who will all fail to bring the required evidence to court and experience the same difficulties when attending court. This has implications, as – like other lay users who participate in court proceedings - their support needs will differ.

To conclude, the extent to which defendants are able to adequately prepare for hearings varies. When defendants fail to live up to court requirements, court personnel have to make a discretionary decision as to whether they will adjourn proceedings as a result or continue regardless. Whether they were willing to adjourn proceedings seemed to depend in the cases observed on how many other cases that they had to deal with that day and how important/relevant they saw the evidence as being to the defendant's case. It was also dependent on the individual court personnel and the behaviour of the defendant themselves. It is important to bear in mind that the examples used and the cases observed in relation to this

all concern traffic matters, which may have been seen as less serious than other, more significant offences. The findings in this study echo those in Transform Justice (2016) where it was mentioned how unrepresented defendants experience difficulties in relation to knowing how to prepare for court proceedings.

6.2 Case papers

In order to be able to prepare for hearings, defendants need to be able to access their case papers. However, when asked about the difficulties, if any, that unrepresented defendants experience most defence lawyers spoke about the issues that unrepresented defendants can have in relation to accessing evidence and getting their papers from the Crown Prosecution Service (CPS).

6.2.1 How and when do unrepresented and represented defendants receive their case paperwork and what information is included within it?

How and when unrepresented defendants are given their case paperwork depends upon the nature of the hearing and the type of offence. In relation to plea hearings, according to those interviewed, the court usher usually gives unrepresented defendants their case paperwork on the day of the hearing; whereas when defendants appear in the traffic court, they should have been sent their papers in the post, sent to their home address because they were – at the time of writing – excluded from receiving case files digitally. Thus, case papers were either sent to unrepresented defendants or printed off for them. In contrast, papers were not printed off for defendants who were represented; rather their lawyer would have access to their papers digitally. According to the ushers and legal advisors interviewed, in some instances, defendants' solicitors will have viewed them prior to the day of their client's first hearing, but this is generally not the case, due to them usually being instructed on the day. For example:

It [case paperwork] is available five days before the hearing, so if a solicitor were perhaps present in the police station or something like that, then they would know about it in advance and they can ring up and get it. They just need their URN (unique reference number). Very often defendants just turn up on the day and expect their solicitor to know that they were charged and they knew all about the case. They just magically expect people to know everything so very often solicitors get it on the day but especially if they know that defendant and they have represented them before,

they get to the nub of it really quickly. The solicitors are very practiced in getting information quickly and dealing with it quickly. (Interview participant 17 – LA)

How much information defendants were provided with at their first or plea hearing varied.⁵¹

When asked what the case paperwork entailed a legal advisor said:

It depends which court they have initially been charged and bailed and requisitioned to as to what they actually get because if they have gone into the GAP court which is the guilty plea expected court, they get a limited amount of information and a fuller file is created for the NGAP, for the not guilty expected, so if they came to a GAP court and plead not guilty, all they will really get is the case summary of the case which is the NG5. They may not get any statements. They'll have their previous convictions and they might have like exhibits so photographs if they are available or attached and that's all they really get in a GAP court. In the NGAP court a full file is created so there will be more in there. There might be the witness statements. There'll be the summary. There might be applications so things like applications for bad character and special measures. There might be the NG15 which ... [contains a copy of] the interview as well. (Interview participant 18 - LA)

6.2.2 Case papers at in-person first and/or plea hearings

As discussed, for non-traffic matters unrepresented defendants tended to be given their case papers on the day at their first hearing. They will not have a long time to consider the evidence against them, which may influence their decision as to what plea they enter. Even though solicitors usually see the paperwork on the day too, they will be in a better position to be able to read their client's paperwork and make an assessment in relation to what plea their client should enter given their knowledge, training and experience. Unrepresented defendants will also be in a stressful environment when having to read their case papers (a courtroom building, which may be busy with other court users), as unlike lawyers they do not have access to secure, private rooms within the court building. Moreover, some unrepresented defendants may also lack the ability to be able to read them. On one occasion (Case 177), for example, I observed an unrepresented defendant who had been charged with criminal damage say prior to his hearing that he had dyslexia and could not read and as far as I was aware, they were not read to him. This may also be an issue for other defendants too – for instance, those with poor reading skills, or for whom English is a second language.

⁵¹ For more information about what information the CPS have to provide for different hearings, see CPS (2019).

One defence lawyer expressed concern that even if they do not lack the ability to read their papers, unrepresented defendants still may not always read their papers before deciding on whether to plead guilty or not:

They're at the point where they are pleading guilty or not guilty - 'Well have you read the evidence? Well have you got it? Have you been given it?' 'No,' which just goes to show that they really haven't got a clue. The fact that they have not even read the evidence against them or thought, well they probably don't even know that it exists. They might not even know that there is a bundle of papers with statements in.
(Interview participant 3 - DL)

A few cases I observed reinforced this claim. In Case 35, the defendant had been charged with being drunk and disorderly. While being questioned by the legal advisor, he said that he had not read the papers, but that he was nevertheless happy to proceed. It is unclear whether he received the papers, but did not read them, or had not been given them at all. The hearing continued and he pleaded guilty. In Case 241, the defendant had been charged with assault occasioning actual bodily harm and when the legal advisor told him outside court that he would need to wait to be given his papers so he could read them, he said he did not want them and he wanted to go into court without having them. He went on to plead guilty. Furthermore, in Case 119, after the defendant was identified, he was asked if he had the chance to see his papers, to which he responded, 'no'. He was then told that one of the offences was an either-way offence and he was told the meaning/consequences of that. The charges were then read out and he pleaded guilty to possession of cannabis, but not guilty to failing to provide a specimen of breath. As the judge was completing the case management form with the defendant, his papers were being printed off. This means that the defendant had entered a plea without seeing the evidence/case against him.

A legal advisor also mentioned how unrepresented defendants do not always want to see their paperwork, but he suggested that it was not always necessary for them to do so:

Participant: If they are on bail at that first hearing, so they'll know why they're charged. They will have had a copy of the charge sheet, but the initial details of the prosecution case that case summary and the key statements are given to them at their first hearing if they want them. Now most defendants quite often don't want them because the description is just telling them generally what they are already know because it's just a short description of the offence and if it's a straightforward guilty plea case because you'll probably know we [put] guilties and not guilties into different court sessions, so

if you're here for a drink driving case, and you're 53 in breath [level of alcohol in breath]⁵², there's not really much that the papers will tell you that you don't know already.

Interviewer: [The participant was asked to expand on why unrepresented defendants would already know.]

Participant: You know, for example, a drink-driving case they know if they've been in a pub and had four pints and driven home. They know that they bumped into a lamppost and they know that the police came along and they know that the police said 'you smell of alcohol at the roadside' – it's not telling them really much that they don't know. That's a simple straightforward case and there are others which are more complicated and more serious but it's less often that those people would be unrepresented, so actually defendants having enough information to enter a plea is not a problem unless it's a technically difficult charge that we don't get, you know, a lot of what we do is repetitive high volume – stealing things from shops and invariably those are people that know the system, minor assaults, criminal damage. Yes, there are others but there's a lot of repetitive, high volume, low seriousness crime. That's the magistrates' court. That's what we do. (Interview participant 17 – LA)

Whilst unrepresented defendants not seeing their paperwork would not be problematic from a crime control perspective, it would be from a due process perspective, given that regardless of what offence a defendant has been charged with defendants are entitled to see the evidence. There is a presumption of innocence, and it is the job of the prosecution to prove the case against them; so, as a result, it is important that unrepresented defendants do see what evidence is against them before entering a plea. Otherwise, defendants could plead guilty to offences where there is no evidence (or at least, insufficient evidence) to support their conviction. Furthermore, by pleading guilty, they accept the prosecution's version of the case, which they are entitled to dispute, in whole or in part. This would also prevent them from pleading guilty on a basis⁵³ (if, of course, they were aware that they could do that). It will also have potential implications for sentencing.

⁵² In England and Wales, the alcohol limit for drivers is 35 micrograms per 100 millilitres of breath (Gov.uk n.d.b).

⁵³ This is where the defendant accepts that they have committed a criminal offence, but they disagree with circumstances/all of the facts put forward by the prosecution. Thus, the defendant can plead guilty to the offence but on a proposed basis, which will either be accepted or rejected by the prosecutor and judge (Ashworth and Redmayne 2010: 300).

6.2.3 Case papers at virtual first and/or plea hearings

Furthermore, when asked about the difficulties that unrepresented defendants' experience if any, one defence lawyer said that unrepresented defendants appearing for a first hearing or plea hearing will generally not have access to their paperwork when they appear via video link:

Well unrepresented defendants on a video link – if it's a plea hearing, for example, they are in prison at that moment having committed another offence and then the first time in is on a video link, they will have no access to their paperwork at all; so that causes some difficulty because they won't even know what they are charged with or they might know what they are charged with but they'll have no idea what the actual allegation is. (Interview participant 12 - DL)

A legal advisor also mentioned that unrepresented defendants have not always received their case papers when they appear for their first hearing over the link:

So it [unrepresented defendants' case paperwork] should be sent to them at the prison, so if they are in prison – not on remand on other matters or sentenced on other matters – what would tend to happen is the police will postally requisition them at the prison so they should have had the papers sent to them at the prison but that is all dependent upon (a) that happening (b) the governor picking it up and giving it to them; so what we will tend to find in those types of scenarios is, we'll link up at the first hearing, we'll ask them 'do you know why you are here?' and they haven't a clue why they are here, so then we'll have to adjourn the case (a) for them to seek legal advice and then (b) if they don't want legal advice for them to have the papers sent to them, so if they have got a solicitor we wouldn't send them to them [the defendants]. The solicitors would get the papers and the solicitor would then take instructions, so in that scenario if they are represented, they wouldn't have it. If they are not represented then it would either be us sending it to the prison or them having it requisitioned to the prison by the police. (Interview participant 18 – LA)

In relation to this, the legal advisor went on further to discuss how appearing via video link can disadvantage unrepresented defendants:

The only difficulty it would cause them [unrepresented defendants] is that they are not physically there in the courtroom so any documentation they couldn't physically have but other than that defendants tend to prefer it because they are not having to be woken up early, lose their cell and have to be transported to court and spend all their day in the

cells at court so in general defendants prefer it ... In theory because we are now paperless there shouldn't be that many actual paper documents but like I said it could be if it's a first time in and they haven't had their IDPC [initial details of the prosecution case] if they were physically at court we could print it out and give it to them but because they're over the link we can't do that and it will be the case of them being emailed to the governor at the prison that's what I'm thinking of. Anything else should have already been served on them if it is subsequent proceedings. (Interview participant 18 – LA)

In Case 155, an unrepresented defendant did not seem to have had their paperwork. The defendant had been charged with failing to provide driver information and failing to provide a specimen of breath. When the defendant was asked if he knew why he was appearing in court via video link on that day, he said that he did not. The charge was read out in any case and he pleaded not guilty. The legal advisor asked him why he was saying he was pleading not guilty, and after hearing his response the prosecutor suggested that the case should be adjourned for a week so that he could get some legal advice, which it was.

In Case 103, the defendant had been charged with the more serious offence of dangerous driving, as well as drink driving, and driving without a licence or insurance. The matter had previously been adjourned for him to get legal representation. The legal advisor asked him whether he had sought legal representation, as no solicitor had attended for the hearing. The defendant said 'no, I've not had the chance'. The defendant wanted to continue without legal representation and the legal advisor and magistrates asked him if he was happy to do this a few times given the seriousness of the offence. He said he was. The charges were then read out and guilty pleas were taken. Though of course I cannot know for sure whether the defendant had been sent his papers or not (as in the case above), given that the defendant was not asked by court personnel whether he had them or whether he had read them, it seems unlikely that he had been.

6.2.4 Issues with media evidence (both when appearing in person and via the video link)

A few interviewees also mentioned the difficulties that unrepresented defendants may experience when attempting to view and gain access to media evidence. For example:

They [unrepresented defendants] will have difficulty accessing all the materials that they need to, especially now that disclosure is on an electronic basis, so unrepresented

defendants often just drop down the queue because the prosecutor hasn't got time to print out the evidence to give to them, so although they may have been there at 9.30 they might not get paperwork until – I've seen people not get their paperwork until the afternoon because there just hasn't been time to print it off. If there's any media evidence, for example, audio clips or CCTV [closed circuit television], it is difficult enough for the defence solicitors to get hold of that, but if you're unrepresented your chances of seeing that are slim to none and if a case relies entirely on say CCTV and you can't see it, it causes difficulties. (Interview participant 12 - DL)

Well this is an issue and I keep saying to the CPS ... whereas before things like that used to be on disks, so you would get a DVD [digital versatile disk] of CCTV or any other evidence. Everything now is digital. Everything now is on Egress [secure software] and the defence have access to Egress. They've got their own portal to it but an unrepresented defendant doesn't have access to that and can't have access to that so that's a really good question that no one seems to have an answer to so it tends to be that they'll be shown it at court on the prosecutor's laptop or on the click share in the courtroom because ... we've tried in the past to make directions for that to be downloaded for an unrepresented defendant but it's not possible anymore because CPS won't do it so that's a really good point that there isn't really an answer to other than they'll view it at court. (Interview participant 18 – LA)

Similarly, a defence lawyer (interview participant 7) when asked what practical problems unrepresented defendants give rise to said, 'the obtaining of paper work. The obtaining of CCTV'.

When defendants appeared over the video link, at the time of writing, the only way that they could view media evidence was also by being shown it at court over the link:

Yeah, so if they were appearing via video link then – just to let you know they would never have a trial via video link. We are not allowed to do that.⁵⁴ They would have to be produced in person for a trial. (Interview participant 18 – LA)

One defence lawyer, however, observed that CCTV evidence is not something that the prosecutor always has available at the first hearing:

If they've got the video or if they've got the CCTV and very often they haven't got it. It hasn't been given to the advocate who is in court. If they've got it and they use it on

⁵⁴ For more information, see Criminal Practice Directions 2020, para. 3N.10.

Clickshare⁵⁵ then it is usually quite good and ideally it should be there at the first hearing, so that you don't have any of this messing about so when somebody says to you 'it wasn't me in that shop. It wasn't me'. Well I want to see the CCTV. If you can see the CCTV there and then, you can say 'well hang on a minute that looks very much like you' or 'no, it's not you' which that occurs as well and you can sort out all these messes but unfortunately, the CPS lawyer does not always have this information at hand at the first hearing because the court is just hell bent on getting guilty pleas in. (Interview participant 7 – DL)

6.2.5 Case papers at trials

In relation to trials, as discussed, a potential difficulty on some occasions is that defendants may not have a fixed address, or they may have moved, so even if documents have been sent to them, it does not necessarily mean that they will have received them. Some of the defence lawyers interviewed suggested that the CPS do not always send documents on time or prior to the day of the trial. For example:

I think the biggest problem from my point of view is that the Crown Prosecution Service [CPS] and the police just aren't geared up at all for unrepresented defendants so you have a lot of cases whereby if they were represented [the] CPS would have to disclose their case to us, but if they are not represented there's no way in which a person could get the papers; so you have a situation whereby Joe Bloggs is charged with an offence, pleads not guilty, gets to the day of the trial and he's not actually seen a shred of evidence, so it's hastily sort of thrown at him on paper and then he's told, 'right, crack on'. They've got no mechanisms to deal with them at all, so [the] CPS work effectively on an electronic basis, so if the person's represented, the case papers and any correspondence are sent by secure email but of course, unrepresented defendants don't have secure email, so there is literally no mechanism whereby they can get the case papers before a trial. Depending on the magistrates and your legal advisor, it can be as brutal as, 'here's your papers, the trial starts now'. (Interview participant 8 - DL)

This means unrepresented defendants will be disadvantaged as a result of this because if they do not see all of the relevant evidence until the day of hearing, they will have minimal time to consider it. This undermines their due process rights and may result in them entering the wrong plea or them not being fully informed when deciding what plea to enter, which would

⁵⁵ Clickshare is a system that enables professional court staff to connect their devices to screens at court so that digital evidence can be viewed (HMCTS 2019b: 3).

have implications for them and negatively impacts on their ability to effectively participate in proceedings.

6.2.6 Knowing how to rectify failures relating to case papers

Defendants who are unrepresented will not necessarily know what evidence to expect to be sent, or how to go about rectifying any failure by the CPS to send the required evidence/papers. As one defence lawyer observed:

Firstly, there are Criminal Procedure Rules, whereby the Crown Prosecution Service must serve all outstanding evidence within a set time frame. The Crown Prosecution Service very rarely serve that paper work within that set time frame so a person representing themselves will not know how to go about getting that paperwork. (Interview participant 2 - DL)

When asked how he thought unrepresented defendants are treated during court proceedings, the defence lawyer expanded on his previous point by saying:

I think they are treated respectfully. Yes, they are always treated respectfully. They are also in court treated fairly. It's the things that happen outside of court, in between hearings that is the issue for them in my opinion. I write every day for papers that I haven't had and I do this for a living, so if I can't get the papers or I can't get a response from the CPS or the courts, how are they going to get a response?

Again, this implies that the ability of unrepresented defendants to participate in proceedings is restricted given their lack of knowledge regarding court proceedings and the process.

6.2.7 Case papers and court-appointed lawyers

When a lawyer has been appointed by the court to cross-examine the complainant and/or witness⁵⁶, one lawyer indicated that the CPS send all of the case papers to the lawyer prior to the trial but they do not send them to the defendant:

⁵⁶ As a result of ss. 34-35 of the YJCEA 1999, a defendant is prohibited from cross-examining complainants in proceedings for sexual offences (defined by s. 62 of the 1999 Act), child complainants and other child witnesses. s. 36 also permits the court to prohibit the defendant from personally cross-examining other witnesses, if it appears to the court that 'the quality of evidence is likely to be diminished if the cross-examination is conducted by the accused ... and would be likely to

In particular we see a significant number of defendants in domestic violence cases who are means-ineligible for legal aid who either can't or won't pay to be represented privately. The knock-on effect then is that they have to self-represent but the court has the power to appoint to actually do the cross-examination of the victim because the court can make an order that forbids them as a defendant from cross-examining their alleged victim; so what happens is for the sake of argument, we would represent a client at the first hearing assuming that they would get legal aid, apply for legal aid, legal aid is refused and they have to be unrepresented because they won't pay or can't pay – can't afford to pay - and then the court, the prosecution has to correspond with them direct because they don't have a lawyer. The prosecution very rarely correspond with a defendant direct and send them the papers as they should or the CCTV evidence as they should if it's a CCTV case, or soon to be body worn video camera footage from police officers. That will be a vital part of domestic violence cases from now on and again they won't send them that so they are very disadvantaged in what they see ...

6.2.8 Case papers and problems for prosecutors

In situations where a lawyer has been appointed to cross-examine, prosecutors are likely to prefer to send the papers to the lawyers in such instances due to the possible practical problems that serving papers on unrepresented defendants gives rise to and the need for prosecutors to follow a different procedure when doing so:

Their procedures are all set up for dealing with firms of solicitors who are representing [defendants] and they like to be in a position to have provided the initial disclosure of the prosecutor's case to a firm of solicitors beforehand and unrepresented defendants undoubtedly throw a spanner in the works for them. (Interview participant 5 - DL)

It would have been useful to interview CPS prosecutors and defendants to explore some of the themes that have arisen further and to gain their perspective on them. The extent to which observations can shed light on these matters is limited given that when observing one can only see things that are directly observable and see what is happening in court at that moment (when observing it was difficult to know, for example, whether an unrepresented defendant had seen their paperwork unless they were asked this by a court actor during proceedings).

be improved' if the accused was prohibited from doing this. In such instances, the defendant will have to instruct his own lawyer to cross-examine the witness(es) (s. 38(2)(a)) or the court will appoint a lawyer to do so on their behalf (s. 38(4)).

CPS Prosecutors have been interviewed in previous research. For instance, Thomson and Becker's (2019) study of unrepresented defendants in the Crown Court found that CPS interviewees experienced difficulties when serving evidence on unrepresented defendants (for instance, not knowing whether they had the defendant's correct address, or encountering defendants who said that they had not received their papers: Thomson and Becker 2019: 9). The prosecutors interviewed said how they often asked the judge to advise unrepresented defendants to be represented by a lawyer so that the CPS could serve the documents on the defendants' lawyers (Thomson and Becker 2019: 7).

CPS prosecutors were also interviewed in research from Transform Justice (2016: 13), and again, concern was expressed about the ability of the CPS to send all the relevant case files to the defendant before the trial by post, given that the defendant may not have a stable address to send it to, and that papers may be sent to a solicitor who the CPS thought was acting for the defendant. One prosecutor also mentioned that unrepresented defendants do not always know what documents to expect and by when and said that the CPS will often 'dump' evidence on the defendant on the day of the trial. It was said that unrepresented defendants were at a disadvantage in preparing their case and that they were excluded from accessing and viewing their papers digitally, like other court users were (meaning that they saw their files later, if at all) and from using the courts' Wi-Fi systems which were being introduced throughout England and Wales at the time that that study was being done (Transform Justice 2016: 13). Therefore, some of the concerns that arose in these two studies echo those arising from the present study.

6.3 Plea hearings

As is evident from the section above, case papers are particularly important at the plea hearing – when defendants enter their plea. At the beginning of the hearings observed – where a plea was entered – both unrepresented and represented defendants tended to be identified, the charges were read out and the legal advisor asked them to enter a plea. The findings from this study suggest that some unrepresented defendants experienced problems in relation to entering the correct plea and deciding whether to plead guilty or not guilty. The responses by court personnel in these situations varied depending upon the individual member of staff, the defendant and what offence the defendant had been charged with.

6.3.1 Interview data – misunderstandings, ignorance and pressure at plea hearings

According to some defence lawyer interviewees, some unrepresented defendants experienced problems at plea hearings as a consequence of them not understanding the law or knowing that they had got a potential defence. This could result in some pleading guilty when they should have pleaded not guilty and vice versa:

You've got to hope that they've not gone and pleaded guilty in a situation where they might not actually be guilty of an offence and that may have become apparent if they had had representation. You do get situations where a person might think that they have committed the offence but they might not be aware that there is a statutory defence available to them - that issues such as duress might be relevant to the position ... You undoubtedly do get situations where unrepresented people through lack of knowledge of what it is that they are actually accused of will plead guilty when they are technically not guilty. That may not necessarily become apparent to the court. (Interview participant 5 - DL)

Two judicial prosecutors also said that unrepresented defendants can struggle with understanding the meaning of strict liability offences and the difference between a defence and mitigation. When asked what, if any, problems unrepresented defendants experience at court, one said:

I would just say it's probably a lack of understanding of the actual law. They know what the offence is that they have committed but they don't know understand what the defences are or what strict liabilities are. They think they may well have good mitigating circumstances excuse but as I've explained earlier, the legal advisor will then point out well that's all it is. It's mitigation, it's not a defence and you've not quite got that right. (Interview participant 19 – JP)

A legal advisor also recognised that unrepresented defendants can experience difficulties in relation to understanding the law but she said that it can be difficult to know, in certain circumstances, whether unrepresented defendants have entered the correct plea or not:

I think they [unrepresented defendants] probably underestimate their nerves, so I think that they're maybe outside showing a bit of bravado and then [they] get into the courtroom and it's quite intimidating, so I think a lot of them probably clam up a little bit. I think they want to say, most of them, want to say very little so it is hard to establish when you're saying 'are you guilty or not guilty to a damage?', for instance, they don't understand the difference between if it's accidental damage and reckless or

deliberate damage; so they'll say guilty and you might never get to the bottom of the fact that they could have had a defence because they don't want to tell you any more about it. (Interview participant 16 – LA)

Another legal advisor, though, said that he did not think that plea hearings cause any particular problems for unrepresented defendants when they have been charged with relatively simple summary only offence:

I think if it's a straightforward summary only case where it is a simple question of guilty or not guilty that doesn't seem to cause any real difficulty, apart from those technical offences; so I would say the most common is failing to give information regarding the identification of a driver, who is set to plead guilty to a traffic offence, so that's speed camera flashes you in your car ... So it's just a letter that you get through the post. Failing to respond to that letter in full or at all is a criminal offence and people struggle with things like that. They think they are here for the speeding and sometimes it takes a little bit of time to explain actually not filling that letter in is the crime that you are alleged to have committed; so some road traffic stuff. Speeding is easy – everyone understands generally what speeding is but some of the more technical road traffic stuff can be a little bit trickier. (Interview participant 17 – LA)

The point regarding defendants' capacity for misunderstanding the offence of failing to provide driver information was corroborated in observations. Some cases were observed where defendants thought they had been charged with speeding when they had in fact been charged with failing to provide driver information; or they knew what they had been charged with but they did not fully understand it and their defence was that 'they were not driving'. Thus, as a consequence they either intended to or did plead not guilty, even when they had been informed that they had not been charged with speeding by the legal advisor, or were provided with a brief explanation of the offence.

Another legal advisor also discussed how defendants can misunderstand the law, and provided a dissenting account of defendants' understanding of the law relating to speeding. She also argued that legal advisors need to assist unrepresented defendants and explain the law to them, but that it can be difficult for legal advisors to provide this support, given that they are limited in what they can do:

Erm [unrepresented defendants' experience] lots [of problems]. They don't understand the law – and so again ... because that's where we tend to get them the most in a traffic

court, they think they know the law and ... they don't understand the law and they might do some research online particularly for traffic cases, for speeding offences, trying to get out of a speeding ticket, trying to get out of prosecution; so they'll go by what's on the internet, what people think is good legal advice and so yeah they don't understand, they don't understand the court procedures. They don't understand the law and we obviously have to explain to them what the law is. We can't tell them what to do and we can't advise them, so it puts us in a difficult position when we know someone is taking a point when they've got no defence whatsoever so we just have to explain the position and see whether they want to seek independent legal advice to clarify it so that's the main issue - them not understanding. It can be difficult and that's part of our job. A part of our job is to make sure that they understand the charge against them and they are given the opportunity to make a decision on plea but it can be difficult for them because like I said, they don't understand, and quite often certain cases there's no reasonable excuse. (Interview participant 18 – LA)

Not understanding the law and experiencing difficulties in relation to the plea is significant for unrepresented defendants because what plea they enter has important implications for them and impacts how their case will proceed.

As well as the issues discussed above, a few defence lawyers mentioned that unrepresented defendants might also feel pressurised to enter a guilty plea or may do so, in order to speed the process up, or because they do not fully understand the implications of pleading guilty:

[Unrepresented defendants' experience] problems at plea hearings – they don't know whether to plead guilty or not. They quite often enter what's known as an equivocal plea, so 'I'm not guilty but I'm going to plead guilty to just get it over and done with' or just not understanding what the consequences of their actions or lack of actions are. (Interview participant 12 - DL)

The defence lawyer quoted was then asked what would usually happen when an unrepresented defendant entered an equivocal plea and he said:

The legal advisor or the magistrate or the district judge, depending on personalities of the court really, one of them will explain what an equivocal plea is and talk them through it but again that contributes to them feeling like they are being pressurised into entering a guilty plea because it happens so quickly; whereas I quite often speak to clients in private and they'll say 'I'm pleading guilty, but I didn't do it. I'm just doing it to get it over and done with' then you have a long conversation with them explaining what an equivocal plea is and how they can't do that, and if they plead guilty, they are accepting it and that results in them either entering a not guilty plea and they have a trial

or they enter a guilty plea but they do so knowing full well they are accepting what they are accused of. They can't have it both ways. You can't say I've not done it and plead guilty but it's much easier to have that conversation in private rather than in a room full of people which could contain multiple lawyers and other cases, and it's just a bit daunting for people I think.

Another defence lawyer spoke after the formal interview about a case that he had observed in court, where the defendant had been charged with the offence of criminal damage. The defendant was brought into court, and he was unrepresented because although the defendant had appointed a lawyer, the lawyer had not turned up. According to the defence lawyer interviewed (interview participant 10), the legal advisor said something along the lines of 'let's see if we can muddle through'. The defendant was asked by the legal advisor, 'are you planning on pleading guilty or not guilty?' The defendant replied with, 'guilty but I was protecting my property'. The interviewee stood up in court and said that he was an officer of the court and he did not think that the hearing should proceed. The interviewee then said from what he had heard the defendant say, he thought the defendant could possibly have a defence, and so the hearing should be adjourned for him to seek legal representation before entering a plea. The court agreed for this to happen, though the interviewee was concerned that if he had not intervened and spoken up on behalf of the unrepresented defendant, then this might not have occurred. The defence lawyer felt it was likely that the hearing would have continued for efficiency reasons; even though, in his view, he did not think the defendant was in a position to enter a plea at that point. The interviewee said that after the defendant had spoken to his lawyer, the defendant may still have pleaded guilty or, alternatively, he may have pleaded not guilty but the decision would have been an informed one. The interviewee said that when unrepresented defendants are in front of court staff in his view, they feel like they have to provide an answer (so say whether he/she is going to enter a guilty or not guilty plea, for example). In his opinion, most defendants would not feel confident enough to say, 'I don't know, as I'm not in a position to make that decision at the moment, given that I've not spoken to my lawyer yet'.

Two legal advisors who were interviewed discussed what they do to assist unrepresented defendants at plea hearings, but they recognised that it can be problematic as they do not want to be perceived as putting pressure on defendants and there is a need for them to remain neutral.

Yeah, like I say we try and talk them through it [the case management form that has to be filled in when a defendant pleads not guilty], but as I say we've got to be neutral so we can't be seen to be filling it in for them or sort of taking instructions from them so it's quite a tricky balance really between helping someone who maybe doesn't understand the language – we can do that – but then we can't then be advising on plea; and if someone is pleading not guilty and they have actually got no defence, that's quite tricky because we're saying to them 'well you know if you plead not guilty', well I'll just say something along the lines of 'from what you've said to me, this doesn't amount to a defence in law but it is your right to plead not guilty etc.' – but then you have to add in talking about credit for a guilty plea and the facts that the costs will be more after a trial and some defendants are thinking, 'well you're trying to, you know, is that bribery? Are you saying to me that you're going to have to pay more?' So it is getting that balance when you're sort of seen as an independent person in the court – you're not trying to persuade them either way but you don't want them to make things worse for themselves if you can see that they've got no defence. (Interview participant 16 – LA)

The legal advisors discussed how during plea hearings when, in their opinion, a guilty plea has been entered incorrectly, they seek to explain things to unrepresented defendants, inform them of the implications of pleading guilty or not guilty⁵⁷, inform them that they have got no defence and/or adjourn the hearing for them to see a duty solicitor when they are eligible to see them. However, it may be difficult for unrepresented defendants to take in information about pleas and defences, and to understand it sufficiently in such a pressurised court environment.

6.3.2 Interview data - the role of a lawyer and the importance of plea hearings

As suggested, court personnel can ask unrepresented defendants whether they wish for the hearing to be adjourned so that they can get legal advice. Whether they will receive legal advice will depend upon whether they are entitled to legal aid, or to see a duty solicitor and, if not, whether they are able or willing to pay for the legal representation themselves. Most interviewees considered legal advice and representation to be important at the plea hearing stage, because of the issue of unrepresented defendants pleading guilty when they possibly could have a defence. Three defence lawyers and two legal advisors also spoke about the opposite issue - where unrepresented defendants plead not guilty in situations where they

⁵⁷ The frequency in which legal advisors informed defendants about the implications of them pleading guilty or not guilty, if they had been charged with an either way offence, is set out in relation to the cases observed in this study in s. 6.7.2(b).

might have pleaded guilty if they had received advice from a solicitor. This creates extra work for the courts and results in defendants losing their sentencing discount, and being made to pay higher court costs if they are found guilty after a trial.

A couple of defence lawyers said that the duty solicitor can assist in relation to defendants: not knowing whether to plead guilty or not guilty; not always knowing the strength of their case; and not always knowing whether they have got a defence or not. However, as noted above, this is not available to everyone and not everyone who is entitled to see the duty solicitor will actually choose to do so:

They turn up unrepresented at the first hearing and if they are entitled to have the duty solicitor and you're in a court where the duty solicitor has got time to attend to people then you can stop any problems because then it may be that they are entitled to legal aid or the duty solicitor can say 'no you've got a defence to this or no that isn't a defence so you need to go this way'; so you get a situation where it's the first hearing [where unrepresented defendants experience problems] but they can ordinarily depending on the offence see the duty solicitor. (Interview participant 7 - DL)

Some defence lawyers suggested then that the problems that unrepresented defendants experience at first or plea hearings are minimised due to the existence of the duty solicitor. When the duty solicitor is not available, though, or when a defendant does not wish to see one, two other defence lawyers thought that the problems that unrepresented defendants' experience were most noticeable at plea hearings:

[Unrepresented defendants experience problems at] plea hearings probably more than anything because that's such a key stage for them to be able to understand actually in law if they are guilty and if so, you know some negotiations will take place if there is a lawyer there to see if there is an alternative charge that they could be dealt with, if it's the appropriate charge that's been alleged. (Interview participant 6 - DL)

I think at the first hearing [the problems with unrepresented defendants' inexperience are most noticeable]. The first hearing is a crucial hearing because it is at that point you are asked by the court whether you plead guilty or not guilty and that then sets the ball rolling as to how a case is going to proceed, and I think it is crucial at that point that somebody knows whether they should be pleading guilty or not guilty and you can only really do that in slightly more complicated cases when you've had the benefit of legal advice. (Interview participant 10 - DL)

As suggested, in situations where defendants are not entitled to see the duty solicitor, proceedings can be adjourned for unrepresented defendants to get legal advice when they are experiencing difficulties at the plea hearing; but even if this does happen, as a defence lawyer recognised, it still does not mean that the matter will be resolved when the defendant next appears in court:

Oh, they undoubtedly do experience problems. The first one being an almost complete lack of knowledge of the law that will apply to whatever it is they are being prosecuted for and very quickly it becomes clear to the court that they don't understand the technicalities and that can then cause chaos in the court process and even if the court adjourns for them to go and seek legal advice, they are then hit with the problem that they probably can't afford legal advice and they may come back the next time no better able to deal with it than the first time. (Interview participant 5 - DL)

In situations where the defendant is unable to afford or wishes to obtain legal advice and is not entitled to see a duty solicitor, then they are then reliant upon court staff, like the legal advisors discussed above, to assist them. The ways in which court personnel responded to unrepresented defendants at the plea stage in the observed cases will now be considered.

6.3.3 Courtroom observations – adjournment of proceedings for legal advice

Courtroom observations confirm what has been discussed above in relation to some unrepresented defendants experiencing problems at the plea hearing stage. Instances, for example, were observed where unrepresented defendants entered equivocal pleas, or entered not guilty pleas but did not appear to have a defence in law (based upon what they said when court personnel were asking why they were pleading not guilty).⁵⁸ The approach taken by the legal advisor, judge or magistrates varied – from them providing an explanation of the offence, to telling the defendant that they did not have a defence, to suggesting that they get legal advice and for the hearing to be adjourned.

In one case, the defendant had been charged with drink driving. The defendant was identified and the charge was read out.

⁵⁸ Though note, although I have a law degree I am not a qualified lawyer so this is based upon my own knowledge of the law, on my own interpretations after observing other hearings (plea hearings, sentencing hearings and trials) involving similar cases and based upon the reactions of court staff after the defendant had entered his/her plea.

Legal advisor to defendant: guilty or not guilty?

Defendant: I didn't drive when I was over the limit. I drank afterwards, after driving.

Legal advisor to defendant: It would be a good idea to speak to the duty solicitor.

Defendant: Just put in a guilty plea. It is too much for me to have to keep waiting and coming back.

Legal advisor to defendant: No, we can only take a guilty plea, if you have committed the offence. We cannot take an equivocal plea.

Defendant: I'm positive I wasn't driving.

Legal advisor to defendant: The duty solicitor can speak through the case with you. It's free of charge.

Defendant: So, do I have to come back again?

Magistrate to the Defendant: It will be dealt with today. (Case 279)

The same result happened in another case, where the defendant had been charged with failing to provide a specimen of blood. Again, the defendant was identified, the charge read out and when he was asked whether he was pleading guilty or not guilty, the following exchange occurred.

Defendant to legal advisor: Guilty. I've got a fear of needles, but I just want to get it over and done with.

Judge to defendant: Are you sure you don't want to speak to a duty solicitor about this? Because you could potentially have a defence. It would have to amount to a reasonable excuse and if you have a severe fear of needles that that could amount to a defence. [The defendant agreed to go and speak to the duty solicitor]. (Case 181)

In another few cases, after the defendant had pleaded not guilty and said his/her reasons for doing so, the judge or legal advisor provided an explanation of the offence/s, said what the elements of the offence were, and then adjourned the hearing for the defendant to get legal advice. In one case after the defendant had sought legal advice, he changed his plea from not guilty to guilty (Case 200), whilst in another the defendant changed it from guilty to not guilty (Case 53).

Even though it does cause delay and undermine efficiency, the willingness of the court staff in these instances to adjourn proceedings was important as it enabled the defendants to make a more fully informed decision and in some instances, it changed the direction and potentially the outcome of their case.

6.3.4 Courtroom observations - explanation of the offence charged

There were also instances during observed cases where only an explanation was provided by court staff, instead of recommending legal advice or adjournment for that purpose. This was perhaps due to efficiency reasons and the desire to avoid delaying proceedings, as has been suggested by interview participant 10 above (see s. 6.3.1).

In Case 94, the defendant had been charged with being drunk and disorderly. The defendant's statements and behaviour suggested that he was not sure whether he should plead guilty or not. It also appeared that he had mental health problems, which was confirmed at the sentencing stage. The defendant initially entered a not guilty plea, but then said he was guilty after hearing a summary of the prosecution's case. However, when he was then asked whether he wanted to change his plea or not he said he did not know. The legal advisor asked him a few questions and briefly spoke about the offence. After being asked again whether he wanted to plead guilty or not, he said that he was guilty and he was fined and sentenced to a conditional discharge.

The defendant was also charged with failing to provide driver information in Case 145. The defendant seemed confused and made comments that suggested that he thought he was at court for speeding and not for failing to provide information. He had indicated that he was going to plead not guilty. The legal advisor explained what offence he had been charged with and briefly explained the law to him. Consequently, the defendant decided to plead guilty and was fined £225 and given six penalty points.

Conversely in Case 144, the defendant did not change his plea, on a charge of failing to provide driver information. The defendant was identified and the legal advisor asked the defendant why he was pleading not guilty and he said he was, as he had not received any letters from the police. The legal advisor explained the law to him and said that there was an assumption that the letters will have been sent but he said he wanted the matter to go to trial. As a consequence, the legal advisor told him to 'bring as much information as you can to trial'.

6.3.5 Courtroom observations - advising the defendant on whether they have a defence

Instances were also observed where the legal advisor went beyond providing an explanation of the offence, and said whether, in their view, the defendant had a defence or not. For example:

[The defendant was identified and the charges were read out. He/she had requested an interpreter but one had not turned up.]

Legal advisor to the defendant: We'll adjourn it if your understanding is not good enough.

[The legal advisor said to the defendant that he had indicated he was going to plead not guilty.]

Legal advisor to defendant: Explain what happened.

Defendant to legal advisor: I've got a foreign licence and I did not know an international licence was not valid.

[The legal advisor provided an explanation of the law to him and said,] it doesn't look like you've got a defence. At trial you're likely to be found guilty. There will be higher costs if you go to trial. [The prosecutor said if the defendant pleaded guilty to speeding, he would withdraw the other charges, which he did. He was fined £100 and 3 penalty points were put on his licence]. (Case 136)

Evidently then, the approaches taken were mixed and so were the responses from the defendants. It is important to note, however, that the cases discussed above were all observed in Court A, that is, none of the unrepresented defendants observed in Court B appeared to experience any difficulty in relation to entering their plea (though of course this does not mean that they did not). Thus, in all of the hearings observed in Court B, where a plea was taken, the charge was read out and a plea was entered and then the defendant was either sentenced there and then or sentencing was adjourned. However, the number of hearings observed in Court B, where an unrepresented defendant entered a plea, was small compared to Court A (see s. 5.1.2) and defence lawyers interviewees, who worked at or had worked at Court A or B or both, did not indicate that the problems that they identified were unique to Court A.

6.3.6 Summary

To summarise, the findings indicate that unrepresented defendants can struggle with knowing whether to plead guilty or not guilty to the offence(s) that they have been charged with. It is

important, however, to acknowledge that there were cases observed where unrepresented defendants just entered a plea of guilty or not guilty and no further questions were asked. In those instances, the defendants may or may not have found it difficult to decide which plea to enter, and may have entered a different plea from the one that they would have been advised to enter by a lawyer if they had been advised by one. Without any more information, however, it is impossible to comment.

As shown, based upon the interviews and observations, court actors do provide some assistance to unrepresented defendants who are struggling, in their view, to enter a correct plea. However, the frequency and nature of the assistance varied. This gives rise to the issue as to how court personnel should respond to unrepresented defendants and what assistance should be offered. Furthermore, the helpfulness of any assistance provided by court personnel needs to be examined by interviewing defendants themselves.

Nevertheless, the findings from this study are similar to those found in Transform Justice (2016). That research found that many prosecutors were concerned that some unrepresented defendants plead guilty to a charge without understanding the consequences or when an alternative lesser charge might have been more appropriate; and that they do not always know whether the case against them is strong or weak or know what counts as a viable defence. This can result in them pleading guilty when they are very unlikely to be acquitted or pleading guilty when they have got a good chance of being acquitted. One prosecutor suggested that unrepresented defendants do not always know the strength of their case and can be pressurised into pleading guilty by legal advisors and the bench (Transform Justice 2016: 11).

6.4 Cross-examination

If an unrepresented defendant pleads not guilty at their plea hearing, then at trial they may choose to cross-examine any prosecution witnesses. From the cases observed, unrepresented defendants were generally poor at cross-examining and tended to make statements instead of asking questions (see below). They also usually did not know what questions to ask, asked irrelevant questions and/or did not give the witness the chance to answer the question asked. Unrepresented defendants tended to need assistance when cross-examining; but the assistance given varied depending on the legal advisor, magistrates, or judge. Some court personnel just

asked them whether they had any questions to ask; others tried to provide an explanation to them as to what they had to do and turned their statements into questions; whilst others also actively asked additional questions of the witness.

6.4.1 Failure to ask pertinent questions

In the examples discussed below, the defendant said very little or asked irrelevant questions and the court personnel did little more than just ask if they had any questions to ask. In comparison, from the observations, professional lawyers tended to ask more questions overall in an attempt to cast some doubt over the evidence presented.

For example, in this trial, the defendant had pleaded not guilty at a previous hearing to the offence of failing to provide driver's information. The prosecutor provided a summary of the case, and the prosecution witness then gave evidence.

Legal advisor to defendant: You've heard [name] give evidence. What is it that you don't agree with?

Defendant: I don't know if it's incorrect or not. I just know what my side of it is.

Legal advisor: You will be able to give your evidence later. In relation to what Mr [name] said is there anything you disagree with? Any questions of Mr [name]?

Defendant: No. (Case 386)

In another case, a not guilty plea had been entered for the offence of failing to provide a breath specimen. The prosecution witness gave evidence. A video was then shown of the defendant at the police station.

Legal advisor to the defendant: Now you've seen the evidence. You've seen the CCTV. Anything that the officer said that you don't agree with, you can now ask about. Any questions of the officer?

[The defendant was talking really fast and making statements relating to his defence, that he was not on his mental health medication at the time. The legal advisor did not intervene, but the prosecutor did.]

Prosecutor to the witness: The question is, did the defendant at any point say that there was a problem with his medication?

Witness: No and when he was asked whether there was any medical reason as to why he couldn't take the test, he said that there wasn't.

[The prosecution then asked another question after he had answered.]

Magistrate to the defendant: Have you got any more questions?

Defendant: Only this. I haven't got any more questions.

[The second witness then started to give his evidence. He explained why he and his colleague stopped the car the defendant was driving in and why they did the breath test.]

Magistrate to the defendant: Have you got any questions?

Defendant: Same question as before.

[Then the defendant started making statements in his defence.]

Magistrate to the defendant: What do you want to ask this officer?

Defendant: Nothing.

Magistrate to defendant: You can give your own evidence in a minute. (Case 371)

The defendant did not appear prepared to cross-examine the witness and he also appeared to find the process stressful and overwhelming.

6.4.2 Some assistance from the legal advisor/magistrate

In other observed cases, the defendants asked slightly more questions and the legal advisors and magistrates provided more assistance. Nevertheless, the defendants observed still seemed to struggle with cross-examination, both in relation to its purpose and what they were required to do. They seemed to think the process was inquisitorial rather than adversarial, and they just wanted to explain to the magistrates what their case was. As a result, the magistrates in Case 153 - asked additional questions of the witness; and the legal advisor took a more active role in questioning the witness in the second case – Case 366.

The defendant was on trial for driving whilst using a telephone. The prosecution's witness gave evidence.

Legal advisor to defendant: You now have the opportunity to ask the officer questions. You can question the officer's evidence. You're not putting your case forward. You'll do that later. Do you have any questions to ask the officer?

Defendant: I disagree with it all, what he's said in his statement.

Legal advisor to defendant: Ask him specific things you don't agree with.

[The defendant made another statement and the magistrate said]: You need to direct your questions to the officer.

Legal advisor: It's question and then answer. Question and answer. [She also reworded the defendant's statement into a question, as an example.]

Defendant to the witness: You're saying no one was in the car? My daughter was in the car. Did you not see her?

Witness: No.

Defendant to the witness: How did you see my phone? It was an earring. You said I had brown hair. I've never had brown hair.

[The magistrates asked further questions to the police officer about the lighting, the time of day, and the positioning of the officer's car and the defendant's when he allegedly saw the defendant on her phone.]

Magistrate to the defendant: Have you got any further questions that you've thought of?

Defendant: No. (Case 153)

The defendant was also on trial for using his phone whilst driving in this hearing in another case. The defendant began his cross-examination as follows:

Defendant: The time I was on my mobile phone I was not on X (name of street). I was on private land. I turned out off the private road onto [X].

Magistrate to defendant: You need to ask the officer questions. You need to put it in the form of a question. What questions do you want to ask him?

Defendant: You said you saw my phone lit up, when in use my phone does not light up. The screen is black.

Magistrate to defendant: That's not a question.

Defendant: I'm trying to say what happened.

[The magistrate gave a summary/explanation of what the police said in his evidence.]

Magistrate to defendant: What's your defence?

Defendant: He didn't see me on my phone on [X] lane.

Legal advisor to witness: Did you see Mr [X] use his phone on [X] lane?

Witness: Yes.

Magistrate to defendant: The officer explained where he said he saw you, are you disputing that?

Defendant: No, but I wasn't using my phone on that road.

Legal advisor to witness: The defendant said the screen was black, are you sure the screen was illuminated?

Witness: Yes, 100%.

Magistrate to defendant: Are you disputing that?

Defendant: Yes, he said he saw it in my hand but I wasn't using it.

Magistrate to defendant: Any other questions for the officer?

Defendant: No. (Case 366)

Despite the difficulties experienced by the unrepresented defendants then, court staff tried to assist them to be able to effectively participate in the process.

6.4.3 Cross-examination and court-appointed lawyers

I also observed a trial, in which a lawyer was appointed to cross-examine on the defendant's behalf (the defendant had been charged with assault). This provided some assistance for the defendant, but it was limited, as the lawyer had only been appointed to cross-examine the

alleged victim, and not the other two prosecution witnesses. Despite the lawyer's help, the defendant continued to make comments, even when told he should ask questions, and asked if he had any:

Witness two (cross-examined by the defendant):

Legal advisor to defendant: This is your opportunity to ask questions.

Defendant to witness: Apparently I kicked him.

Legal advisor to defendant: You need to put it in a form of question.

Defendant to witness: How did I kick him?

Witness: Flat foot.

Legal advisor to defendant: What position was he in when he was kicked?

Witness: He was crouched down.

Legal advisor to witness: How does he get kicked with a flat foot if he was crouched down?

[Witness: The witness explains further what happened.]

Legal advisor to witness: Explain what happens after he was kicked.

Witness: He fell onto the grass, next to the curb.

Legal advisor to witness: You didn't see any injuries?

Witness: No.

Legal advisor to defendant: Any other questions you want to ask?

Defendant to witness: Did he go and report his injuries to anyone?

Witness: No, he did not.

Defendant to witness: If I had been kicked I would have suffered injuries.

Legal advisor to witness: You're making comments again Mr [name]. Ask the witness questions.

Defendant to witness: Did you see me going back to [place named]?

Witness: Yes, I did.

[The prosecution then asked the witness more questions to clarify his evidence.] (Case 369)

The defence legal representatives interviewed also mentioned some of the difficulties that unrepresented defendants face when having to cross-examine witnesses during trial proceedings. Half of those interviewed expressed concern about unrepresented defendants cross-examining and questioned their ability to do so. This was based upon their own observations and/or belief that unrepresented defendants generally do not possess the required skills to do so. The other half did not mention this specifically during the interview. For example:

Just knowing what to do because the prosecution call witnesses and effectively, they give evidence and then the defendant's just told 'right do you want to ask this person any questions' and of course if someone has got no legal training or experience that's a very difficult thing to ask. (Interview participant 11 - DL)

In relation to whether unrepresented defendants know what questions they should and should not ask, a defence lawyers said:

Oh yeah, [unrepresented defendants' cross examining is a] absolute nightmare. Complete nightmare because they don't understand the rules of evidence, they don't know when they should talk and when they shouldn't talk; they don't know what is admissible evidence; they don't understand what questions to ask; they don't understand what questions they can't ask; they're just chaotic. (Interview participant 7 - DL)

Lawyers may be appointed to cross-examine witnesses, when the witness is seen to be vulnerable. Interviewees suggested that the court-appointed lawyer scheme (discussed in s. 6.2.7) does provide some assistance to those who are unrepresented – even if this is not its intended or main purpose – and it helps the court out. This is because when lawyers are appointed to cross-examine all witnesses the court does not have to try and deal with an unrepresented defendant who does not know how to cross-examine. However, they also recognised that court appointed lawyers are restricted in what they can do, are paid to do, or are supposed to do. So, for instance, once they have finished cross-examining, they leave, so they do not provide any assistance in relation to sentencing or any advice on appeals, if the defendant is convicted. For example, one interviewee said that:

What happens is for the sake of argument, we would represent a client at the first hearing assuming that they would get legal aid, apply for legal aid, legal aid is refused and they have to be unrepresented because they won't pay or can't pay – can't afford to pay - and then the court, the prosecution has to correspond with them direct because they don't have a lawyer. The prosecution very rarely correspond with a defendant direct and send them the papers as they should or the CCTV evidence as they should if it's a CCTV case, or soon to be body worn video camera footage from police officers. That will be a vital part of domestic violence cases from now on and again they won't send them that so they are very disadvantaged in what they see. If the court appoints a lawyer to cross-examine the victim then the court – sorry the prosecution will send everything to the lawyer. The lawyer does not act for the client. The lawyer acts for the court to do one job only which is to cross-examine the victim on the defendant's behalf but we're not instructed by the defendant. ... So you're not expected to do any of the preliminary work. You're just expected to turn up on the day having prepared your

cross-examination for the one, perhaps two witnesses, unusual to be more than 2, do the cross-examination and then walk away from the case. ... It's not permitted for the solicitor who has represented them - sorry who has been court appointed to do the cross-examination to then represent them at the sentencing hearing. (Interview participant 4 - DL)

However, a few of those interviewed suggested that lawyers do tend to do more than the minimum required of them. For instance:

As the court appointed lawyer, you're not allowed to actually advise them about the strengths and weakness of the case, you've just got to take instructions about cross-examination and what they can and can't do. I think the courts get excellent value for money because it's very difficult for a lawyer to not stray into advising more than they are actually being paid for in the circumstances. (Interview participant 12 - DL)

A defence lawyer also suggested that they do not always see the client before the day of trial - when they are appointed to cross-examine - like they normally would, and that this can cause problems:

The problem with that [a solicitor being appointed to cross-examine] is you don't always get time to talk to that solicitor until the day of the trial. The court want to start spot on ten o'clock. You're bailed until 9.30 so you only get half an hour if you're lucky. (Interview participant 2 - DL)

A legal advisor, however, said that she thought that the scheme was a positive thing and said that often the solicitor that is appointed to cross-examine on behalf of the defendant is someone that the defendant will have met before and will be familiar with (though this may not be the case in instances where the defendant appears unrepresented for their first hearing):

I think that is a good, positive move for all parties in the criminal justice system because obviously that's been around for a few years but not all the time I've been a legal advisor - but yeah, I would say most of them find that to be sort of useful and positive. It's often now, which it wasn't a few years ago, it is often now, somebody that they are familiar with, so it is often the solicitor that they instructed initially but then discovered that they can't get legal aid who are then appointed, so is someone who has seen part of the process with them, so yeah I would say that is a positive move forward. (Interview participant 16 - LA)

Another legal advisor suggested that it was beneficial to not only defendants but also the court and any witnesses involved (as was one of the original purposes, to prevent defendants inappropriately cross-examining witnesses):

It makes it easy for a defendant in court because ... what will happen is if we court appoint someone the solicitor will have a briefing with them before the trial starts and they will ask them what questions they want to ask of the witness and they will also advise them in terms of the appropriateness of that as well – just because a defendant wants to ask a question doesn't mean that that's either relevant to the case or an appropriate question to ask so they'll have that briefing with the solicitor first and the solicitor will ask the questions for them because obviously for a defendant in court, it is a nerve wracking experience for them and their mind might go blank and no matter how many times we say to them 'right do you have any questions for the witness?', 'do you want to write them down?' 'do you want to think about it?' in that pressurised environment they may forget things that they want to ask, so it has definitely made it easier for the defendant and also easy for the witness and for the court as well to have that solicitor there to ask the questions. (Interview participant 18 – LA)

6.4.4 Summary

To summarise, based upon the data collected, defendants tend to struggle to cross-examine witnesses in both courts that were observed. They rarely have the necessary skills or knowledge. This can result in them not asking many questions of the witness or asking inappropriate or irrelevant questions. The level of help they seemed to get from those in court appeared to vary depending on the personalities of those in court, the circumstances and facts of the case and on the defendant themselves. When a lawyer is appointed to cross-examine a witness, this assists the defendant in a number of ways, but there are a number of limitations to the scheme. As suggested, lawyers will only be appointed to cross-examine witnesses in certain instances, where the court feels that the witness is vulnerable. The court may also decide that some individuals giving evidence are vulnerable, whilst others are not; so the defendant will be left to cross-examine the latter. It is not clear how much it costs for lawyers to be appointed for this purpose, compared to of the relative cost of ongoing representation through legal aid. This should be researched further.

The inability of most unrepresented defendants to effectively cross-examine has been noted in previous studies; although the matters discussed above in relation to court-appointed lawyers have not been researched as far as I am aware. McBarnet (1981) found that

unrepresented defendants usually floundered when cross-examining, and usually made statements due to them lacking the required skills. Similarly in Transform Justice (2016), there was a consensus amongst participants that unrepresented defendants struggled in preparing and conducting cross-examination. They usually did not understand the rules of cross-examination and made statements rather than asking questions, or asked irrelevant questions. Participants pointed out that a lawyer can be appointed to cross-examine vulnerable witnesses and discussed some of the benefits of this scheme to vulnerable witnesses. Some lawyers thought that it would not cost a lot more if the defendant in these cases were awarded legal aid so that a lawyer represented them throughout the trial.

In Thomson and Becker (2019), most of the interviewees also expressed concern about the way in which some unrepresented defendants behave whilst conducting cross-examination and the effect that this might have on witnesses. When defendants were asking unnecessary questions and being aggressive, for example, some judges said that in these situations, they had to act to control the defendant's behaviour. In doing so, they had to tread the line between allowing the defendant to put forward their own case and preventing harm to the witnesses.

Unrepresented defendants are likely to struggle when it comes to cross-examining due to the knowledge and level of skill that is required when doing it. The purpose of cross-examination is to undermine and discredit the witness and/or their evidence, whilst also advancing the cross-examining party's own case, by eliciting favourable evidence and putting their own theory of the case across (Webb et al 2017: 161, 163). However, it is difficult to see how procedures relating to cross-examination or the nature of cross-examination could be changed to help unrepresented defendants. Cross-examination is a key feature of an adversarial trial (Doak and McGourlay 2009: 47). Furthermore, according to the principle of orality, in English evidence law, live oral witness testimony is generally regarded as the best way for the accuracy and reliability of evidence to be tested is if witnesses give oral evidence live. The vast majority of witnesses, in England and Wales, are required to do this. When witnesses give evidence live in court it enables the jury/bench to take into account the body language of the witness and other non-verbal clues, like the tone of their voice and facial gestures (Roberts and Zuckerman 2010: 299). Furthermore, in live testimony, witnesses can answer further questions, clear up anything that is ambiguous or unclear, and elaborate on their evidence in a public arena (Roberts and Zuckerman 2010: 294).

One possible way in which unrepresented defendants could be assisted in relation to cross-examination is by extending the regime for vulnerable and intimidated witnesses to help them (see ss. 16-17 YJCEA 1999 and s. 2.3.2). These measures are subject to the discretion of the court – and they are currently not all available to defendants. In particular, s. 28 of the 1999 Act allows for cross-examination to be pre-recorded on video before the trial, so that the witness is not cross-examined in open court. Those cross-examining may only ask questions agreed by the judge in advance. A similar provision allowing defendants to cross-examine all witnesses in this way (vulnerable/intimidated or not), so that defendants would be able to see the witness statements and submit questions in advance would reduce the stress and nervousness associated with cross-examination for unrepresented defendants. It would also mean that defendants would have to prepare their questions when cross-examining witnesses in advance, so they would not be required to think on their feet as they currently do in the courtroom setting. Inappropriate questions (such as personal attacks on the witness, for example) would be less likely, because the questions would have to be approved by the judge beforehand. The issue, however, is that it would still be difficult for unrepresented defendants to be able to prepare questions and know what questions to ask. Some of the questions asked in cross-examination depend upon how the witness answers the previous questions asked. It would be very difficult for an unrepresented defendant to be able to foresee what answers the witness would give. Thus, in spite of the difficulties that unrepresented defendants tend to experience when cross-examining, in order for cross-examination to have the most impact, it may still be more desirable for questioning to take place live at trial (Doak and McGourlay 2009: 25).

6.5 Sentencing hearings and mitigation

At the beginning of the hearings observed where a sentence was either passed or considered, generally the defendants were identified and the legal advisor read out the offence(s) the defendant had been charged with. A guilty plea was then entered, or if it had been entered previously, or the defendant was found guilty at trial, this was stated by the legal advisor. The prosecution then gave an outline of the case and listed any of the offender's previous convictions. If an oral pre-sentence report had been prepared, then a member of staff from the Probation Service read it out. Written pre-sentence reports were read by the bench before passing sentence. If the defendant was represented then their lawyer gave their plea in mitigation. If the defendant was unrepresented, then they were usually asked if they had seen

the pre-sentence report and whether they wanted to say anything before being sentenced. The bench then decided if they were willing and able to sentence the defendant in that hearing, or whether it would have to be adjourned (for instance, to send the case to the Crown Court for sentence, because of time and caseload constraints, or in order to request a pre-sentence report).

The purpose of a pre-sentence report is defined by s. 158(1)(a) of the CJA 2003. It is a report which seeks to assist ‘the court in determining the most suitable method of dealing with an offender’ (see also National Offender Management Service 2016: 7). In these reports, an analysis of the offence committed and pattern of offending should be discussed, as should the risk of harm and the likelihood of reoffending. Relevant information about the defendant’s circumstances will also be provided with links to their offending behaviour highlighted. Sentencing suggestions are also made, which should be in proportion to the seriousness of the offence and will address the defendants’ risk and needs.

The plea in mitigation by the defence and pre-sentence report, therefore, provide information to the bench to assist them to impose the appropriate sentence. They also provide the defendant with a voice and an opportunity to be heard and an opportunity to participate. The defendant can speak directly to the court themselves (if they are representing themselves) or indirectly through their solicitor (if they are represented) and/or a member of staff from the Probation Service, if a report has been requested (Doak and Taylor 2013; Thomas 2007).

Some of the factors that would be relevant in a plea in mitigation are illustrated by this quote provided by a defence lawyer (he/she was asked about the ability of unrepresented defendants to mitigate):

They [unrepresented defendants] just don’t know what to say. A defendant who perhaps has a massive amount of personal mitigation that a solicitor would draw out of them in an interview room like this – you know like we’re having a conversation. You know ‘tell me about your family; tell me about your school’. ‘Oh well you know I didn’t go to school. I’ve been in care for most of my life. My parents have drug and alcohol problems. In fact my mum passed away when I was 13. We were taken into care. I’ve been separated from my siblings. You know it’s been really tough’. Those kind of things ... you’ll get asked that an unrepresented defendant, ‘have you got anything that you want to say about what’s happened?’ ‘No, no or no, I’m sorry’ - so the court will have no background information or information about the offence and why it’s

happened. ‘Well my benefits had been sanctioned and I absolutely, I had no cash. I was forced to do it to get ... some food or get some electric or – you know – or otherwise I’m homeless at the moment and I was destitute. I had been robbed and I didn’t have any money’. All of those things are things that the court should take into account when sentencing somebody. You know was it a planned thing or was it spur of the moment, were there any aggravating or mitigating features, no cooperation with the police? They won’t know about that but those are all things that a solicitor would ask and time and time again you’ll see an unrepresented defendant and shoplifting is a good example because if you’ve not got much of a record you’re unlikely to go to prison for it so you’re unlikely to get legal aid for it. Sometimes it’s a client you’ve dealt with previously and you know there’s a lot of personal mitigation and they simply answer, in one word. ‘Have you got anything you would like to say about it?’ ‘No.’ (Interview participant 3 – DL)

6.5.1 Results from the current study

In relation to the ability of unrepresented defendants to mitigate, the data from the observations in the current study largely confirm the data gathered from the interviews: unrepresented defendants tended to say a minimal amount when they were asked if they wanted to say anything before being sentenced. They would not make a sentencing suggestion, except in hearings where a pre-sentence report had been prepared and they had been asked if they agreed with the sentencing suggestion recommended in that report (they all said that they did). Some unrepresented defendants observed did not say anything at all:

In one case, the defendant had pleaded guilty to driving or attempting to drive with excess alcohol (while exceeding the legal limit).

Legal advisor to defendant: Did you want to explain the events that led up to the situation? Say anything?

Defendant: I’ve got nothing to say. I’ve said everything at the police station. (Case 11)

This also occurred in Case 86 (the defendant had pleaded guilty to the offence of criminal damage) and Case 377 (the defendant was found guilty after trial for using threatening behaviour or intending to cause someone to fear violence or to provoke them to use violence). Furthermore, in only a very small number of cases did an unrepresented defendant make a comment which appeared to be offence related when they were asked if they had anything to say before being sentenced (such as ‘it was fortunate that no one was injured’ in Case 338).

In some other instances, although the defendant only spoke briefly, they did mention some factors relating to personal mitigation (they expressed remorse and/or acknowledged it was wrong and/or acknowledged guilt).

In one example, the defendant had pleaded guilty to driving or attempting to drive with excess alcohol (while exceeding the legal limit).

Legal advisor to defendant: You don't have to say anything but did you want to explain anything?

Defendant: It was a mistake. It was out of character. (Case 33)

In another example, the defendant had pleaded guilty to being drunk and disorderly.

Legal advisor to defendant: Did you want to say anything about the offence?

Defendant: I should have dealt with it differently. I am sorry. (Case 35)

A guilty plea had also been entered by a defendant who had been charged with driving whilst disqualified and not having third party insurance.

Legal advisor to defendant: Do you want to say anything?

Defendant: No, I'm happy with what's in the report.

Magistrate to defendant: We are concerned about how soon this offence was committed from when you were disqualified.

Defendant: It was very a very reckless act to get behind the car.

Magistrate to defendant: We are prepared to go along with what probation have said. (Case 299)

Although some mitigation was offered by the defendants in these cases, they did not mention other possible likely relevant factors relating to the offender or the offence, which would have been discussed had the defendant been represented. For example, information could have been provided on: the character of defendant and whether he/she was in employment, volunteering, or studying at the time of the court appearance, of the offence, or in the future; whether they have/had any family responsibility; and whether they suffer (or have suffered) from physical or mental illness or disability. They could have also discussed what impact the offence has had or will have on them or on others, and how they seek to change their behaviour to avoid reoffending in the future.

6.5.2 Reasons why unrepresented defendants experience problems at the sentencing stage

Some interviewees also discussed if they thought unrepresented defendants tended to experience problems at the sentencing stage. A legal advisor generally thought that unrepresented defendants did not:

I think perhaps [unrepresented defendants' experience] less [problems] than people would anticipate in the types of cases that we deal with. I think the majority of cases are quite low level and cases which – you know – the majority of people are capable of speaking up for themselves and the magistrates are used to eliciting the information that they need either directly from the defendant or through probation and things like that. (Interview participant 17 – LA)

Nevertheless, some other participants felt that unrepresented defendants struggle for an array of different reasons. These included: not understanding what to say or what constitutes mitigation, not understanding the purpose of mitigation, not accessing or knowing that sentencing guidelines exist; and not being confident in the court environment when it comes to speaking to professional court staff. For example:

The court isn't appraised of the full position [when a defendant is unrepresented]. The court when sentencing have sentencing guidelines to look at ... So you've got the offence and then you've got aggravating and mitigating factors and it can bump you up or down on a scale; so if the court doesn't know about mitigating factors then you know they might put the category of offence in a more serious bracket than perhaps it would be had they heard a persuasive argument from a solicitor. (Interview participant 3 - DL)

I would say the biggest problem with that is the reluctance to speak to the magistrates. If there's a report that probation have prepared, then in my experience, they'll be more open with probation. They will have sat and had a one-on-one interview, and they'll have seen the content of that report before – well at the same time as the magistrates are reading it – so they'll often be, you know, 5 pages of information that the defendant has disclosed so they feel then, 'why do I need to say anymore to the bench?' which might be the right thing for them to do but you sometimes feel that they have not said as much as they might have wanted to say either through nerves or through them not knowing what they should be saying. (Interview Participant 16 – LA)

In relation to sentencing guidelines, if unrepresented defendants do not know that they exist or if they do not understand them, the extent to which they will know what they should and should not be speaking about during their sentencing hearing will be restricted.

The existence of sentencing guidelines (see s. 2.5(1)), though, was considered helpful by some interviewees in that they promote greater consistency in sentencing regardless of whether a defendant is represented or not. For example:

I don't think it [being unrepresented] has any effect upon the sentence because the sentence is set by sentencing guidelines. Yes they are guidelines and yes they are exactly what they say they are but by and large if you are sentenced to an offence, magistrates will sentence within those guidelines. (Interview participant 2 – DL)

However, although guidelines are more restrictive, they still leave quite a bit of discretion and flexibility (Roberts 2013), and in any event that discretion is bounded by aggravating and mitigating factors, which is the sort of things that the majority of participants said defendants struggle to effectively communicate. Pre-sentence reports do help to identify those factors, though.

6.5.3 The benefits and limitations of pre-sentence reports

A number of interviewees recognised pre-sentence reports as being helpful in relation to unrepresented defendants. For example:

If they plead guilty then, the management of the case is to a great extent taken out of their hands anyway. The court will always have the ability to ask for a pre-sentence report, so the Probation Service will become involved in cases when you've got an unrepresented defendant you're then likely to have the court duty probation officer putting forward what would be part of their mitigation for them to the bench so that removes some of the difficulties. (Interview participant 5 - DL)

Oh yeah that [a pre-sentence report] is definitely going to be to their advantage because the probation officer would then ask them questions that a solicitor would ask them so the magistrates are going to get a lot more information about someone if they have got a pre-sentence report available ... the Probation Service look at all different aspects of their life. They will look at the offence, they will look at trigger points for the offence, they will look at their personal circumstances, they'll look at their previous history, they'll look at any drug or alcohol issues, any mental health issues because there looking at risk so yeah, it is always going to be advantageous for the court and for the defendant to have a pre-sentence report first because everyone is going to have a lot more information. (Interview participant 18 – LA)

When a written pre-sentence report has been prepared, a legal advisor stated that defendants will be given it to read before the hearing or if it is an oral one, then the probation worker will have gone through it with them:

Our preference is to sentence on the day. So, the magistrates dealing with the case, 'were thinking about – you know, it's community or higher, and ask the Probation Service to prepare an oral on the day report and I think that's probably about 70% of cases are dealt with in that way. Sometimes for a host of different reasons that can't be done but that's less common – probably about a quarter or a third of cases, then it will be adjourned for a report and there will be two things happen – either they come back on another day and an oral report is prepared on the day and delivered then or much, much less common now in the magistrates' court, a written report – so that's probably less than 10% of cases. (Interview participant 17 – LA)

Another legal advisor mentioned an issue with literacy in relation to defendants not always been able to read their reports:

Literacy can be an issue – so we have just talked about giving people their reports. We don't necessarily know their literacy levels – and I think, well last time I looked at it, probably 15 years ago, there was quite a lot of evidence to say that many people who appear in criminal courts have literacy problems, so you don't obviously know that until someone says 'I've not been able to read that report' – and if they haven't been able to read it then it's sort of finding the time to be able to sit with somebody which in an ideal world you might go through but in reality because you are not representing them, that's not sort of part of the role – you'd probably call upon probation to help with that. (Interview participant 16 - LA)

The issue with this, however, is that court staff would be reliant upon an unrepresented defendant to bring it to their attention if they did have any literacy issues and did need this type of help, which an unrepresented defendant may not feel confident in doing.

In the current research, in relation to pre-sentence reports, in Case 220 the defendant was asked if he had seen his report and he had said he had just been given it, so the hearing was stood down for him to read it. In Case 46, the probation officer made the judge aware partway through the sentencing hearing that the defendant had not read it, so he read it, whilst the lawyers of his co-defendants spoke. In the other instances, where a pre-sentence report had been requested, the defendant said he/she had read it or been through it with his/her probation officer.

A problem with pre-sentence reports is that they are now increasingly done quickly and, in less depth, to meet with court efficiency expectations (Robinson 2017). Furthermore, they are not requested for all offence types and unrepresented defendants did not usually add to them or comment on them, as lawyers usually did, unless they were probed by court staff. When they did comment, very little was said. In the cases that I observed, suggestions in pre-sentence reports were normally followed, which was also perceived to be the case by those interviewed. Where sentencing suggestions from the Probation Service were not followed, this could cause issues for unrepresented defendants, according to one lawyer who was interviewed. He also suggested that unrepresented defendants do not always understand the sentence that has been imposed:

If a report is prepared the magistrates don't have to abide by the recommendations in that report. They could still send people to custody or they could [change] a community order to a suspended sentence. The client is going to worry - he's not going to prison today. It's a suspended sentence but does he understand the implications of failing to comply with the suspended sentence? Probably not, but without someone mitigating on their behalf or adding to, putting things, which are not in the report to the magistrates, they get little or no help. (Interview participant 2 - DL)

Another interviewee also questioned the ability of defendants to question what is said in the report and she questioned the ability of the Probation Service to always adequately assess the situation:

They're relying on what the probation have written about them and I'm afraid the Probation Service is on its knees and they don't always grasp exactly what is going on and they put things in the report and of course very often good people will not interject and say anything and they'll just stand there and take what's coming (Interview participant 7 - DL)

Thus, this suggest that pre-sentence reports are not always fit for purpose and do not mitigate all of the problems that unrepresented defendants face when it comes to sentencing.

6.5.4 Examples where unrepresented defendants participated more than what was usual

Contrary to the above findings, though, when observing there were instances where unrepresented defendants did say more than what was typical, did speak well on their own

behalf, and did discuss their personal circumstances at the time of the offence and/or at the time of the court appearance and/or future personal circumstances. This is something that the bench appeared to appreciate, based upon their demeanour and response.

For example, this defendant had entered a guilty plea to the offence of fraud.

Legal advisor to defendant: What would you like to say to the magistrates about the offence?

Defendant: At the time I had a breakdown. I lost a child. I lost my business. I was on drugs. I've now got another job. I'm getting my life back together. I've been clean for six months. I'm doing a lot better. It's disgusting what I did. I know it was wrong. It's caused me a lot of stress. I shouldn't have done what I've done. I'm moving forward in life, not backwards.

Legal advisor to defendant: The prosecutor said it was offered to be dealt with by way of restorative justice but you did not pay so a charge has been brought. Why did you not pay?

Defendant: I didn't pay the money for restorative justice as I didn't have the money at the time. (Case 197)

In another case, the defendant had pleaded guilty to racially or religiously aggravated assault.

Legal advisor to defendant: Anything you would like to say about the offence?

Defendant: I've got a gambling problem. I'm in £13,000 debt. This is really made me realise that I've got that has got to stop. Due to the debt that I've been in, that's why I turned to drink to block it out.

Judge to defendant: Do you accept the comments were unpleasant?

Defendant: Yes.

Judge to defendant: I'm thinking about imposing a football ban. Any comments on that?

Defendant: I know the alcohol is a problem at football but that's due to my financial circumstances. That's the root cause of everything. I'm going to try and get professional help to address it.

Judge to defendant: Anything you would like to say about the banning order?

Defendant: That's something I'm hoping to avoid. Due to personal circumstances, I've had a few bad moments that's the first incident I've had since I've been allowed to go back to the football. I realise that things have got to stop and I've got to change. This has had a negative impact on my mum's health too. (Case 204)

These examples show that, on occasions, unrepresented defendants' mitigation was longer and richer. This may have been due to a mixture of factors: the defendant being more comfortable speaking publicly and to authority; prior experience of the courtroom (in Case 204 it was said that the defendant had previous convictions, for example, but in Case 197 this

information was missing); the nature of the offence(s) committed; the nature of the defendants' circumstances; the probing questions asked from the legal advisor and/or the magistrates or judge, as well as the extent to which they guided unrepresented defendants through it. The legal advisor took a particularly active role in guiding defendants and asking them questions in hearings where the defendant was making an exceptional hardship plea (to avoid being disqualified from driving). In the hearings observed, information about defendants' current circumstances was usually attained, as well as the impact that losing their licence would have on themselves and others.

There were also cases observed, though, where regardless of the probing questions asked the defendant failed to add any or much more additional information. This is something that a legal advisor commented on:

So again difficulties for an unrepresented person [at a sentencing hearing] would just be not having a solicitor there to put across their full mitigation so again if they are not represented, again it would be on the legal advisor and magistrates to make sure that they are given their version of events and they're explaining their circumstances but there's only so much that we can do because obviously we wouldn't have a consultation with them in person beforehand so that we can elicit all of the information like a solicitor would so we can ask them questions in court but it's how much engagement we get from them and what they actually answer in court and a lot of people get nervous in court and their mind goes blank and they don't mention things and then they might go away thinking: 'I really should have said that. I should have said this and I should have said that'; so it's on us to ask the right questions of them to get that information out of them but yeah, that's a clear difficulty. (Interview participant 18 – LA)

Whether probing questions were asked and how many were asked appeared to depend upon the individual legal advisor, judge or magistrate, the nature of the offence that the defendant had been charged with, how necessary they thought more information would be in order for them to be able to come to their decision, and the response of the defendant to questions asked. When the magistrates or judges were thinking about imposing anything more than a fine or a discharge, they usually requested a pre-sentence report. These appeared to help the sentencers to decide on what sentence to impose, but bear in mind the issues that have been discussed above in relation to this.

6.5.5 Overview

Based upon the interviews and observations, it appears that although the amount said by defendants and their ability to mitigate did vary, on the whole defendants tended to struggle when it came to providing a plea in mitigation before being sentenced. In relation to this, there was no material difference between unrepresented defendants in Court A and B. Unrepresented defendants usually did not say a lot and when they did say something, the main content of their mitigation generally revolved around their attitude to the offence. It was uncommon for defendants to speak about the offence itself or their own personal circumstances.

From the observations conducted, an impression was gained that statements around personal circumstances made a greater impression than when the defendant simply expressed remorse, for example. None of the guidelines say how much weight different factors should be given, so the impact that mitigating and aggravating factors will have will be dependent upon the subjective view of the bench (Doak and Taylor 2013: 15). Jacobson and Hough (2007) observed sentencing hearings from 132 cases across five Crown Courts, and interviewed 40 sentencers. In relation to mitigation, Jacobson and Hough (2007: 33) concluded that matters relating to the defendants' present and future played the most significant part when it came to sentencing decisions. Expressions of remorse, on the other hand, were found to not necessarily carry weight unless accompanied by other factors, like an expression that the defendant was willing to address the causes of his/her offending behaviour, or a gesture like an apology letter to the court (Jacobson and Hough 2007: 24).

In Dell (1971) women prisoners from Holloway prison were interviewed and it was found that the unrepresented women in her sample rarely provided any mitigating factors because they did not know what factors were regarded as mitigating or because they did not feel confident speaking in court about them due to the setting. Carlen (1976) found that the unrepresented defendants she observed were nervous and unable to express themselves in court and were, therefore, unable to effectively take part in proceedings. Shapland (1981) also found that unrepresented defendants said much less in relation to mitigation, and they rarely discussed their personal circumstances. Only a very small proportion offered a sentencing suggestion, as legal representatives would have. Finally, in Transform Justice (2016), unrepresented defendants were found to usually not know how to mitigate. When a

pre-sentence report was prepared, they were helpful in sentencing unrepresented defendants and in helping the bench to understand what mitigation may be relevant. The findings from the current study largely mirror those of this previous research.

However, in this current study greater acknowledgement has been made of those defendants who did address the bench well, spoke about their personal circumstances and did come across as sincere and articulate, because as discussed already this was the case for some unrepresented defendants. Furthermore, the helpfulness of sentencing guidelines was not discussed in the other studies mentioned, although since Dell (1971), Carlen (1976) and Shapland (1981), sentencing guidelines have become more extensive, and they impose greater restraint on sentencers in order to promote greater consistency (Ashworth 2015). Nevertheless, discretion has not been completely eliminated (and this would not be possible or ideal given that all cases are different and different defendants will have different circumstances), and issues still exist for those who are unrepresented, which largely relate to their ability to communicate effectively and understand what they are required to say and what influences sentencing.

6.6 Unrepresented defendants' levels of understanding at court generally

As evidenced from the above section, unrepresented defendants can experience problems at the sentencing stage. When asked at which hearing the problems were particularly noticeable, most defence lawyers and legal advisors either said at the plea hearing or at trial. Other issues in addition to those discussed so far, included unrepresented defendants: not understanding the language and terminology used; not knowing what to say and do; struggling to make bail applications; not always understanding court procedures; not necessarily understanding rules of disclosure/evidence; and not always knowing how to make special measure applications. These matters will be discussed within this section.

When defence lawyers were asked to what extent they thought that unrepresented defendants understand proceedings and given a scale of very often/fairly often/sometimes/rarely/never, the majority answered rarely or sometimes. Two of the three judicial prosecutors said they thought that unrepresented defendants understood proceedings fairly often, though. Furthermore, whilst the majority of defence lawyers felt that unrepresented defendants had a

limited understanding in relation to what is happening during court proceedings, a few were reluctant to generalise:

It's difficult to generalise. Some will understand. Some will have been there before and therefore know what's going on. Some are like rabbits caught in headlights and have never been to court and are completely utterly fazed by their appearance in court, so it's difficult to generalise. (Interview participant 4 - DL)

A small number of defence lawyers mentioned how defendants with mental health issues, learning difficulties, or other vulnerabilities may also struggle to understand as a consequence of these issues.

A legal advisor said:

That's difficult to answer because it all depends upon them so you get a mixed bag of people that come before the court so you might get people that are fully familiar with court proceedings ... it all depends on how familiar they are with criminal courts and also their level of understanding in general so someone obviously a more educated person may have done their research. They may fully know what's happening and they may be fine but obviously we get a mixed variety of people and also people that tend to come before us are people that have lots of special needs. That have a lot of mental health problems or might have learning difficulties so it's a wide spectrum so that's quite difficult to answer. (Interview participant 18 – LA)

One defence lawyer, however, felt that both unrepresented defendants and represented defendants struggle with understanding – regardless of whether they have been to court before:

My experience [in relation to the extent to which unrepresented defendants understand court proceedings] – not at all because you get the clients asking just the fundamental questions so many times even the ones who have been through the system. In a way they're more at risk because I think they tend to think then they know the system but in fact they don't because they don't understand the complexities of law, disclosure and evidence. (Interview participant 6 - DL)

Why the process is so difficult to understand and whether it needs to be like this, though, was not something that was queried by those interviewed.

6.6.1 Language and terminology

An usher mentioned how unrepresented defendants may struggle with terminology, and four defence lawyers said that the language and terminology used in court can cause difficulties regardless of whether English is the defendant's first language or not. Some defence lawyers also suggested that this can be the case for both represented and unrepresented defendants.

I think some of them haven't got a clue. Even represented ones come out and haven't got a clue. They don't know what's happened - don't understand what's happened even though you've explained it to them numerous times. Unrepresented [defendants] do not have a clue. If you speak to an unrepresented defendant they'll come out and say, 'oh I've got a suspended sentence' and it turns out they've got a conditional discharge or 'I got let off because I just got a fine'. No, you got a conviction. They don't understand the terminology. They get the terminology sentence, charge, conviction – they get it all mixed up. (Interview participant 7 - DL)

It is heavily weighted against a client in court because what you have, is you have is someone whose prosecuting who is qualified, who is experienced, so they've already got an unfair advantage and you have an individual who has no experience of the legal system potentially, no experience of legal terminology. It can be an intimidating environment and it's heavily weighted in favour of the state ... it is the state against you. The state has the benefit of all their resources and the client has the benefit of their universal credit or their employment support allowance. They struggle to get to court – I know I'm using an extreme example – but they might struggle to raise the bus fares to get to court. It's a David v Goliath situation and it needs be a level playing field and what we do as lawyers is, we bring that level playing field into the frame. (Interview participant 10 - DL)

I think they [unrepresented defendants] leave court proceedings and then they have no idea what's happening because they don't generally have pen and paper with them, they are not making a note of what is being said. A lot of information is being imparted to them in quite an official way and as a professional court user I understand what certain phrases mean and I'll be able to note them down and send out a detailed letter explaining what that means to the client; whereas if you are unrepresented, you get told in quite a short period of time what's happened, what's going to happen to you and then you walk out and you probably forget immediately. (Interview participant 12 - DL)

Words are used where everybody in the trade understands – whether they are magistrates, clerks, prosecutors whatever – but people often think that the word witness means eye witness, and you'll have some agreed police evidence that isn't in dispute at all and the prosecutor will say 'we'll refer to the police witness' and the defendant

doesn't understand. 'Well there weren't any police officers there'. Well no that's not what it means. I just think it's not jargon. It's the use of language in a context that people aren't used to ... that's where the problem arises. (Interview participant 8 – DL)

Some interviewees referred to court jargon as the problem whereas others were saying it was the contextual usage of language. Both may be happening, each compounding the other, making it harder for defendants (whether represented or unrepresented) to understand proceedings as a consequence.

6.6.2 Understanding what is relevant and appropriate to say or do

Respondents also discussed how unrepresented defendants do not always know what is relevant and appropriate to say in court (this issue shall be discussed further in s. 8.2.2) and the ways in which it is appropriate to behave:

In a sentencing hearing the mitigation doesn't always get across and sometimes things that the magistrates don't need to know end up being told. You've got to bear in mind that magistrates are laypeople so you've got to be careful how you address them and make sure the only things that they hear are things that they ought to be hearing ... Disadvantages [of being unrepresented] is that people [defendants] can rub the magistrates up the wrong way because of the way they present, because the way they speak, because of the language, because of their demeanour ... They don't say all the right things. They don't put forward everything that the magistrates need to hear. They miss things out. They only put forward things that they think is important. They very often misunderstand. Very often they can't hear through the glass panels in any event so it's not professional. (Interview participant 7 – DL)

On a few occasions when observing the defendants did appear to struggle with being able to hear, in that they had their ear pressed to the glass. Together with defendants' aforementioned general lack of understanding about what the court needs to know, what they should and should not tell the court, and how to speak to court actors, this can have negative implications for them and their case. In Carlen (1976), also observed some of these factors contributing to defendants' feelings of marginalisation, confusion and exclusion at court.

6.6.3 Bail applications

As discussed in s. 5.1.3, participants said it was rare for a defendant to have to make a bail application without legal representation. A defence lawyer and a few legal advisors, though, explained some of the issues and misunderstandings that usually arise in bail applications when unrepresented defendants do make such an application:

Yeah [unrepresented defendants do experience issues at bail hearings] because that's probably one of the most important hearings because if you don't get bail at the first time of asking, there's a good chance that you'll not get it throughout your case. The trouble with even represented defendants the first focus is bail: 'am I going to get bail?'. They can't focus on the evidence or the procedure, their only focus is on bail and that's why it is important that you have a solicitor there that can deal with the bits that the court needs to hear at that time and if you've got an unrepresented defendant trying to make a bail application, they don't understand the law. They don't understand what can be objected to. They don't understand what kind of clauses or bail conditions to propose that the magistrates can consider and they don't have access to hostels and addresses and things like that. (Interview participant 7 – DL)

If I'm honest we don't get that many unrepresented defendants applying for bail who are here in remand. In that sort of scenario they generally would be represented because like I say with duty solicitors and prisoners, if they are at risk of being remanded then they would qualify for the duty solicitor so what would tend to happen even when they say they don't want to see anyone, the legal advisor or the magistrates may feel 'no we're not happy with this, we want you to see the duty solicitor' so we would then refer them to duty; so I would say that it is very limited cases where we've got people applying for bail who aren't represented but when we do have that scenario again that's where our job comes in where we have to assist them so we would have to help them get out any information they need the magistrates to know about a bail application but yeah it's an uphill struggle for an unrepresented person to be applying for bail. (Interview participant 18 – LA)

The legal advisors discussed their role in assisting unrepresented defendants in making a bail application. However, it is clear from these quotes that unrepresented defendants experience problems when it comes to making a bail application because they usually do not have the required skills, knowledge, understanding and experience.

6.6.4 Court procedures

Another area mentioned in which unrepresented defendants seemed to struggle was court procedures – although one defence lawyer and one judicial prosecutor commented on how they thought this had been simplified over the years:

They [unrepresented defendants] don't understand how the procedure works. I mean the procedure has got more simple in recent years because now everybody is supposed to plead guilty or not guilty when they first go to court if it's a case that can be dealt with in the magistrates' court, and then if they plead guilty then they are going to be sentenced very often on the same day, if not they'll have to come back. If they plead not guilty then it goes out to a trial, so the uncertainty would be what happens between the plea and the trial because for a solicitor, the prosecution send documents, so if they're not sending documents to a solicitor they should be sending them to the defendant and they definitely wouldn't understand what they say. (Interview participant 1 - DL)

They [unrepresented defendants] think it is going to be all sorted in a very quick and decisive manner and then obviously that's not the situation at all. So many arrive at our court thinking the matter will be heard and dealt with that day and if it is a not guilty plea and as you know that's not the case – it is adjourned for many months for the trial for that to take place. (Interview participant 19 – JP)

A judicial prosecutor also said how unrepresented defendants struggle to understand how to correspond with the court before or after court proceedings:

They don't know how to communicate with the court. It's very bureaucratic and they just want to talk in person. Just like anyone. When people phone the bank, they want to speak to a person. They don't want to be on the phone, they want to go to the bank, and speak to a person, but it's not – it doesn't work like that. You've got to send letters in, you've got to email in ... and then things go wrong and 'we never got your letter or we've got no record of that because someone has not logged it or it's got misfiled' and things go wrong and they don't know how to chase it up, so just not knowing how to communicate with the courts. As well if they want to appeal they have to write to court within 21 days. Unless they specifically ask that, the legal advisor won't tend to mention it. If they are really unhappy and go, 'I can't believe you are doing that to me'. 'You can appeal to the Crown Court. You need to write to them within 21 days'. But even that's quite vague. Who do you write to at Crown Court? (Interview participant 20 – JP)

One defence lawyer and judicial prosecutor felt that defendants who do not have good English skills will particularly struggle with understanding what is happening during a court hearing and understanding court procedures and the court process:

There are undoubtedly going to be occasions particularly nowadays where we have so many more nationalities appearing in courts with difficulties understanding what's going on because unless a court is put on notice that a particular type of interpreter – a particular type of language is required – then they just won't be there and if you get an unrepresented defendant whose English is either very poor or non-existent that first appearance is going to be very, very difficult indeed. (Interview participant 5 - DL)

Two defence lawyers said that misconceptions arise as a consequence of defendants - who have not necessarily been to court before - getting their knowledge of court proceedings and procedures from television programmes which often do not reflect the reality of the situation:

I suppose the procedure of it. People have grown up on a diet of television programs haven't they, which aren't, don't bear any resemblance often to the reality of a court experience. (Interview participant 3 - DL)

There's also some common misconceptions from people watching too many TV programmes; for example if the evidence has been obtained in an unlawful way or there's been some problems with the way it's been collected, it doesn't immediately make it non-admissible, which is different in America and people watch American TV programmes and think if there's any problems with the evidence then it immediately has to be removed, which is not correct. (Interview participant 12 - DL)

Two participants also expressed concern that unrepresented defendants charged with a triable-either-way offence may not always understand when they have the option of the trial being heard in the magistrates' court or the Crown Court. For example:

They may also have difficulties if it's a case that can be dealt with in the magistrates' court or the Crown Court being able to put forward their views on whether they want their trial in the magistrates' court or the Crown Court because they have a right to elect to take their trial to the Crown Court in what are called either-way offences but magistrates' court might say, 'well I think we can deal with it here' but a defendant might prefer a judge and jury in the Crown Court. They might be incapable of representing themselves at that point ... They don't understand necessarily that just because you're standing in a magistrates' court doesn't mean to say that the case starts and finishes there. They may feel better, more comfortable to have a jury of twelve

people trying their case but that necessarily is not understood as well as it could be.
(Interview participant 4 - DL)

The interviewee's comment about how a defendant may prefer for his/her case to be heard in the Crown Court, replicates the preferences of some defendants in Bottoms and McClean (1976). In that study, some defendants opted for the trial to take place in the higher court because, for example, they thought that they would receive a fairer trial and they had a better chance of acquittal (Bottoms and McClean 1976: 95). In the Crown Court, though, judges have higher sentencing powers than sentencers in the magistrates' courts, so the penal risks associated with being found guilty are higher. Thus, when defendants are making this decision, one legal advisor interviewed discussed the importance of explaining things to unrepresented defendants, which was also mentioned by the other two participating legal advisors, and an usher. In relation to the need to explain things to unrepresented defendants, the legal advisor went on to say:

I think by the time the hearing is concluded in the majority of cases, I think they understand it well enough to have a fair hearing but often, a lot, not often but sometimes along the way, you've got to keep stopping, checking, and explaining, but in a straight forward road traffic case – that kind of thing – which is the vast majority of cases where we get unrepresented defendants, it is a simple procedure and a little bit of an explanation usually gets us through quite easily. (Interview participant 17 – LA)

Another legal advisor suggested that this explanatory role means that unrepresented defendants understand more about the process than represented defendants do, but then said in relation to other matters unrepresented defendants will understand less:

They probably understand more, yeah when they are unrepresented they probably understand more than they do when they are represented, if that makes sense. They'll understand more about their case with the defence, they'll understand more about the evidence and the case, so it is an advantage to be represented but the actual process – because as I said, we go through the process, I'm not sure that a defence solicitor would spend any time going through that because they deal with all that – so if the question is about the process, then I would say unrepresented defendants would understand the process but maybe there are other things that are missed by being unrepresented.
(Interview participant 16 – LA)

When she was asked what type of things may be missed she elaborated by saying:

Just the things that we've discussed before really – but they might have a defence that they don't talk to us about, or they might have a personal issue; for instance, drugs and alcohol that they don't want to say in a big open courtroom that they may have disclosed to their solicitors that would affect sentencing. Family issues – you know – sometimes you'll give someone a curfew and they just sit and don't say anything and then they'll go out and it's like 'I've got a holiday booked next month' and they've not thought to say it because they are not represented and you wouldn't necessarily tease that out of somebody; so yeah, there are definitely some things that are missing for somebody that is unrepresented but the procedure I don't think is part of that.

Understanding procedure is something that some unrepresented defendants experience difficulties with, then. As the legal advisors have discussed above, it is important that proceedings are explained to unrepresented defendants in a clear and accessible way.

6.6.5 Disclosure and evidence

In relation to participation and understanding, one area highlighted by interviewees was disclosure of evidence prior to a trial and evidence more generally.

They don't understand Criminal Procedure Rules. They don't understand disclosure rules, so they don't understand it at all. (Interview participant 2 – DL)

Before giving evidence, in a trial, defendants (and witnesses) also have to swear an oath. When asked if they thought unrepresented defendants had problems in relation to taking their oath, three ushers said that they did not, although one of them qualified this:

Only if they can't read or dyslexic but then we'll just say 'do you want to repeat it after me?' (Interview participant 13 – U)

In addition, another usher said that unrepresented defendants did not always understand when she asked them about taking the oath:

Sometimes they don't know what you're talking about – what do you mean? – you know, if I say do you want to affirm or do you want to swear on a holy book. Sometimes they'll say 'I'm not bothered' but no, I've never had any problems. (Interview participant 15 – U)

Ushers were asked if unrepresented defendants experience any problems in relation to organising their witnesses for trial, as far as they were aware. One said that they struggle to fill out the case management form:

Well this is another thing – when like in the NGAP [not guilty plea] courts that we’ve got today. When they are going to trial, and if I have got someone who says they are not represented, then I would definitely say to them ‘look you need to see a duty solicitor’ because they need to fill a form in, which is about 6 pages long with witnesses on both sides that they will be calling, and the issues – why it is going to trial and the judge or the bench on that day will want to know what their issues are and why, so it is important that they have a solicitor especially if it is going to trial. (Interview participant 15 – U)

The other two ushers said that they did not think that they really experienced any problems in relation to organising witnesses. Nevertheless, they both suggested that unrepresented defendants may not always have the required information regarding their witnesses to fill out the full name of witnesses on the form. Courts were prepared though to be telephoned for further details to be passed on.

Furthermore, one defence lawyer discussed the difficulties that some unrepresented defendants have with instructing witnesses:

I mean you get clients who sort of have mental health problems and they won’t be able to self-diagnose and often times even if they are aware of it, they won’t want to raise it for all sorts of reasons. They won’t understand how to access defence experts, all those kind of things. (Interview participant 6 – DL)

Another participant thought that unrepresented defendants would struggle to make a special measure application for any of their witnesses or respond to such an application made by the prosecution:

How do they communicate about ‘well I’ve got a witness who’s deaf’. You know ‘are you going to sort out my special measures?’ and then there’s the special measures argument. Again, you see the prosecution, they’re always late with things, so the day before the trial they might put an argument in for special measures. Well how’s an unrepresented defendant going to cope with that? (Interview participant 17 – DL)

To summarise, there was concern amongst some participants about unrepresented defendants' ability to understand court proceedings, the law and the terminology used. Such a lack of understanding will undermine a defendants' ability to follow and effectively engage during their hearing.

Lack of understanding in relation to court procedure and court rules is something that has been mentioned in previous research (e.g. Dell 1971a, 1971b; Carlen 1976; McBarnet 1981; Astor 1986; Transform Justice 2016 – for more information about these studies, see Chapter Three). Previous research (e.g. Dell, 1971a, 1971b; Carlen, 1976; McBarnet, 1981; Astor, 1986; Transform Justice 2016) has also mentioned the problems caused by lack of understanding in relation to court procedure and court rules. In Souza and Kemp (2009: 9), however, where defendants - both represented and unrepresented - who had appeared in a magistrates' court were asked if they understood what was happening in court, on average most said that they did. This was also the case in Kemp and Balmer (2008: 16) and Kemp (2010: 79-80), though those who were represented had a greater understanding than those who were unrepresented. The researchers doubted whether defendants did really understand what was going on, though, due to the language used in court and the complex nature of proceedings, which made it hard for defendants to follow (particularly those who did not have English as a first language or who were not legally represented: Souza and Kemp 2009: 10; Kemp 2010: 80). Furthermore, a Crown Court study (Thomson and Becker 2019: 1) found that judges and prosecutors who were interviewed thought that unrepresented defendants had a varied but limited understanding of the court process and were less able to participate in proceedings. Some interviewees said that unrepresented defendants did not know how to ask questions in court, for example, and did not understand the concept of disclosure (Thomson and Becker 2019: 8). Thus, overall, the literature tends to support the findings of this current research that generally unrepresented defendants tend to struggle to understand.

If defendants experience difficulties in relation to understanding this will affect their ability to effectively participate in proceedings. Those with learning difficulties, for example, and/ other mental health issues are particularly likely to struggle. Based upon the previous literature done and this study, the problems in relation to understanding appear to be similar for represented and unrepresented defendants. However, the problems appear to be particularly pertinent for those who are unrepresented, as they cannot rely on a lawyer like a

represented defendant can to speak on their behalf at court and make their bail application for them, for example. They also need to understand court procedures and the process, as they need to know what is going to happen and when and what they will be required to do and within what time period. Given that unrepresented defendants then need to take a more active role in court proceedings, issues around understanding and the extent to which they do understand are even more critical.

6.7 How are unrepresented defendants treated in court?

The question of how unrepresented defendants are treated in court was explored both through court observations, and through interviews with defence lawyers, ushers, legal advisors, and judicial prosecutors. Treatment of defendants is important as it relates to due process rights and procedural justice. ‘Treatment’ within previous research has related to whether unrepresented 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. The first section will provide 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, with reference to the previous literature and the findings from the current study. Then the data collected from the current study will be set out in relation to how court actors assist unrepresented defendants.

6.7.1 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: the architecture of the courtroom; 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; the tendency to silence defendants; and the formal clothing that is worn by court actors (e.g. Carlen 1976; Darbyshire 1984; Rock 1993; Mulcahy 2013; Jacobson et al 2015; Transform Justice 2016; Jacobson and Cooper 2020). As a result, defendants are often marginal players

during court proceedings, despite it being their court case and their having the power to change the course of proceedings, for example, by changing their plea (Kirby 2017).

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. In magistrates’ courts, unlike in the Crown Court, wigs, gowns, robes and collars are not usually worn by legal representatives or the judge. During observations, ushers in magistrates’ courts wore gowns, whilst the legal representatives tended to wear suits, and the magistrates and judges wore suits or other smart attire. This was rarely the case for the defendants observed – they usually wore casual clothing, which set them apart from the other actors within the courtroom. The friendly exchanges, jokes shared, and discussions 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, also contributed to this implicit isolation of defendants. 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.

6.7.1(a) Represented defendants being prioritised

In Transform Justice (2016), it was noted that unrepresented defendants were usually dealt with last and this theme was also raised by some interviewees in the current study.

Half of the defence lawyers interviewed said that they thought that unrepresented defendants were treated as fairly as other defendants. The other half, however, thought that unrepresented defendants were not given enough allowance for the fact that they are not legally qualified. One said:

I think to be fair the court does its best, but I think resources are so scarce these days and trial courts are so overloaded that particularly unrepresented people who've not got anyone to speak for them get lost in the mix a little bit. (Interview participant 11 - DL)

Another three defence lawyers suggested that unrepresented defendants are treated unfairly because they usually have to wait longer for the case to be called on – as they are unrepresented, they can be forgotten about because they usually wait outside for their case to be called on. Represented defendants have a representative, in court, vying for the next spot and, thus, represented defendants are usually given priority over unrepresented defendants. This is something that around half of the interviewees mentioned:

They tend to have to be put to the end of the list, as in, say if you're in a lock up court, your custodies take priority, then you'll have your solicitors with bailers and then they [unrepresented defendants] tend to come on towards the end, so that can be a bit frustrating for them. I'm not saying that happens in every court but in mags [magistrates' courts] it does. (Interview participant 13 – U)

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)

Thus, if a solicitor is ready to proceed then their case will be dealt with:

They deal with everybody the same really, although if you know you're represented you'll get jumped to the front of the queue basically because when the cases are called on it's when the solicitors are ready and they'll do those cases first, so I suppose they do get shoved to the back of the queue. (Interview participant 1 - DL)

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; by general consensus (see s. 8.2.2), unrepresented defendants' cases take longer; and there are greater perceived financial implications for delaying a represented defendant's court case:

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)

I think where they lose out is often legally represented defendants are given priority in terms of calling cases on because it helps – if we have solicitors waiting then other courtrooms are kept waiting, so it's often in our best interests to promote solicitors in the list but it does feel a bit unfair at times. There are little things that we can do to do that but often unrepresented defendants will be kept waiting longer than represented ones and I think that's true. (Interview participant 17 – LA)

Purely it is down to cost because those solicitors are there and defendants are paying for them as well don't forget, so if that solicitor has got to sit at the back of court for 2 hours that will go onto the defendant's financial bill and also the solicitors will have other work to do, especially like if they have got prisoners in other courts and they are waiting to get to those courts as well. It's just common sense really to get them off and let them get on with other work. Then it's the same with the interpreters. They are being paid for and the longer they are just sat there waiting then they are subject to the courts funding so let's get them on and off and gone. (Interview participant 19 – JP)

A judicial prosecutor said it depended upon the usher involved:

Every usher is different with how they do the ordering – so who comes in first. Some will tend to put solicitors on first. No matter when they've attended ... they will bump them up the list when they come. Sometimes that seems unfair but it's also because they are being paid probably by the hour; so the longer you keep them the more their client is being charged, which riles up the defendants who are waiting outside - if someone has just turned up swans in and they have been there since 9 o'clock or whatever. (Interview participant 20 – JP)

In the cases observed, unrepresented defendants were generally 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 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, it can be argued

that 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. However, it seemed priority was usually given to other court actors for efficiency reasons and to promote good working relationships.

6.7.1(b) The use of the dock

As noted in earlier studies, the magistrates and judges observed sat on raised benches in the courtroom. All docks were situated at the side of the courtroom, whereas in the Crown Court they are usually located at the back of the courtroom (Justice 2015). Docks can either be open or secure (enclosed). In Courts A and B, some docks were enclosed with glass, whilst others were not. In Court B, seats were available in front of the secure docks. In Court A, in 68 hearings (91%) unrepresented defendants were told to sit or stand in the dock, compared to 7 hearings (9%) who were 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 in front of the glass dock or sit on them, rather than sitting or standing inside a 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. 94% of represented defendants (122 hearings) were sat in the dock in Court A and 6% (8 hearings) 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 that have found it 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 makes 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 a physical or mental health issues, the use of 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 (Mulachy 2013). This is due to the positioning of the dock and the impression that the use of the dock gives regarding dangerousness and guilt (Mulachy 2013). These problems are likely to be exacerbated when the defendant is 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 the 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; Justice 2015).

The findings from this study, therefore, imply that although some improvements have occurred since earlier studies were done, some issues still remain in relation to how defendants are treated, which undermines the ability of defendants to participate.

6.7.2 How do court actors assist unrepresented defendants?

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

6.7.2(a) 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:

The ushers will try to help – will always try and help people who are unrepresented ... They're nice and they explain what's happening and they will steer them towards the duty solicitor as well to try and get someone to represent them ... They will push for it [the duty solicitor scheme] yeah. Unless it's dead simple because if it's dead simple then they don't need a solicitor. (Interview participant 1 – DL)

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)

The usher will go out ... and they have to speak to these people and a lot don't speak English anyway. They don't understand and because that is the first person they see ... everything just comes out. 'I'm not guilty. Let me talk to you' and they say 'no, it's not me. I'm just here to take your name' but they will listen and they will come back in and say to me or [colleagues' name] 'such and such a person is outside, he's showed me loads of documents, saying they are insured, or they are saying this or that, could you go out and have a word with them?' and then it will at least, hopefully, calm that person down. If it doesn't calm them down or you've not done a good job, we usually will give them a bit of assurance that they have been listened to and we might be able to clear up some confusion there and then before they come in the room ... so the ushers treat everyone as well as they can ... (Interview participant 20 – JP)

One interviewee, however, did say it 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 the extent to which legal advisors and CPS prosecutors help unrepresented defendants depended upon the individual concerned. 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 – so it really is dependent on the other party that we're talking about. Other agencies are sort of better, like probation ... they're used to dealing with unrepresented people because they privately interview them – clients if you like, so they are very good at explaining when someone is unrepresented because it is part of their training I suppose. (Interview participant 16 - LA)

I think prosecutors, good prosecutors, they spend a bit more time explaining the process, so what I would generally do, if it's a trial, for example, I would usually get the defendant in, whilst the prosecutor's there and go through the process so they can understand who does what and why and when and at what stage. The prosecutor will often introduce themselves, explain their role, and usually at each stage of proceedings just introduce what they are doing and why a bit more than they would if it was a legally represented defendant, so if you do it right, it works better. (Interview participant 17 – 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)

I would say [that unrepresented defendants are treated] fairly [rather than very fairly] because ... I can remember a legal advisor being in court, he's not one that we usually see and one that we don't particularly work well with. Not one that works in our court often at all. This person was doing an exceptional hardship argument and he didn't lead him into it at all. He just set him off and was taking notes whilst the magistrates listened and there were clear, clear points that he missed ... and he didn't guide him through the argument at all, so he was unrepresented, his argument went off on a bit of a tangent because he didn't know what he was supposed to say, so he just went off on a tangent a bit. The magistrates didn't ask any further questions, as they were a different set of magistrates to what we usually see anyway, so they're perhaps not used to seeing those arguments. They didn't have any questions at the end. They just took what he said and said 'no, you are going to lose your licence for 6 months' and I remember thinking, 'he would have won that if it had been a different bench and a different legal advisor; he would have won that'. But generally speaking, as well, just the inconsistencies amongst the bench of magistrates ... Some are harsher than others, so that can be unfair for defendants, because sometimes you sit there and think, 'I'm surprised they've not won that [exceptional hardship argument] because usually any other set of magistrates, that's easily won' so that's a bit unfair because it just depends on what magistrates you get or legal advisor you get. (Interview participant 20 – JP)

Prosecutors are in a problematic position when responding and conversing with unrepresented defendants. A defence lawyer (interview participant 5) mentioned that prosecutors have to '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'.

Some defence lawyers 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 imputing 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)

In short, crime control values (e.g. speediness and increased workloads - see s. 2.4) are again being promoted over due process ones in relation to how much assistance legal advisors can provide to unrepresented defendants, due to the limited time that they have to help them and the amount of work that they are required to do.

One defence lawyer, however, said that although there are limitations in what court staff can do to assist unrepresented defendants, regardless of what they do, unrepresented defendants will still be placed at a disadvantage due to the nature of the system. When asked if unrepresented defendants are treated fairly or not by court staff, he said:

Fairly isn't the appropriate word because I think the system is inherently unfair, so even if they, even if the legal advisor is doing their best, an unrepresented defendant is always going to be up against it. (Interview participant 3 - DL)

A few defence lawyers mentioned some additional factors which they thought will have an impact on the response defendants receive:

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

That depends on the defendant. I think they'll operate a policy of treat others as you be treated yourself so starting with the usher, if they are rude to them then they will do their job politely but they will do their job to what they are required to do. (Interview participant 12 - DL)

A legal advisor also discussed how having different numbers of unrepresented defendants shapes court ambiance and culture:

I'm thinking about like the road traffic court, for instance, we try and be conversational rather than adversarial. We've got a good team of sort of police prosecutors here – I'm talking about, you know, my personal experiences, not necessarily across the board – so in [Court A] you've got a really good team of police prosecutors who will happily have a chat beforehand, show the people the evidence, they'll come in the courtroom and we'll explain everything in basic language because that's the way that court runs. If you were in a remand court and suddenly someone was unrepresented, you'd sort of switch in your mindset, whereas in a court where nearly everyone is unrepresented, they get sort of an experience of everything is explained, this is what is going to happen next; whereas I think if someone comes in with a solicitor, in a road traffic court, which is rare, it's a bit sort of right you know what you are doing, you've got legal advice, bang, bang, bang going through the process; whereas I think that we, most of our legal advisors, well probably all of our legal team would make sure the experience for somebody unrepresented was more detailed – the explanations are more detailed – and obviously like in any role, there are good and bad solicitors so it might that we've picked something up because we're sort of the experts in road traffic because we have a lot of unrepresented road traffic people, it might be that we maybe pick things up that a defence solicitor who is not really versed in road traffic and doesn't deal with it very often might sort of miss. (Interview participant 16 – LA)

When asked about whether things were explained in other courts within Court A, the legal advisor expanded by saying:

I mean we always explain the process – but I'm thinking about like in road traffic from beginning to end they've got someone explaining. They'll have the prosecutor speaking to them beforehand; whereas obviously in a bail application, you don't get your prosecutor going down and saying 'this is your case against you'. It is a lot more informal because we're obviously dealing with people who aren't dangerous or you know, just sort of Joe public we're dealing with in the road traffic court.

This suggests that the offence with which the defendant was charged, whether they are viewed as dangerous or not and their behaviour, will influence the level and nature of assistance that they are provided with throughout the court process. However, in relation to

defendants' behaviour, for example, 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 2018: 4) outlines how court actors should recognise these things and seek to put defendants at ease and basic conventions should be stated at the outset.

6.7.2(b) 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, whilst 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. There is no jurisdiction for us to actually do that and we do it just to assist them and give impartial and fair advice to just try and assist them if they have got no legal representation and that also assists the court when the case comes live because it means we have usually got some idea of the route that we are going to go down with it and the legal advisor, the person who runs the court, is fully appreciative of our involvement outside the live actual court environment ... 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 ... I don't think, well I know that they don't just come into our court and just get slaughtered like a lamb. They are treated with dignity and like I say, we give fair and impartial advice, only to try and assist 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 (discussed in s. 6.2.1) and give them other relevant paperwork, and they advise them to see the duty solicitor - when eligible:

Well, I will ask them if they want their papers printing off. We would hand out, if it was like drink driving, we would hand out a list of courses that they are entitled to go on if

the magistrates offer it to them, which can reduce their ban by 25% (Interview participant 13 – U)

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, they'll say, 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)

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 so. One usher also mentioned that when a defendant says that they wish to be unrepresented, she will seek guidance from other court actors (like a prosecutor, legal advisor or probation officer) to see whether it is advisable for them to do or not:

I always, what I do personally I can't speak for other ushers, but I would always go to my legal advisor or the prosecutor because obviously the prosecutor has got the records and say look 'this person wants to come in not represented. Is it recommended?' and also if it's a probation court, you know if they are in a for a probation breach, I would also always go to the probation officer and say look 'they want to come in not repped [represented]. What are you recommending?' Now they might say to me, 'we are just recommending extra hours so they'll be alright coming in on their own' or they might say 'no, we're looking at sending him to prison. We're looking at a recall. He really, really needs to see a solicitor' - and I would go back to that person and say look 'I can't force your hand but it's recommended by the court that you see somebody' – or if they say to me they're just going to get a few extra hours, I'll tell them that and say 'you're alright coming in not repped', so that's what I do. (Interview participant 15 – U)

During observations, it was noticed that ushers often provided defendants with the relevant paperwork, asked defendants whether they were represented and signposted them to see the duty solicitor, if they did not have anyone at court to represent them. 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. Whilst observing, it was noticed that at some point during court proceedings, some legal advisors, judges or magistrates would provide information to a defendant regardless of whether they were represented or not. The tables below set out what type of information was provided to defendants in cases involving represented defendants and in cases involving unrepresented defendants, and the frequency for both Courts A and B together. Differences between the courts, where they existed, are outlined below.

Table 10: Information given to represented defendants – both courts

	Represented defendants					
	Yes		No		Total	Missing data⁵⁹
	N	%	N	%	N	N
Court actors directly identified at the start of the hearing	26	9	271	91	297	
Told the consequences of pleading guilty/not guilty	7	3	223	97	230	2
Explanation of an either-way offence provided	83	93	6	7	89	8
Asked if had any questions at the end of hearing	27	11	208	89	235	93
Asked if they understood the outcome/sentence	86	37	148	63	234	94
Explained consequences of not turning up to next hearing	67	70	29	30	96	70
Information on how to pay a financial penalty given to them (in the form of a leaflet)	102	91	10	9	112	7
Orally told the consequences of not paying a financial penalty	65	76	20	24	85	67
Told the consequences of driving whilst disqualified	34	89	4	11	38	5

⁵⁹ This is the overall amount of missing data for unrepresented and represented defendants (so this is applicable to both tables). Missing data have been excluded from analysis. The observation schedule was amended partway through doing the observations and some questions were added to it, so data for the earlier hearings in relation to this were not always recorded.

Table 11: Information given to unrepresented defendants – both courts

	Unrepresented defendants				
	Yes		No		Total
	N	%	N	%	N
Court actors directly identified at the start of the hearing	11	11	91	89	102
Told the consequences of pleading guilty/not guilty	24	40	36	60	60
Explanation of an either-way offence provided	6	86	1	14	7
Asked if had any questions at the end of hearing	9	12	62	87	71
Asked if they understood the outcome/sentence	21	30	50	70	71
Explained consequences of not turning up to next hearing	8	44	10	56	18
Information on how to pay a financial penalty given to them (in the form of a leaflet)	62	100	0	0	62
Orally told the consequences of not paying a financial penalty	25	76	8	24	33
Told the consequences of driving whilst disqualified	17	100	0	0	17

Thus, in the cases that were observed, it was rare for different court actors, such as prosecutors, judges, magistrates, and legal advisors, to be directly identified to either represented or unrepresented defendants at the beginning of the hearings (in terms of who they were, what their role was, or where they were sat). Court actors were only directly identified in 11% of hearings involving an unrepresented defendant and 9% involving a represented defendant (37 hearings in total). The majority of these hearings were virtual hearings: 31 out of 37 hearings (84%). In the majority of virtual hearings, the defendant was represented. Thus, those appearing via video link benefit from a greater explanation of the roles of different court actors. In the remaining 6 non-virtual hearings, where court actors were directly identified, the defendants were all unrepresented.

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, however, 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.

Furthermore, in 60% of hearings where the defendant was unrepresented and 97% where the defendant was represented,⁶⁰ in both courts, defendants were not told the consequences of pleading guilty or not guilty, in terms of sentencing discounts and reduced court costs for early guilty pleas. This includes those who had entered a plea for the first time in all courts and those defendants in the traffic courts who had entered a not guilty plea previously via post or online, which was being checked in open court. In the majority of hearings where defendants were told about consequences, though, the defendant was unrepresented (24 out of 31 hearings: 77%). In most hearings involving both represented and unrepresented defendants at both courts, defendants were not asked whether they had any questions at the end of the hearing by the legal advisor, magistrates, or judge. Only 12% of unrepresented defendants and 11% of represented defendants were asked this; a higher percentage (30% of unrepresented defendants and 37% of represented defendants) were asked if they understood the outcome, but the percentage is still low. Court staff are advised not to ask defendants whether they understand or not, as defendants, due to them feeling embarrassed or scared, may say that they do even when this is not the case (Judicial College 2018: 16). 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.

In contrast, most defendants (86% of unrepresented defendants and 93% of represented 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

⁶⁰ There was a significant difference between these factors – representation and whether the defendant was told the consequences of pleading guilty or not guilty before entering a plea (chi-square = 73.4, $p < 0.001$). All significant differences are noted in a footnote in this section.

be heard (or that, if they pleaded guilty, that only the court would decide). After defendants were provided with the explanation, they tended to have a puzzled look on their faces, which suggests that they did not always understand. The impression that was, therefore, gained was that legal advisors were usually just going through, as ‘the motions of due process’, to use Carlen’s (1976: 86) terms.

As Table 11 shows, 44% of unrepresented defendants were informed orally of the consequences of not turning up to their next hearing by the magistrate, judge or legal advisor, whilst 70% of represented defendants were.⁶¹ In relation to financial penalties, 91% of represented defendants and 100% of unrepresented defendants who had been sentenced to a financial penalty were given information on how to pay, in the form of a leaflet provided by the usher. 76% of both unrepresented and represented defendants were told the consequences of not paying the financial penalty. 100% of unrepresented defendants and 89% of unrepresented defendants who had been disqualified from driving, were also told that driving in 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.⁶² As suggested, though, it should not be taken for granted that an explanation in court will mean that defendants will definitely understand what is taking place, or the implications of different decisions. Bottoms and McClean (1976: 83) observed the following when considering the way in which either-way offences were explained to defendants:

It is delivered at some speed by a clerk who has done it a thousand times before; it may simply not ‘register’. Certainly there are occasions on which the defendant who is being addressed has to be awoken from his trance-like state, and the question repeated. It has something of the quality of a television washing-powder commercial; slick, rapid, familiar – and yet the viewer may pay so little attention that he could not tell you the name of the product at all.

⁶¹ A chi-square test showed that there was a significant difference (chi-square = 14, $p < 0.001$) between representation and whether the defendant was told the consequences of not turning up to their next hearing. Those who were represented were more likely to be told this than those who were unrepresented.

⁶² There is a statutory duty to give reasons for a sentence and explain its effects, under s. 174 of the CJA 2003.

This suggests that explanations may not always have a significant impact on defendants. Dell (1997) also pointed out that understanding can be hindered due to defendants being nervous and frightened, or due to hearing issues. In this regard, 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:

Yeah, [we have to do] quite a bit, so obviously for us for an unrepresented person we have to do a lot more than we would for someone who is represented; so for us it's about (a) checking that they understand why they are here and what the charge is that they are facing and if they don't understand, advising them on what that charge is and what the law is, checking whether they have had the papers and that they understand the papers or need more time, clarifying that they don't want legal representation and then maybe, obviously not advising them on the plea because we can't do that but explaining the difference between what will happen on a guilty and a not guilty plea and then potentially explaining to them the order of proceedings, so what's going to happen throughout the proceedings particularly in a trial. We would explain to them the run of who is going to talk first, in what order and that they'll get a chance to speak in due course; so yeah depending upon what type of case the case is and what court it is in, there is going to be more involvement so in a trial court, there will be a lot more involvement from a legal advisor because we'll have to take them through every stage of proceedings, so yeah at every stage, I would expect the legal advisor and magistrates are checking that they understand – and then particularly at the end at sentencing once they have had everything explained to them, again checking that they understand or that they have any questions. (Interview participant 18 – LA)

Another legal advisor also discussed the need to explain things when a defendant is unrepresented and said he would advise them to see a solicitor in certain cases:

I think it's taking a little bit more time to explain and it's doing things as I say, checking. I would say to the usher, 'It's ABH [assault occasioning actual bodily harm], the prosecutor says this is probably a Crown Court case, have you spoken to them about the duty solicitor?' The majority of times they will take that on board and go and see them. If not, I would often go out and see a defendant and explain why it's important that they see them; so I think yeah, most of the time, with a little bit of explanation there's nothing that you can't really overcome, apart from language barrier – we haven't arranged an interpreter, drink or drugs, but it's unusual for someone to attend in such a state that they can't be dealt with. We wouldn't even try them. We would put it off to another day. If someone's in drink, no amount of explanation will perhaps get us through it and it can undermine the dignity of the court and it's just not fair really so if we've got a problem that we really can't deal with, we would look to probably fix

another date, but most of the time it's not particularly a problem. (Interview participant 20 – LA)

During observations, however, the assistance provided by court staff relating to matters specifically affecting unrepresented defendants varied. Further quantitative data were collected on some of the things that unrepresented defendants were asked about during court proceedings and whether things were explained to them (see the table below).

Table 12: Questions asked and explanations provided during a hearing involving an unrepresented defendant – both courts

	<u>Unrepresented defendants</u>					
	<u>Yes</u>		<u>No</u>		<u>Total</u>	<u>Missing data</u> ⁶³
	<u>N</u>	<u>%</u>	<u>N</u>	<u>%</u>	<u>N</u>	<u>N</u>
Asked if they were happy to proceed without a lawyer	39	38	63	62	102	
Asked if they had received/seen their papers before entering a plea (and confirming a not guilty plea in the traffic court)	15	24	48	76	63	
Asked if they had time to read their papers before entering a plea (and confirming a not guilty plea in the traffic court)	11	17	52	83	63	
Asked if they had received/seen their papers at trial ⁶⁴	2	12	12	88	14	
Asked if they had time to read their papers at trial ⁶⁵	1	6	13	94	14	
Explanation at the beginning of the hearing as to what was going to happen and what the purpose of the hearing was	45	49	46	51	91	11

Despite what some of the legal advisors suggested then, from the quantitative data, it is clear that unrepresented defendants, at both Court A and Court B, 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

⁶³ Again, missing data have not been included.

⁶⁴ Three trials have been excluded from analysis as a consequence of the defendant not turning up.

⁶⁵ See above, footnote 64.

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, the defendant was normally asked if they wanted 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, even though the defence is entitled to receive a copy of the report (s. 159(2)(a) CJA 2003).

Explanations at the beginning of the hearings as to what was going to happen during the hearing were only provided at Courts A and B in 49% of hearings. In the majority of cases (62%), defendants were not asked if they were happy to proceed without a lawyer and/or whether they would like to see a solicitor. The majority of unrepresented defendants were asked this in Court B - in 73% of hearings, compared to only 29% of hearings in Court A. A legal advisor, who practises in Court A, suggested that whether he would recommend the defendant to see a solicitor or not would depend upon the seriousness and nature of the offence and the ability of the defendant and court to deal with the case:

What we try to do is – obviously I've got a list of cases in advance so when the usher says to me so and so is not represented, I'll look at the charge, and if it was, for example, a very low level drink-drive case, very often they can deal with it perfectly adequately themselves, especially if it's a straightforward guilty plea case; but if, for example, it was a burglary or an assault occasioning actual bodily harm or something more serious where there is the possibility that it may go to the Crown Court, for example, or if they were subject to a court order at the time so that ratchets it up a little bit, then I would be advising them either directly or through the usher about the availability of the duty solicitor; so we do try and keep an eye on those things.
(Interview participant 17 – LA)

According to another legal advisor, 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, though, 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 or visible to others. A defendant may be highly intelligent but it does not mean that they will always understand legal language.

Furthermore, a number of issues have been discussed throughout this thesis in relation to unrepresented defendants experiencing problems with their paperwork, and generally struggling with understanding court procedures and the process. These issues are more likely to create problems if defendants are not asked about relevant matters in particular hearings or proceedings, and/or if they are not provided with the opportunity to clarify things at the end of proceedings. Despite what the interviewed legal advisors suggested, practice appeared to vary (and there did not appear to be a great deal of difference in relation to the treatment that defendants received in the different courts observed). Like unrepresented defendants, in the vast majority of 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 defendant's adequate understanding. This is problematic, however, as the findings from the current research and previous studies (e.g. Carlen 1976; Jacobson et al 2014) suggest that those who are represented do not always understand proceedings either.

6.7.3 Summary

Overall, then, the two judicial prosecutors interviewed both said that unrepresented defendants were treated fairly or very fairly by those at court, and half of the defence lawyers

interviewed felt that unrepresented defendants were treated fairly. The other half, though, said that this was not the case. There were concerns about unrepresented defendants being dealt with last and whilst interviewees agreed that ushers, judges and judicial prosecutors were generally good in responding to unrepresented defendants, the assistance provided by legal advisors and CPS prosecutors was said to vary more depending on the individual involved. 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.

Given that CPS prosecutors were not interviewed, it was not possible to gain their views on the matter of what assistance, if any, they provide to unrepresented defendants; though as evident, other views have been obtained in relation to this and the views of judicial prosecutors have been obtained in relation to the traffic court. As mentioned already, more help could be provided to unrepresented defendants, for example, in the sense of things being explained to them at all stages of proceedings. What assistance might be provided to unrepresented defendants and why it is important that they are adequately supported is something that will be discussed further in Chapter Nine.

As suggested, previous research has also examined how unrepresented defendants are treated in court, although there have not been many significant studies recently. The findings of previous research are similar to the present study's, in relation to the help provided by legal advisors varying, and to court staff being limited in how they can assist unrepresented defendants. Darbyshire (1984), for instance, concluded that there were legal advisors who were helpful and patient with unrepresented defendants but others who were unhelpful and motivated by racial bias (the current study did not observe overt displays of racial bias). The level of help legal advisors provided depended upon the attitude of the advisor, as well as his/her personality, training and experience. Astor (1986: 229-232) found that most legal advisors were helpful, empathised with unrepresented defendants, and understood the difficulties that some of them experienced (nervousness, lack of understanding etc.). However, there were some who were abrupt or simply passive and stereotyped defendants to decide who they should give their attention and time to. The level and standard of assistance that was provided depended upon the attitude, skill and the amount of time that legal advisors had. The difference in the standard of help was due to the differences between the legal

advisors rather than differences between courts (Astor 1986: 232); which was also the case in this study.

Transform Justice (2016) also discusses the treatment of unrepresented defendants. One usher in Transform Justice (2016: 12) said that unrepresented defendants generally ended up at the bottom of the court list, and that sometimes their case would be adjourned until the next day even though they arrived at court first. One barrister also thought that the anxiety and stress of going to court would be worse for unrepresented defendants, which would only be exacerbated by delays and long waits at court. The judges and magistrates who were interviewed 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, however, that due to judges and magistrates having to remain impartial, they were restricted in how much assistance they could provide. 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. Court associates⁶⁶ who sometimes sit with district judges were said to be able to provide limited help to unrepresented defendants due to them not being legally trained. Many of the prosecutors empathised with unrepresented defendants, and expressed concern about problems that they might face when representing themselves at court. They said that they did what they could to help them, without compromising their own case (Transform Justice 2016: 21). In relation to the assistance that McKenzie friends⁶⁷ provide in the criminal courts, they were said to rarely speak on behalf of unrepresented defendants, unlike in the civil courts where they are more common.

In Thomson and Becker (2019: 10), most interviewees discussed the assistance provided by court staff to unrepresented defendants (for example, informing them about what to expect and explaining what was happening during proceedings). Some CPS interviewees said that they tried to assist unrepresented defendants and talk to them prior to the trial, explaining their role and what the prosecution would be arguing in court. Others said that they were restricted in what they could do to help unrepresented defendants due to them being on the

⁶⁶ Court associates provide assistance to a judge. They differ to a legal advisor in that they are not required to be legally qualified.

⁶⁷ I did not see any McKenzie friends whilst observing. For an explanation of McKenzie friends and what they do, see Chapter Three, s. 3.3.3.

‘other side’, and they were concerned about discussing the case with the defendants, especially where they might be seen as encouraging them to plead guilty (Thomson and Becker 2019: 6-7).

The latest study examining the treatment of lay users, including defendants, in court is Jacobson and Cooper (2020). The findings from this study were largely positive. The study found that professionals in the courtroom (e.g. legal advisors, judges and lawyers) tended to treat court users with respect (Jacobson 2020a: 14). They also sought to help court users to participate in proceedings (by being friendly, for instance). It was also found that court professionals helped self-representing defendants to participate by explaining things to them, and reassuring them. However, court staff were constrained when doing this, and although some court professionals sought to explain court processes and the terms used during hearings, many practitioners usually used jargon and complicated language, which would negatively impact upon the extent to which lay users understand court proceedings (Jacobson 2020b: 130-131).

In short, some of the points that were raised in the above studies were also raised in the present research. For instance, this research has emphasised: good practice by court staff to facilitate the engagement and participation of unrepresented defendants; the varying level of assistance provided by legal advisors; the restrictions felt by legal advisors in relation to how much help they could provide; and concerns (expressed by 10 interview participants) about defendants being made to wait longer than represented defendants. Some improvements appeared to have been made since some of the earlier studies were done, 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 said that both represented and unrepresented defendants are excluded and marginalised during court proceedings.

6.8 Do unrepresented defendants experience any advantages?

Despite the issues discussed so far, it was suggested by some interviewees that sometimes defendants can benefit from being unrepresented. The interviewees were asked about whether unrepresented defendants, in their view, experience any advantages due to them being unrepresented and this was also an explicit focus upon whilst observing court hearings. Around half the defence lawyers interviewed said that they did not think that unrepresented defendants experienced any advantages at all. The other defence lawyers did suggest some limited advantages, as did some of the ushers, legal advisors and judicial prosecutors that were interviewed.

One benefit that a few defence lawyers mentioned was that they thought that the magistrates may feel sorry for unrepresented defendants, which may influence how they treat them:

Well, I think they probably are treated more sympathetically because the magistrates know that they don't know what they are doing, so I don't think they would be deliberately harder on someone who wasn't represented. (Interview participant 1 - DL)

In observations, whilst some magistrates, legal advisors and judges appeared to be sympathetic to unrepresented defendants, others appeared less so, and still others responded in the same way to represented and unrepresented defendants alike. This response depended upon the attitude of the actor in question, as well as the behaviour of the defendant themselves, what they said, and whether or not they were polite and cooperative.

A legal advisor also suggested that in some instances the mitigation put forward by unrepresented defendants had a greater impact on the eventual sentence:

I think there can be advantages. I think in the right type of case, these simple straightforward cases where there is some genuine mitigation, it can come across as being disarmingly honest – and I think that magistrates do take into account in sentencing that people aren't represented, and will – there's a lot of what defence solicitors say that is just very repetitive and they weave the defendant's narrative into their usual spiel ... that sounds like I'm diminishing what they do and that's a bit unfair, but you know, they are very well practised in what they do generally and from their instructions, they are able to present it in a very comprehensive and cohesive way – but actually just sometimes standing up, someone just telling them why they are in that position and the difficulties that they are having it can just come across as more human

– and I think in road traffic and other cases, someone who is, you know, reasonably comfortable in speaking in a courtroom, they can actually do themselves a power of good. (Interview participant 17 – LA)

This did appear to be the case in some of the hearings that I observed, as defendants could come across as being very genuine, but whether this will have actually significantly affected the magistrates’ or the judges’ decision-making is unclear.

Another legal advisor (interview participant 16) said that ‘they [unrepresented defendants] may feel more involved in the process’ as a result of self-representation. It was also noted that defendants may benefit from greater explanation from legal advisors and prosecutors, particularly in the traffic court, than a represented defendant would. Furthermore, in the traffic court, legal advisors may also pick up on things that a defence lawyer may not necessarily detect, due to legal advisors being more knowledgeable in some instances due to the frequency in which they deal with those types of cases (see s. 6.7.2(a)).

A third legal advisor also mentioned how unrepresented defendants get the opportunity to take a more active role in their case, and how it can be quicker for them to appear unrepresented:

If I am honest in straightforward cases, yeah because it’s quicker for them so say they are turning up in a traffic case, they are not waiting for their solicitor to come. They can get straight in and into court so in your run-of-the-mill type cases, like your traffic cases, like your excess alcohol cases in the GAP court, your drunk and disorderly, it can be a lot quicker for them to come in and also they get to explain their side of it to the magistrates as well directly so I would say that’s potentially an advantage. I wouldn’t say there were many if I’m honest but that’s definitely one – and also, they are getting to make their own decision on what they want to do with the case rather than taking the advice of the solicitor that they may not want to take the advice of. They may disagree with the advice that has been given to them. (Interview participant 18 – LA)

From observing it was true that unrepresented defendants did participate in proceedings more than represented defendants did. If they had pleaded not guilty, for example, in certain instances they had to cross-examine witnesses, and if they had pleaded guilty or were found guilty, then they were given the opportunity to speak before being sentenced. This did not usually happen to represented defendants. In the cases that were observed, it was not always the case that unrepresented defendants were dealt with more quickly. They did not have to

wait to see the duty solicitor or for their solicitor to arrive, as the interviewee said, but as has been discussed above (at s. 6.7.1(a)), unrepresented defendants tended to be dealt with after those who were represented.

In addition, a few defence lawyers felt that because unrepresented defendants do not always know about the rules of criminal procedure, they can get away with doing or saying certain things, which a lawyer would not be able to get away with. For instance:

In trials I think an unrepresented defendant can have some advantages in the way that they present their case because they'll be doing things that they are not actually allowed to do by virtue of the Criminal Procedure Rules and if they have a solicitor or barrister representing them then it would never even come up or come out in court like that but because they are not to know better, they get away with it, whether they are doing that on purpose or not I don't know and that varies from person to person; but yes, I think there are some advantages but I'd say the advantages of having a lawyer far outweigh the advantages of not having one. (Interview participant 12 - DL)

An usher indicated an additional advantage: that unrepresented defendants would save money as a consequence of them not instructing a solicitor in cases where they would not be entitled to legal aid, or be entitled to see a duty solicitor. The usher suggested that in certain cases a solicitor would not usually be required (due to the lower seriousness of the offence and the penalties available). Although the participant felt that in general there were no benefits (financial or otherwise) to self-representing, she went on to say:

Participant: Ah well see your motoring courts are a different kettle of fish because in motoring courts, if it's not imprisonable – you know like for not having no insurance and things like that, then they wouldn't normally have a solicitor; so if I were in them courts, you couldn't recommend that they go and get a solicitor because - do you know what I mean? That's not in their best interest because they would end up paying because they can't get legal aid. I wouldn't recommend that they should go and get a solicitor.

Interviewer: and you wouldn't recommend because of the financial impact?

Participant: Yeah [because of the financial impact] and it's not imprisonable – do you know what I mean? The outcome, if they are in for no insurance, it's a mandatory so many points and they are going to get a fine no matter what, so the majority of people – some people do have a solicitor and they do pay them – but the majority of people come in not represented, and I wouldn't dream for one minute saying you know 'you should go and get a solicitor'. We wouldn't do that. No ushers would do that. (Interview participant 15 – U)

In the observations, I observed that unrepresented defendants generally received more assistance from legal advisors than represented defendants. Judicial prosecutors were also observed speaking to unrepresented defendants before their hearing began. However, I did not notice unrepresented defendants getting away with things that lawyers would be reprimanded for, although this only means that it did not occur in the cases that I observed. When considering financial factors, money will have been saved where defendants would otherwise have to pay for legal representation

However, if a defendant pleads guilty to an offence under circumstances where they would have contested the case and been acquitted had they received (and followed) legal advice, then this will have financial implications for them in relation to court costs and potentially, financial penalties. The impact of having a criminal conviction may also have financial consequences. Furthermore, if a defendant pleads not guilty to an offence that they might have pleaded guilty to if they had received legal advice, and they are later found guilty at trial, they will be subject to higher court costs; though whether this would outweigh the cost of legal advice/representation is not clear given that court costs vary, that different cases last different amounts of time, and that legal representatives will charge different rates. No other recent research has discussed the possible advantages of self-representation in England and Wales – they seemed to focus only on disadvantages – so it is not possible to make any comparisons.

6.9 Chapter conclusion

It is clear from the above discussion that some unrepresented defendants will experience fewer problems than others. For example, experiences are likely to differ based upon how much assistance they are provided by court staff, whether they have been to court previously, and whether or not they are regarded as vulnerable. One defendant's experience is not going to be identical to another. Criminal proceedings are complex and defendants' needs will differ at different stages. As shown within the findings set out within this chapter, different things are expected from defendants at each type of hearing – whether that be at a plea hearing, sentencing hearing, or trial, for example – and different problems arise for defendants as a result. The assistance that defendants will require to participate in proceedings at each stage of the process will be hearing, individual, and context dependent and will depend upon the particular issues at the time. This makes it a difficult task for court

actors to assist defendants at court, as no case or individual will be exactly the same. Awareness and understanding of the different experiences and circumstances that defendants have is important, in order for assistance to be best tailored to the individual concerned.

Despite the differences discussed, though, from the data collected in this study and in previous research, it appears that generally unrepresented defendants experience issues when representing themselves at court. Their ability to effectively participate and engage in proceedings tends to be limited. They do not always: prepare effectively for their hearings; fully understand or read their case papers; and know what plea to enter. They also sometimes struggle with cross-examining witnesses and say little when it comes to sentencing. There was a clear tension between due process and crime control values when it came to the amount of assistance offered to unrepresented defendants. Some advantages of self-representing were mentioned, but these were few and far between. Importantly, issues around understanding and feelings of marginalisation and exclusion were not exclusive to those who were self-representing. Represented defendants can also experience problems with these things as well. There is less concern around this, though, as represented defendants are required to take a less active role in proceedings. It is important, however, that both represented and unrepresented defendants are able to participate in court proceedings themselves (as has been discussed in Chapter Two and will be further discussed in Chapter Nine).

7.0 Chapter Seven: Virtual Hearings

The last chapter focused on the experiences that unrepresented defendants have when appearing in person at court. This chapter will consider the experiences that defendants have when appearing virtually, both on the use of video links from prisons to courts and those from police stations to courts. As will be shown, video hearings raise different issues for defendants.

7.1 The use of video links from prisons to courts

As discussed in s. 2.3, live links are now used for some hearings from prisons to courts; and, thus, in these instances defendants are not physically present in court. This section discusses the implications that this has for defendants themselves, both represented and unrepresented. It considers whether appearing via video creates efficiency or inefficiency. The findings discussed are mostly based upon the interviews conducted. This is due to the small number of virtual hearings that were observed and the fact that information on some of the issues discussed could not be attained through observing court hearings.

As will be shown, video links are used for a range of hearings. A legal advisor discussed the process of booking a case in for a virtual hearing:

What we do is so defendants are charged and detained, they plead not guilty so it goes off to trial, we go into an interim hearing pending the trial so I look in the electronic court diary search for that particular type of hearing, it throws up a slot for me and we know that the consultations starts 15 minutes beforehand and that's all booked in our diary and then an email goes to a centralised regional diary unit who are based in [prison name] and they then basically oil the wheels behind that and make sure everyone is in the right place at the right time for the hearing. (Interview participant 17 – LA)

When defendants are represented, they will speak to their solicitor over the link before their hearing begins. Solicitors have a fixed time slot to speak to their clients prior to the hearing over the link and the hearings themselves are scheduled for a fixed time, too. Hearings are conducted as if the defendant is present in court.

7.1.1 Interviewees' experiences with the use of video technology

The judicial prosecutors interviewed did not have a great deal of experience in relation to prosecuting defendants via video link from court to prison. However, the defence lawyers, ushers and legal advisors interviewed reported having a lot of experience of using it or observing it being used for an array of hearings, including: first hearings for defendants already sentenced or remanded on other matters; second bail applications; and sentencing hearings where the offender is remanded in custody. These types of hearings were observed whilst observing in Courts A and B. None of the participants interviewed had used it for trials - and no trials that were observed were conducted over the link.⁶⁸

Those interviewed were also asked what the surroundings are usually like when the defendant appears via video link from prison – what can the court actors see? They could usually see the defendant's face and upper body, and defendants are usually sat on a chair at a desk with a sign behind him/her, which will say which prison he/she is at. This confirms what was observed.

One participant who was asked about what defendants can see when appearing via video link said:

What they are able to see is dependent on what camera angle is currently showing so we will do, so we have about six different settings on our [missing] link and what we will do is we will take them through all of the angles, so it will start off angled on us and we'll explain who we are, and then we'll move the angle so they'll be an angle on the magistrates, an angle on their solicitor and an angle on the prosecutor and we will move the angles round depending on who's talking in the courtroom. (Interview participant 18 – LA)

When defence lawyers were asked if anyone else was in the room with the defendant, the majority of them stated that a prison officer was – or they thought that there might be usually one in the room with the defendant. A minority of defence lawyers interviewed said that the defendant appeared on his/her own. When there was a prison officer present, interviewees said that they tend to sit out of sight of the camera, so that they are not usually seen during

⁶⁸ At the time the data were collected, trials involving oral evidence were not being done over video links, although witnesses might appear by video link (see, s. 2.3.2).

the proceedings. However, court actors do on occasions see prison officers pass over the microphone, for example. Legal advisors and ushers said that prison officers do sit with defendants, but that they are not usually visible during the hearings. Most of the time when observing, the defendant was looking straight into the camera, but on occasions, the defendant was seen speaking or looking at someone next to him/her, although the audio was muted or the defendant could not be heard, so it is not known what was said or who he/she was speaking to or looking at.

Although no concern was raised by any of the defence lawyers, ushers, or legal advisors interviewed when they were discussing their experiences with the use of video technology, there is the risk in situations like this that defendants could be coerced, manipulated or influenced by the person who is in the room but not visible on the camera into saying certain things and/or answering questions in a particular way. I am not suggesting that this happened on the occasions I observed, but this is a potential issue with the use of video technology when it is not always clear who else is present in the room with the defendant and when they are not visible, what they may or may not be doing. Of course, when defendants are giving evidence in open court, they may also be subjected to coercion (from those sitting in the public gallery, for example) and they could be bribed or intimidated before giving evidence (Roberts and Zuckerman 2010: 294), but at least within an open court environment, court staff are physically present and are more likely to see such things and assistance can be provided by them. Relating to this, another reason for defendants in England and Wales appearing in person at court relates to the writ of habeas corpus – defendants should be physically brought to court so the legality of the detention and confinement can be scrutinised (Farbey et al 2011). To some extent this can be done over the video link, but the issues discussed above relating to coercion over the link will apply. Furthermore, as the interviewees have said, the whole of the defendant's body cannot usually be seen, so any potential injuries/damage caused to the defendant may not be as visible or noticeable as would be the case if the defendant was present in person.

7.2 What effect does appearing via video link have on defendants' experiences?

When defence lawyers were asked about what effects appearing via video link from prison has on the experiences that unrepresented defendants have, the responses were mixed. Three interviewees said that they did not think that it caused unrepresented defendants any

difficulty at all (and explicitly said there was no difference between represented and unrepresented defendants appearing via the link), one suggested that it depended on the hearing (a standard bail application causes no difficulty but appearing from the police station for a first hearing via live link would); two said that there were pros and cons; five said that it causes them at least some difficulty; and one said that it benefits unrepresented defendants. In relation to the court staff who were interviewed, two ushers reported that it caused unrepresented defendants no difficulty, one legal advisor said it benefits them, a legal advisor and a usher said it causes them some difficulty, and one legal advisor said it causes them little difficulty. In relation to represented defendants, all ushers and legal advisors said that it either benefits them or causes them no difficulty.

7.2.1 Positives of appearing over the video link from prison

All apart from one defence lawyer, as well as a few ushers and legal advisors, mentioned a positive for both represented and unrepresented defendants: namely that they do not have to travel to court when they appear via video link, which benefits them in a number of ways. For example:

From a defendant's point of view if you were in custody and you've got a choice of going on a video link or being put in the back of a van in handcuffs and being driven down the [motorway name] and losing your cell. I think from the prisoner's point of view I'd imagine that it is tremendously advantageous. (Interview participant 8 – DL)

The person that's in prison, it might be better for them that they are not coming into court and sitting in a cell all day because ... that's what happens. They are transported in a van and then they sit in our cells and they could be sat there all day – so they might not like [that]. (Interview participant 15 – U)

Whilst reaping the above benefits, the usher quoted also suggested that the video link causes defendants no difficulties as proceedings are conducted as they would be if the defendant were present in person. A defence lawyer (interview participant 1) also said how defendants can request (usually through their solicitors) to be introduced in person if they wish and said the courts 'don't mind having them produced'. Although whilst a legal advisor also said that this was a possibility, the legal advisor suggested that the courts are more hesitant to grant this than suggested by the defence lawyer:

They can request to be introduced as well. Court is reluctant too because we are encouraged to do video links but if there's a good reason for someone saying 'I really don't want to appear on the link, I've got issues and whatever', they can be asked to be produced in person. (Interview participant 16 – LA)

The legal advisor also said that the experience defendants have depends on the defendants themselves:

I think that there are positive and negative aspects; so, like I've said about the positive, not having to travel, defendants not losing their cells. It depends on the circumstances of the defendant. If they are serving a long sentence and that sort of – you know – they're a bit institutionalised. It depends. If it is someone who is new to the criminal justice system it is probably a bit more strange and a negative experience, whereas if it is someone who's a regular if you like, it is preferable to some defendants for practical reasons.

The positives mentioned largely revolve around practical matters relating to defendants not having to travel to court. How many requests are made by unrepresented defendants to be produced in person, and how many requests are granted is not known.

7.2.2 Negatives of appearing over the link from prison

One legal advisor suggested that a disadvantage of appearing over the link for defendants is that they are not usually able to see the duty solicitor:

I can say that there might be some limited disadvantages in that obviously if it's a new case and they don't know anything about it had they been produced at court they could then see the duty solicitor and have their case dealt with. If not, it would have to be adjourned for them to seek legal advice whilst in prison but in general I would say it is to their benefit ... We wouldn't necessarily ask the duty solicitor to go and see someone over the link because there just wouldn't be time because they are time-based slots so we may have 6 slots in a court and they are time based and we have to meet those timings and so a 15 minute briefing slot is given with their solicitor prior to it coming into court, so we wouldn't routinely ask the duty solicitor to assist someone over the video link. We would expect that they have already arranged it – and if they haven't, so say it's their first time in that they have been linked in from prison and they are held on other matters, and they don't know anything about it and they've not had chance to instruct a solicitor whilst they've been in prison, we would have to adjourn that link for them to do that. (Interview participant 18 – LA)

An usher also said that defendants appearing over the link do not usually see the duty solicitor. This appears to be due to the issues above in relation to timing and also because the defendant may already have a solicitor or had one at a point in the proceedings:

For a video link, it is very rare that they have duty. Then again if it's a video link, then they are normally in prison so somewhere along the line, they will have had a solicitor. If they've sacked them, then that's up to them, but more often than not, they don't ... Sometimes they forget – and they'll say 'I haven't got a clue who my solicitor is' and then we will try and find somebody. I have, on Friday I was in a video link court, and he couldn't remember who his solicitor was and nobody had come and said 'I am for this video link time' so I got duty, bail duty, and I said 'I'm not quite sure if you can help' but we did try and help him – and they went downstairs in the video link booth, where they can speak to them in private and duty said 'I can't help him because he has already got a solicitor who has spoken to him about this but he can't remember who it is', so then they were trying to find out ... They did eventually – but by that time the video link slot – because there are half an hour slots – that had gone; but that wasn't the court's fault. ... if it's a fixed rigid one, which this morning we have got back-to-back ones, so there's no room for people going over, then we can't do a lot about that; but obviously if we can, sort of say 'right he can have an extra 15 minutes', we try and help. I mean most of the solicitors round here, they're in walking distance, so we can phone them and they can be with us or send someone down within a couple of minutes. (Interview participant 14 – U)

This will cause delays and may exacerbate any confusion felt by the defendant. It was clear that courts felt bound by the booked length of time for the video links. A judicial prosecutor also said that when defendants appear over the link it is harder for prosecutors to communicate with the defendant and provide them with some informal advice and assistance; and another said how the behaviour of the defendant can be negatively impacted when they appear over the video link:

If it's a case management hearing, it means that we wouldn't be able to speak to them [the defendant] informally, which can sometimes help alleviate any confusion that they have. It's not that we can't say certain things in the courtroom; it's just a formal procedure that's all. You have to wait until it's your turn to speak and you're supposed to not address the defendant, you address the magistrates all the time, but sometimes you just want to sit down and speak to them and say 'right, you're trying to tell us you were insured, but let me show you why that can't be' or 'if you've got a certificate, then let me look through it' and help them understand that 'yeah you've got a certificate but you're not insured for that journey because you were delivering a takeaway and this is not business insurance' – and it's easier to help someone understand outside of the

courtroom sometimes because you can take a bit more time and you can speak to them one-on-one which is better, but if it's a video link you can't do that. You could perhaps ask the magistrates to leave the room but it's still a bit strange over a video link. (Interview participant 20 – JP)

I find that because they are hidden behind the screen and not actually in the arena of the court they can be quite more abrupt and disturbing sort of thing, if you know what I am trying to say. (Interview participant 19 – JP)

Concerns raised by participants related to unrepresented defendants experiencing problems with getting their paperwork (discussed in s. 6.2.3); organising representation; as well as understanding, remoteness, hearing, and participation issues:

I imagine they feel even more removed from the whole sort of scenario and it's not always easy to understand things when you're listening over the link. I mean I'm sure you can't hear as clearly as you would if you were in the room and I'm sure they just feel more removed from it as well. (Interview participant 6 - DL)

I have seen one or two defendants unrepresented on the video link. They don't really seem to participate or when they do, they participate too much and they don't know when to shut up and they can't judge when it's their time to talk and when to finish so the communication is quite difficult and sometimes, there's a bit of a delay. It might only be two seconds but there's a delay sometimes in listening to them, so I think I should imagine unrepresented defendants feel – I can't believe that they feel as if they are talking to a court because they are just sat in a room in prison. (Interview participant 7 - DL)

I think an unrepresented client feels quite unattached to the court case in any case – not involved - and if you take them out of the room and just put them in another room in prison, it removes the formality and they just don't really listen or understood what's going on. (Interview participant 12 - DL)

A legal advisor also mentioned the issue of remoteness and suggested that it is more difficult for a legal advisor to build a relationship with an unrepresented person when they appear over the link as opposed to when they are present in court:

You want to explain to them what the process is. When the solicitors see them beforehand, they're in a private consultation room – solicitors are in a private booth in the court and they're in a private booth in prison and it's one-to-one. When you do it in the courtroom, it's in a bigger court setting and you're further away from the camera so you appear more remote and quite often as I say with solicitors, people don't appear on

the video link very often for a first hearing, so they've already got a relationship with this person. We generally haven't and it might be the first time that we've seen them so there's a barrier there and it's easier to bridge that barrier when you've got someone sat in front of you than when they are on the link. It's not insurmountable. It just feels better. (Interview participant 17 – LA)

Furthermore, another legal advisor discussed how organising representation can sometimes be difficult when defendants appear over the link:

I don't think there is a problem with the average hearing. It can cause a problem – the police sometimes produce people on the link who should have solicitors – obviously these people are in prison, so they've obviously got a criminal history usually of some description. Somebody might be serving a lengthy sentence and the police realise that they've got a burglary sitting on the shelf that needs charging, they will contact our central team get a video link hearing and that person, if they are unrepresented, well they won't have had the chance to instruct anybody from prison, they won't know what that hearing is about ... it won't be in a defence solicitor's diary as they don't know so then you generally feel obliged to adjourn that so it's a bit of a wasted hearing at first hearing for the ones that the police arrange. In the past we've tried to get better systems to deal with that, but yeah, it still happens. (Interview participant 16 – LA)

A legal advisor also spoke about the problems that appearing via video link has on represented defendants' experiences, and so did two defence lawyers:

[It is] negative in the sense that a lot complain that they just can't hear what's going on and sometimes you'll find that a video link hearing will take place and then half an hour later, the client will ring you from prison saying, 'can you just tell me what happened? Because I've no idea'. (Interview participant 11 - DL)

In relation to defendants' ability to hear, in three cases observed (Case 397, 399 and 400, which were all observed in Court B), when the defence lawyer was talking, the defendant themselves or the prison officer, who was sat with them, had to tell the court that they could not hear what was being said. On two occasions this was because the lawyer was too far away from the microphone and on another occasion the microphone was not working so the lawyer had to speak into the prosecutor's microphone. When this was brought to the court's attention (in two cases by the defendant themselves and in the other case by the prison officer sat with the defendant), the defence lawyer repeated what he/she had said, so the defendant could hear it. Based upon the observations, the potential difficulty with hearing is something

that both courts A and B are aware of. To check hearing and also to check whether the defendant could see everything and everyone, the legal advisor – at the beginning of the hearing - always introduced the defendant to the bench and he/she did the same with the prosecutor and defence lawyer. Furthermore, in the cases discussed above, the lawyers repeated what the defendants had not heard to ensure that they did not miss anything.

When asked whether there is any procedure in place to check whether microphones are working prior to the hearing, one legal advisor said that there is not, but this is something that may be changing. Another said that she tries to check with the prison officer at the start of the hearing to see if the equipment is working. Thus, practice appears to vary.

An usher also mentioned a difficulty that defendants have in relation to them being unable to see their family during the hearing:

I think in some cases it is a negative one because it's like any trial, you can girlfriends, family at the back of the court but sometimes they can't see them. They know that they are at the back of the court or they've said to the solicitor – 'is my mum here?' and they say 'yeah your mum's here. She's at the back of the court'; whereas if they come in in person, they can look at their family for reassurance. (Interview participant 14 – U)

Therefore, when appearing via video link, it will not be possible for family members or friends to be present during the hearing to provide comfort and support like they would be able to if the defendant was appearing in person at court. Family members or friends could attend court, but as the interview participant said, defendants cannot always see those sat in the public gallery on their screen.

Two ushers also mentioned how technical issues can also cause problems for defendants (technical problems are discussed below in relation to its effects on efficiency: see s. 7.4). It was, however, suggested by the ushers that this is not something that frequently happens. One of the ushers went on to explain how the hearing would sometimes have to be adjourned if technology did not work, which delays things for the court and the defendant themselves. She also provided an example where visual difficulties had occurred in a hearing involving a represented defendant. The defendant could hear everyone in the room but could not see anyone. In spite of this, the hearing continued (with the defendant's consent).

The issues discussed above concerning the problems that some represented and unrepresented defendants' experience when appearing via video link will apply to both represented and unrepresented defendants. They impede a defendant's ability to participate in the court process. However, unrepresented defendants would be at a greater disadvantage, due to them needing to participate in proceedings to a much greater extent than represented defendants. They also signal to those in court that the defendant is in prison and therefore is likely to have a criminal record or be charged with other offences. Some defence lawyers mentioned other concerns, though, which would only be applicable to represented defendants. These are discussed below.

7.3 Before the hearing: time slots – pros/cons

Defence lawyers are allocated time slots to speak to their clients before the hearing. This is usually 15 minutes long, regardless of the hearing type, although, if possible, it may be extended. However, solicitors are expected to visit the prison before the day of the hearing to take instructions (though obviously this is difficult if prison visits are not available):

Participant: Yeah, there are [time] slots. I think they get 15 minutes slots. As a standard sometimes if there is no one else booked in, they can see them for longer. They would rarely be expected to see them for shorter unless they'd sort of missed their appointment time and then they might have to share with someone but generally they get 15 minutes or so.

Interviewer: ... Is this the same for all types of hearings?

Participant: Yeah, but if it was something like a tricky sentencing hearing or something, a solicitor will have often gone to the prison beforehand to see them, but yeah because they know that is sort of the time slot that they've got available. There is also the facility to contact the court if you do want to arrange a video conference before but I think it's rarely used. That is not something that I would suggest is used often but I think the court would try and accommodate that if there was that request. (Interview participant 16 – LA)

A quarter of defence lawyers interviewed said from their own perspective, the links can be negative due to the minimal amount of time they get allocated to spend speaking to their client before the hearing – which is not always long enough in their view - which can have implications for represented defendant themselves and the experiences that they have:

It causes us difficulties as defence lawyers because we get allocated slots – normally 15 minutes and I’ve criticised this in open court to a district judge. I’ve asked him to note it - I said 15 minutes to deal with a client who you’ve never met before on the video link for potentially a complicated case is not enough time and we’re dictated to by time. (Interview participant 10 – DL)

Some defendants may need a longer period of time with their solicitor, which may be the case, for example, if they have learning difficulties and/or have mental health problems or if there has been a change in legal representation. The interviewee quoted also suggested that lawyers do not always visit their clients in prison; though he did not say why. Another defence lawyer suggested that it may be due to financial reasons (see s. 7.3.2). Furthermore, two other defence lawyers discussed how their ability to communicate with a client and the prosecutor prior to the hearing is more limited when the defendant appears via video link as opposed to when they appear in court in person.

One of the problems is so much sort of negotiation goes on on the day but you only get a short slot with somebody so you can’t. If they were in the cells you would be able to say right we’ll speak to the client, speak to the prosecution and then go back to the client again and go back to the prosecution and you can’t do all that side of it when they are not there because you can’t often have them brought back and back. (Interview participant 6 - DL)

Another defence lawyer also felt that the discussions in the video conference booths at the Crown Court are not confidential:

Well we have video links from prison, which are oftentimes not great. One of the main problems I have with the video links system down at the Crown Court – the local Crown Court - is you have sort of a video conference before the hearing and the rooms aren’t soundproof. You can often hear as clear as anything the conversation, which impacts on how freely you are able to talk to your client, you know particularly if you are dealing with a sensitive type of case because you don’t want to be discussing the details; so there are issues with confidentiality. (Interview participant 6 – DL)

Note, however, that no interviewees brought this up as being an issue in magistrates’ courts during the course of the interview. Furthermore, in contrast, to what some of the defence lawyers said, another defence lawyer suggested that the short time allocated can be advantageous, as it means time is not wasted speaking about irrelevant matters with their

client. It also means that defence lawyers do not have to go to court until the time of the hearing (because they know when their hearing is scheduled for):

You have a short period of time with them [defendants] so they can't go on and on and on about things that aren't relevant. It focuses your mind on what you need to know because you have that 15 minute before the hearing and then you're in the hearing so video links are good provided we know what times things are happening and that the court doesn't change the times because, for instance, if I've got a video link at quarter past three, I know I don't have to go down first thing so I can get some work done and then go down; whereas sometimes you'll go down at two o'clock and be told 'oh your video link has been moved to half past three' so you're hanging around. (Interview participant 7 - DL)

What the above interviewee said, though, does not appear to be particularly client-centric. McConville et al (1994), found that most solicitors spent little time speaking to their clients at court – to take instructions and develop a relationship with their client - and when they did speak to them, they usually did so in the corridors of the court or some other public location rather than in a private interview room, in order to save time. Defendant participation was also not prioritised by some lawyers in that study then.

Thus, whether the length of the time slots will be sufficient will depend on a number of factors. Nevertheless, it appears that defendants are usually dealt with quickly, defence lawyers only have a short period of time to speak to them over the link before the hearing, and they do not always go and visit their clients prior to their hearing. In short, efficiency is being prioritised over other concerns.

7.3.1 During the hearing: speaking to clients

A couple of defence lawyers and an usher also mentioned that video links give rise to difficulty if they need to take instructions from their client during the hearing and they mentioned the problems with speaking to them in open court:

Yeah, I mean sometimes you can ask and if you want to talk to them during the hearing, you have to do it in court, so people have to leave court. Everybody else has to go, so that's not so good. There used to be a phone but you used to phone and everybody could listen to what you were saying; so now what they normally do is just get people out of court so that's an inconvenience for the magistrates. (Interview participant 1 - DL)

Discussions between the defendant and their lawyer during a video hearing did not occur in the hearings that I observed, though they were observed to occur when the defendant appeared in person. This was usually because the defendant wanted to speak to their lawyer about something or because the lawyer wanted to take instructions from them. When this was the case, the lawyer walked up the dock where the defendant was positioned to speak to them. As suggested, this is not something that is or would be possible when the defendant appears via live-link, so instead the court has to be cleared and defence lawyers can then speak to their client in that way or they can speak to them over the phone. Some of those interviewed suggested that this is not something that usually happens due to the disruption that this would cause, resulting in efficiency and other court actors again being favoured over the defendant and their needs.

7.3.2 At the end of the hearing

When defendants appear unrepresented via live-link, once the hearing has finished, they did not appear to speak to anyone in court afterwards (based upon what I observed). When the defendant is represented, when observing in court I witnessed defence lawyers speak to their clients after the hearing – when they appeared in person to clarify things what had taken place, or to ask any questions that they had. When they appeared via video link, I did not see defence lawyers speak to their clients immediately after the hearing in court. This means they could not clarify what had happened, nor advise on next steps (e.g. on any appeal).

When court staff were asked if defence lawyers were able to speak to their clients after a video link hearing, a couple of court staff mentioned how this is something that the court could arrange, although they suggested that it would not always be possible:

So quite often we'll get them saying, 'are you going to come and see me now?' in theory, no but if there was a need to and we could accommodate it what we can do is we can all vacate the court and allow the solicitor to speak to the defendant over the link if there was a genuine need for it or what they could do is they could make a phone call to the prison from the court phones and obviously to the prison line but in general no, we wouldn't arrange a briefing for them afterwards, so it would generally be the solicitor will say to them 'I will come and see you at prison. I will come and book an appointment with you' so yeah that is one thing because they'll always say 'are you going to come see me now?' which they are not going to do because there is not a briefing afterwards. (Interview participant 18 – LA)

Hence, defence lawyers do not usually speak to their clients immediately after a video hearing due to the practical issues this raises and the lack of available facilities:

In [Court B] you rarely get the opportunity to speak to the person afterwards. The court will ask if the prison can accommodate it and it's rare that the prison can accommodate it; whereas if you've got someone in person then you have a chat with them outside or you can go down to the cells and speak to them; whereas if you're video link sentencing, they might have been sentenced to 52 weeks in prison and you don't get to debrief them and talk them through it and say this is what happened and this is why their decision is this and explain what 52 weeks in prison actually means and they've got time served and give them an estimate of when their actual release date is going to be. It just doesn't allow them to have any advice effectively as soon as they've been sentenced. The problem is if you've got two or three cases one after the other, I don't see how it would work. (Interview participant 12 - DL)

Another legal advisor implied that defence lawyers now speak to their clients less frequently immediately after the hearing than used to be the case:

There's a phone at the back of the court and I'm thinking it used to be used quite a lot and I can't remember the last time the defence used it and I honestly don't know if that's because it's not working or if they just don't use it anymore. If it's because, because there's not that sort of time slot and it's normally back-to-back appointments, I don't – the prisons are really helpful and I think if they could, if we said 'could they have a brief word with their solicitor?' I think those prisons would say 'yeah', unless we were doing a back-to-back appointment, but yeah, there was like a phone conference at the back of our video link room, and it was quite normal to see defence solicitors to say, 'I'll have a word'. You'd see them on the phone, 'right, this is what's happened. I'll come and see you next week' but yeah I can't think that has been used lately. (Interview participant 16 – LA)

Instead of speaking to their clients on the link immediately after the hearing, the defence lawyers interviewed tended to send them a letter instead, either visit them in prison personally or ask a colleague to do so, or arrange to speak to them over the video link at a later date. One defence lawyer noted that prison visits had become rarer due to the potential financial implications, however.

There were mixed opinions from the defence lawyers, ushers and legal advisors interviewed about whether the inability to speak to a lawyer immediately after the hearing was problematic for their clients. One defence lawyer (interview participant 1) said it was 'rare

that you need to speak afterwards' as she makes sure she has 'covered it all before'. A legal advisor also said:

Yeah, they can go and speak to them afterwards. As I mentioned very often because a defendant cannot stand trial over the link, witnesses can give evidence over the link but a defendant cannot stand trial over the link, so very often you're dealing with interim hearings, so what will usually happen as I mentioned, the solicitor will often speak to the prosecutor before they go into the booth, so what happens in the hearing is pretty much what the defendant is expecting to happen. There are very rarely any big surprises but if they just needed some reassurance or explanation then they can be seen afterwards or either over the private link in the booths or they can speak to them over the telephone. There is a dedicated line in the video link suites. (Interview participant 17 – LA)

These interview participants are making assumptions about literacy and understanding of legal processes. Even if a defence lawyer has explained things to them before the hearing and an explanation has been provided in court, that does not mean that no further discussions will be required.

Thus, some other defence lawyers interviewed said that they would want to speak to clients afterwards, and they felt like their client would want to speak to them too. This view was also shared by some legal advisors and ushers: For instance:

What can you do? Well, write, but that's not ideal because people want to speak about things. (Interview participant 10 - DL)

I think sometimes, yes. If they are still going to be locked up and not released, I think maybe because it's like everything else. Sometimes things go so quickly, and if they can't hear properly or if they can't understand what's going on, it would be nice for them to say 'right after this session here, you've got another 10 minutes, so instead of say half an hour slots, if they gave them 40 minutes slots and said right, after we've done this, you know you can go down and have 10 minutes with your solicitor and he'll explain everything. (Interview participant 14 – U)

Two other defence lawyers also expressed concern about whether defendants really understand what is happening when they appear via video link, which suggests a chat afterwards is necessary on certain occasions for this reason (see also the quote by interview participant 11 in s. 7.2.2 above):

You don't usually get a chance to speak to them after the hearing anyway which is a bit of problem because they're sort of sat blank face during the hearing and you can tell they've not really understood everything that's happened and it's quite difficult to get them to keep them afterwards to go and speak to them after the hearing so it usually involves a visit after anyway – going out to see them ... you can ask the prison officer to try and keep them back but they will often say – if there's another one [defendant] that is going to be brought in, then they have to clear that room for the actual court hearing and often times they just want to get them back on the wing and the staff will say we can't sort of hold them back for you to come and speak to them afterwards so nine times out of ten you don't get to. I mean, I just usually end up saying to them in the conference before the hearing, I'll come and see you next week to sort of explain what's happened or if you know it's someone who is reasonably clued up you may just be able to do them a letter or if they phone you from prison, but a lot of time you can tell they've not really understood even though you've had a chat beforehand so. (Interview participant 6 - DL)

Thus, when defendants appear via video link they do not get the same opportunity to verbally communicate with their lawyer as they would if they were appearing in court in person.

When defendants are unrepresented, no one will be there to speak to them after the hearing to explain what has happened and/or what is going to happen next and to answer any questions that they may have, so they may be particularly disadvantaged.

7.4 Does using video links improve efficiency or create inefficiency or both?

As stated above, defence lawyers, legal advisors and ushers were also asked whether using video links from prisons to courts improves efficiency or creates inefficiency or both. Seven of the twelve defence lawyers interviewed said that they thought using video links generally improved efficiency. The view was also expressed by an usher and a legal advisor. The reasons given related to time and money and issues relating to transportation. For example:

Well it's quicker for the defendant, well you don't have to transport them and you can speak to them quite well. (Interview participant 1 – DL)

It depends what you're defining as efficiency. It's a lot cheaper so if you're talking about financial, it's a lot cheaper and we're all taxpayers and we don't necessarily want people to be brought from prison at the costs of hundreds of hundreds of pounds to then go back – you know – at a similar cost. Getting somebody from prison, they'll be setting off in the morning at something ridiculous like 5 o'clock in the morning and might not get back for 12 hours. A video link, they're brought off the wing 15 minutes before and

they're back on the wing 15 minutes after so it's probably, it's more efficient – time and money – in time and money. (Interview participant 3 – DL)

Usually if it works it improves efficiency ... Because as much as there are technical difficulties occasionally, there are also, you know, if you were transporting people they were as equally as many problems with transportation – you know buses breaking down, people not being put on the right bus to the right court so it runs pretty smoothly I think, the video link stuff. It's obviously cost efficient. It means that the defence solicitors don't have to travel to prison to take instructions so there are lots of positives outweighing the negatives I would say. (Interview participant 16 – LA)

Most of the defence lawyers who said that using video technology increases efficiency, however, also mentioned how the link can create inefficiencies as well. Four other defence lawyers said how they felt overall it decreases efficiency (and the response of another defence lawyer was mixed). Most of the legal advisors said either that it is inefficient, or that it depends on whose point of view is being considered; and the ushers provided a mixed response. There were several different points behind perceived inefficiency: technological and administrative issues; the fixed time slots; and confidence in using the technology.

Technological failures and administrative issues were mentioned by a few defence lawyers and an usher. For example:

Prisoners take priority over non-prisoners. Video link tries to take priority over physical appearance prisoners because they have slots to work to. The technology doesn't always work ... I think it just engenders inefficiency in the way that the court runs. (Interview participant 4 – DL).

If the system worked perfectly it would undoubtedly increase efficiency. Unfortunately technology has a habit of failing, the links fall over and not infrequently and there are administrative difficulties such that the court finds itself with the video link up and running and they are looking at an empty room because the prisoner/defendant has not been placed in it at the other end and there is then delay whilst the person is found so if it worked perfectly it would undoubtedly be much more efficient. (Interview participant 5 - DL)

Two defence lawyers also mentioned problems they had experienced in relation to video links being used for multiple participants. For instance:

When it doesn't work, it just results in more adjournments ... A particular problem is where you've got multiple people in multiple locations so sometimes what you might have is the defendant in one place, the judge in another place and the advocates in a third place. They call those bridging links and they very, very rarely work ... One out of the three people can't hear. (Interview participant 11 - DL)

An usher also mentioned how due to the video link hearings being timed slots, it means that the court that is dealing with virtual hearings cannot always assist other courts by hearing other cases in-between the virtual ones, as they do not always know if they will have time to fit the cases in or how long the cases may take:

I think sometimes it creates inefficacy – because once you've got video links, you're not able to look to do anything else. You can't offer... you can go next door or to one of the other courts and say 'can I help out?' You know, give me a case that's ready and do it that way but if it's a video link, your video links are for a certain slot so you can't do anything else until either before the sessions all start or after. (Interview participant 14 – U)

The usher went on to elaborate further as to how courtrooms usually assist other courtrooms when they are not dealing with virtual hearings, suggested that things are more flexible when the defendant appears in person and that, in situations where video link hearings are missed:

If there were all bailers that were sat outside of your court, you'd say 'yes no problem, bring you in' then when we'd finish that then we would say 'right we can help you [another courtroom who have got other cases to deal with] out' or we'll be helping out and then someone will say 'ah I should have been here at 10 o'clock. I'm sorry – I'm late'; they would wait but we can't on a video link, we cannot keep them waiting because the prison would turn around and say or the detention centre, 'I'm sorry but you've missed your slot' ... It would either have to be rearranged or maybe, you know, if the wind is in the right direction, maybe you could get it on later that day or that morning, or it would have to be adjourned for another day and then they obviously get a bit fraught and a bit frustrated because they have not been able to be heard.

A legal advisor also mentioned this and said that whether it is efficient or not, depends upon whether it is being considered from the court's perspective or from a solicitor's perspective:

I think it depends from whose point of view you're looking at it from because we will deal with fewer hearings over the video link in an afternoon than we would with defendants in person who are present ... Having said that ... from a defendant's point of view and perhaps from a solicitor's point of view, they are given slots. It's more like an

appointment-based system. ... so actually, doing an appointment-based system sounds really good but it is inefficient - from a courts point of view it's inefficient, so there are pros and cons and there's pressure on court lists at the moment so we need to squeeze every minute out of it so we tend to do that at the expense of appointment-based slots. (Interview participant 17 – LA)

No cases involving multiple defendants appearing via the live-link were observed so no comment can be made in respect of this. Most of the observed hearings ran smoothly, with no technical faults, and the hearings did not overrun. However, in some hearings, some of the issues raised by the interviewees above occurred. Furthermore, not all legal advisors observed appeared confident using or setting up the video technology and they relied upon others in the courtroom (particularly ushers) to assist them.

7.5 Overview

The effect that appearing via video link has on unrepresented defendants and represented defendants appears to be mixed. The positives mentioned mostly related to the time saved (and inconvenience avoided) as a result of defendants not having to travel to court. This has the potential to enhance participation. However, the negatives related to unrepresented defendants' ability to receive their paperwork, as well as to hear, understand and engage with court proceedings, which gives rise to problems in relation to participation. Moreover, a couple of defence lawyers mentioned that the limited time that they have to speak to their client before the hearing can also be a negative for them and the defendant; although another respondent suggested that the fixed length of time that they have to speak to the defendant was a positive and did not mention this as being an issue. Of course, this only concerns those who are represented. Some of those interviewed also expressed concern about defendants not being able to immediately speak to their representative after their hearing.

Other research has also examined the use of video links from court(s) to prison(s). Two pilot studies evaluated the pilot use of video links between prisons and the magistrates' courts (Plotnikoff and Woolfson 1999); and the Crown Court (Plotnikoff and Woolfson 2000). In both studies, a range of court actors, including legal advisors, lawyers and defendants, completed questionnaires. The Crown Court study also interviewed judges. Data were also collected at hearings prior to the start of the pilots, where the case would have been eligible for the link had it been available. Information was gathered on, for example, the length and

outcome of each hearing (Plotnikoff and Woolfson 1999: 17-18; 2000: 8-9). Another more recent study by Transform Justice (2017a) examined virtual hearings, both from prisons and police stations. The report drew upon previous research, and gathered additional qualitative data, which was collected through three sources: a survey; telephone interviews; and a roundtable discussion. Participants included lawyers, magistrates and probation officers. The most recent study done examining defendants attending virtually was done by Jacobson and Cooper (2020). Interviews with practitioners took place, as well as observations of court proceedings (e.g. in criminal courts and family courts: Jacobson 2020b: 108).

As with the findings in the current study, the benefits of defendants not having to travel to court were mentioned in all of the above studies. In the 1999 and 2000 study, for example, the majority of defendant participants said that they would rather have the hearing conducted over the link and stay in prison than go to court (69 out of 88 - 73% - said this in the 1999 study, compared with 41 out of 54 - 76% - in the 2000 study). Some of the reasons for this included that the defendant did not have to clear (and likely lose) their cell, or travel in an uncomfortable van to get to and from court, and they had to spend less time waiting at court for their case to be heard (Plotnikoff and Woolfson 1999: 49; 2000: 34). In Transform Justice (2017: 10), some defence lawyers supported the use of the links for practical reasons, since they knew what time their case was going to be heard and what time their client was going to be there for a consultation. Other reasons for supporting the use of video-link included the avoidance of lengthy consultations, and because they deemed more administrative hearings to be more suitable for video. These matters were also mentioned by some of the defence lawyers interviewed in the current study.

The views of defence lawyers in the previous studies, however, were largely negative. In the 1999 and 2000 studies, participants who completed the questionnaire were asked whether they thought that the video link was fair. 83% of defence lawyers in the 1999 study said that they felt the link was unfair in some respect, as did 52% of defence lawyers (Plotnikoff and Woolfson 1999:50; 2000: 6-7). Participants described the link as being unfair for a number of reasons. There were concerns about the implications that appearing via the link had on outcomes and on confidentiality (whether conversations before, during or after court hearings with clients could be overheard or were being monitored). In Jacobson and Cooper (2020), those interviewed were concerned about the potential impact of video enabled hearings on confidentiality. In the Transform Justice (2017a) study, pre-hearing consultations on videos

were said to be overheard frequently by others due to the need for those speaking to shout due to the quality of the line and because rooms were inadequately soundproofed. The difficulty that defence lawyers experienced with communicating with their clients during the hearing was also mentioned. It was said that in order for a lawyer to have a private conversation with the defendant, the lawyer had to ask for an adjournment, book a slot in the video consultation booth and then return back to the courtroom where the hearing was being heard (Transform Justice 2017a: 12-13). Confidentiality was less of an issue for participants within the current study, though difficulties with speaking to defendants during court proceedings was something that was discussed by a few interviewees.

In the two pilot studies, defence lawyers also objected to the use of video links on principle grounds: the belief that defendants have the right to be physically present in court and should, therefore, be brought to court. There were also concerns that appearing over the link was impersonal and artificial and that defendants could not follow or participate in proceedings if they were not physically present in court (Plotnikoff and Woolfson 1999: 7/50-53; 2000: 6/34-38). In Transform Justice's (2017: 17) study, the majority who completed the survey thought that using video links would have a negative effect on defendants' ability to participate (58%) and communicate with practitioners and judges (72%). Participants were particularly concerned about defendants with disabilities, for example, appearing via video link and their ability to participate and understand. They thought that these defendants would be further disadvantaged (although it was recognised that it may be beneficial to those who have certain mental health issues, like social anxiety: Transform Justice 2017a: 20). In Jacobson and Cooper (2020), there was also concern about this (Kirby 2020: 96). However, in that study, those interviewed also said how the use of virtual technology in some ways encourages participation in that, for example, it creates a less intimidating and formal environment, and reduces delays and the extent that defendants have to travel (Kirby 2020: 97-98). The reduction in delays and travel were mentioned as a positive by some interviewees in the present study, but so were difficulties with hearing, and the remote and artificial nature of video hearings, which can have implications on defendants' ability to engage, concentrate and participate in court hearings.

In Transform Justice (2017a), respondents to the survey also mostly felt that appearing on video negatively affected the behaviour of defendants, in that defendants did not respect proceedings as much or view them as being as serious as they would if they appeared in

court. Video links were also said to facilitate and encourage inappropriate behaviour (using disrespectful language and/or leaving the room where they were held) due to defendants not being physically present in court surrounded by court actors (Transform Justice 2017a: 33). This is not something that was discussed by many participants within the current study, though, suggesting that it was not a particular problem for them.

The time slots that lawyers are allocated for consultation with their client was seen as being more problematic. In Transform Justice (2017a: 15), participants said that the 15 minute time-slots that lawyers were usually allocated were not always long enough for the lawyer to speak to their client. Consultations with those with learning difficulties and limited English, for example, were said to be particularly challenging. There was little flexibility to extend the slot due to other lawyers needing to use the booth and although they could book another slot later on in the day/when one was available, this would mean that their hearing would then be delayed (Transform Justice 2017a: 15). The problems with the limited time slots were mentioned by a quarter of defence lawyers within the current study.

Again, similar to the findings in the current study, in relation to post-court consultations, it was found in the two pilot studies that the majority of defendants did not speak to their lawyer over the link or have a telephone conversation with them after the hearing (Plotnikoff and Woolfson 1999: 27; 2000: 5/22). Likewise, in Transform Justice (2017: 13) lawyers often found that it was impossible for them to speak to their client over the live link due to practical and logistical issues (video rooms not being available and/or their client had already been taken back to their cell by their prison officer). These former studies did not say whether this was something that the defendant wanted, though in the 1999 and 2000 pilot studies, the importance of having post-hearing consultations were acknowledged in order for understanding to be checked (Plotnikoff and Woolfson 1999: 27; 2000: 22). It was also found in the present study that lawyers rarely spoke to their clients immediately after their hearings, though there were mixed views as to whether this was problematic or not.

In the two pilot studies, lawyers were also asked about their views on the reliability of the equipment and the majority said that they thought it was reliable. The majority of participants also described the performance of equipment as being acceptable or excellent; though some concern was expressed about the quality of the picture and the sound. Lawyers expressed concern about the ability of defendants to be able to hear what was happening during

proceedings. Some judges in the 2000 study also felt the same. However, 97% of defendants in the 1999 study said they could both hear everything that was said in court and see the court clearly on their monitor, and 93% said this in the 2000 study (Plotnikoff and Woolfson 1999: 25; 2000: 16-18). Nevertheless, concerns about the reliability of video technology were raised in Transform Justice (2017a) and in Jacobson and Cooper (2020). Those interviewed in the latter study were concerned with the practical difficulties associated with video-enabled hearings (e.g. problems with sound and connecting). In Transform Justice (2017a: 8), respondents said the live link did not always work which caused delays when this occurred; and the sound was not always adequate, so defendants could not always hear court actors or court actors could not always hear the defendant. Some technological issues were also discussed in the current study, which suggests that some of the technological problems mentioned in the pilot studies still have not been resolved.

In the 1999 and 2000 studies it was stated that it was not possible to quantify the costs and savings associated with wider implementation of video links, due to the number of factors involved and their complexity (Plotnikoff and Woolfson 1999: 7/54-59; 2000: 38-39). In Transform Justice (2017: 31) it was said that the costs associated with virtual hearings were not transparent and were difficult to calculate as a consequence of them being spread across a number of different bodies - including the Courts Service, prisons and probation, and the police (Transform Justice 2017a: 31). The majority of the defence lawyers interviewed in the current study thought that the use of video links improved efficiency due to cost and time reasons, though the views of the other participants were mixed in relation to these things.

More research needs to be done asking defendants themselves about the effect that appearing via video link has on their experiences. In Transform Justice (2017a) and Jacobson and Cooper (2020) defendants themselves did not participate in the study, and even though they did so in the two pilot studies, defendants' views may have changed since then. In relation to the current study without speaking to the defendants themselves it is impossible to know whether they felt remote, for example, as this is not something that can be known through just observing. The findings from those interviewed are useful, though, as they have had the opportunity to speak to defendants about the use of video links and they have observed them being used and had experience of using them themselves both prior to the court hearing, during and, in the case of defence lawyers occasionally – sometimes afterwards.

The defence lawyers interviewed in this study appeared overall to be more positive about the use of video links from prisons than they did in the previous studies conducted, although they did raise some concerns similar to those that were raised in the previous studies done (e.g. mostly relating to the restrictive time slots and the implications that this has and the technological issues that sometimes occur). Some of barriers faced by some unrepresented defendants when appearing over the link were also discussed by some of the interviewees, which were not mentioned at all or in much depth in the previous studies done. In the current research, however, less concern was expressed around privacy and confidentiality and the negative implications appearing over the link has on defendants' behaviour. Furthermore, few of the reactions raised matters of principle linked to the practicalities. For example, unlike in the previous studies done, no objections centred on defendants' right to be present at court and not many participants mentioned the need and right of defendants to be able to follow and be involved in proceedings. No participants mentioned the reason for defendants appearing in court either, which is habeas corpus (and that the defendant can be seen not to be injured). These factors may not have been considered to be an issue by the participants interviewed or it may be that it is accepted that in order for video links to work – and for the court system to be a more efficient one - such rights have to take a back seat.

7.6 First hearings from police stations to courts

As discussed in Chapter Two, video links are used to try defendants remotely from police stations, as well as prisons. As a result of the Coroners and Justice Act 2009 (s. 106(3)), this sort of hearing no longer requires the defendant's prior consent. Though defence lawyers do have the option to attend the police station or court, generally defence lawyers attend court and speak to their clients over the link before the hearing begins, as they feel they are better able to communicate with those within the court when they are there in person, though this does mean that communication between themselves and the defendant is hampered (Atkinson 2012). When the hearing is ready to proceed, defendants will be escorted to the appropriate room, where the hearing will be conducted in the usual way (Atkinson 2012).

In the area where the two courts being studied in this research are based, these hearings are not – at the time of writing – taking place. Defence lawyers, ushers and legal advisors were asked about this scheme and whether they thought it would have positive and/or negative implications for defendants or both. It is important to note, however, that the majority of

those interviewed had not observed it being used, or been involved in a case where it was used. Nevertheless, there was a general consensus from the defence lawyers interviewed that they did not welcome this scheme, and that it would have negative implications for defendants' experiences. In contrast, the legal advisors and ushers interviewed were more positive.

7.6.1 Negative effects on relationships and the ability to communicate/privacy concerns

Some defence lawyers were concerned about the negative effect that hearings by video-link from police stations to courts would have on lawyer-client relationships and their ability to build a rapport with each other – when the defendant appears at the station and the lawyer appears from court. Alternatively, when defence lawyers appear instead via video link from the police station, the ability of defence lawyers and prosecutors to communicate was questioned:

It's unacceptable. You can't have access to your client, the prosecutor. You can't be in two places at once. You're either with your client speaking to him, face-to-face, and if you are then you're at the police station, you can't then make representations to the Crown Prosecutor about potential, well he won't plead guilty to this but he'll plead guilty to that or he doesn't accept that, but he will accept that. You haven't got access. You need everybody in the same place. As well it's about building up the client rapport. You're asking somebody to put their trust in you very quickly, very quickly. You're there in 5 minutes and then you're basically giving them advice on things that might get them locked up so being able to speak to them face-to-face properly rather than on a video screen is really important in my mind - really important. That's an efficiency too far. (Interview participant 3 - DL)

I mean, I often think that the clients are at the most stressed at the police station because they are often thinking that they are going to get out [when they are going to get out]. They don't know what's happening. I think it would probably be one of the most difficult times to have somebody over the link. (Interview participant 6 - DL)

The issue of privacy/confidentiality was also mentioned by one defence lawyer:

The lack of privacy and therefore confidentiality is going to be very, very difficult in those circumstances and I think with experience and one's never sure whether if it's apocryphal or not there will be a deep mistrust as to whether a solicitor/client discussions are being listened in on. (Interview participant 5 - DL)

These matters undermine defendants' due process rights and their ability to participate in the court process (in the sense of being able to speak to their lawyer freely and in private).

7.6.2 Implications for bail applications, and vulnerable defendants

A couple of defence lawyers also felt that video-links from police stations could potentially have negative implications in relation to bail applications. For example:

It creates an impression at the police station because they are surrounded by police officers. It is in a police station. Police officers then have the opportunity to influence a bail decision; whereas if they [defendants] are in court, they have the opportunity to talk directly to a solicitor face-to-face, rather than a solicitor appearing via a video link. ... Magistrates can see them - they're there. If they are remanded in custody so be it; if they are not, then they walk from court rather than from the police station. (Interview participant 2 - DL)

This of course has implications for both represented and unrepresented defendants, but one defence lawyer (interview participant 5) said how he thought that the latter would be particularly disadvantaged because 'they don't have the knowledge and skills to make a bail application'. The difficulties that unrepresented defendants tend to experience when making bail applications was discussed in s. 6.6.3.

Vulnerabilities may be more difficult to identify over the video link due to the remote nature of the hearing (JUSTICE 2019: 56). Furthermore, even when vulnerabilities are known about, in Transform Justice (2017: 20-21), it was said that reasonable adjustments are not usually considered in relation to video hearings because staff are not sure what adjustments might be made when a defendant appears in this way. Again as mentioned above (in s. 7.2.2) - where the use of video hearings from prisons was discussed - defendants appearing over the live link from the police station will also be disadvantaged in the sense that family members and/or friends will not be able to be physically present like they would be able to be if the defendant appeared at court in person.

7.6.3 Practical issues, positives and efficiency concerns

Some defence lawyers were also concerned about the practical problems that the scheme would and does give rise to (as well as the issue of privacy/confidentiality which has been mentioned above). For example, the issue of defence lawyers not being able to get the legal aid form signed by the defendant (if the defendant is at the police station and the lawyer is at court) was mentioned:

I just tried that at [place name]. I've tried that before – the pilot scheme - and it didn't work ... From a defence solicitor's point of view when you can't go to the police station because you're going to court and can't go to the police station, you can't even sign the legal aid form so the whole system just doesn't work so solicitors don't get paid for the work that they do over the video link because you can't get your client to sign the paperwork. (Interview participant 9 - DL)

In this instance, this meant the defendant had to self-represent because the interviewee went on to say: 'I had to walk away because I couldn't get legal aid so he represented himself in the end'. This problem with getting the paperwork signed was also mentioned by another interviewee, who said that as a result of this police staff need to be in place to assist with it, which creates extra work and costs for the police. It seems that technological advantages have not reached obtaining necessary signatures, nor how to help defendants fill in documentation.

Another defence lawyer, while talking about the extra work that it creates for the police in order to supervise and run the hearings, said that the location of the hearing could also have a negative impact on the behaviour of some defendants:

Inevitably the technology won't work and you'll get defendants who will because they are in what they will perceive as quite a hostile environment at the police station will be quite disruptive or difficult and there's also from a police perspective the practical problem of who exactly supervises and staffs the video link. (Interview participant 11 - DL)

Only two defence lawyers mentioned a possible benefit of defendants appearing from the police station on their experiences (though both overall thought that it would have a negative effect). One referred to the convenience of appearing from the police station and the other described the speed with which the case could be resolved:

With some people [defendants], they'll be happy with it because they don't want the inconvenience of going to court and stuff. (Interview participant 10 – DL)

The positive ones would be the career criminals who know they are going to prison, know the system like the back of their hand, and they just want to get to prison as soon as possible and start serving their sentence but they're few and far between. (Interview participant 12 - DL)

One defence lawyer expressed concern about the implications the scheme would have on efficiency:

I think come the day when we have first appearances from the police station by the video link that will engender even more inefficiency and I think from my understanding of it, the police take the view that the only way they can make video linking run efficiently from their perspective is if the court sits earlier and much later than it currently sits and that's just the tail wagging the dog. In order to make video linking work so we don't have to bring a body, so we don't have to accommodate them in our cells, we would like you the court and the magistrates and the lawyers – on both sides – to work considerably longer hours to facilitate putting this punter on the video link instead of putting him in a cell overnight and bringing him tomorrow morning. It doesn't work – tail-wagging [the] dog. (Interview participant 4 - DL)

7.6.4 Interviews with court staff (legal advisors and ushers)

The court staff who were interviewed were also asked about what implications they thought the scheme would have on defendants. None of the court staff had been involved in such a hearing or observed one taking place, because it had not been set up in the two courts.

When legal advisors were asked whether they thought it would be something that would be introduced in the future, they suggested it would be something that the Government and HMCTS would want to happen. For example:

I know there is a push for it [by the Government] so it's going to happen eventually because there's a push for more and more video links to stop the transportation of prisoners so eventually yeah, but I honestly don't know any plans at the moment for when it will happen here. (Interview participant 18 – LA)

The issues that it may cause for the police and defence lawyers, though, were recognised by one of the legal advisors:

We could deal with it tomorrow because linking to a prison or linking to a police station in many ways it makes no difference whatsoever. The difficulties are the logistical difficulties for the police and the solicitors; so solicitors are in a court building, so if the defendant is arrested and transported to the court building, they can take instructions in the cells, so that's relatively easy. If we were doing it ... if we were linking to a police station 5 miles away, then they can't be in two places at once. There isn't the money in legal aid that there used to be and most solicitor firms are fairly lean, so it would mean employing someone to cover both, so they would be splitting themselves; so there is a bit of logistical difficulty from a defence solicitor point of view but they would adapt their practices to deal with it and I dare say that it would work. It would probably not help small firms with maybe one or two advocates but, you know, that's life I suppose – marketplace changes. The police cells are based upon throughput so they will know that in a 24-hour period they would expect to arrest 20 people and detain 12. They rely on those 12 people being put on a bus on Monday morning and being transported to the court cells and that frees up their cells for people to come in during the day and then they sit in our cells so they are dealt with throughout the day so some of them may be dealt with at 10 o'clock and some of them may be at 12. It might be 3 o'clock before the final defendant is dealt with in the cells and they are in our cells. The police don't want them sat in their cells because they want them to be freed up for the next group of people coming through and keeping people in cells – well from a police and court point of view is expensive and because you've got to have appropriately designed, well maintained cells, they've got to be well staffed and staff have to be vigilant because people can become difficult in cells; people can become unwell in cells. (Interview participant 17 – LA)

7.6.5 Summary

In contrast to the legal advisors and ushers interviewed, there was overwhelming agreement amongst the defence lawyers interviewed that rolling out virtual hearings for defendants via video-link from the police station nationally would be a negative thing, for both represented and unrepresented defendants (in contrast to the legal advisors and ushers interviewed). The reasons were similar to the kind that were mentioned by interviewees when discussing the use of video links from prison to court (e.g. problems with communication, the technological and practical problems that it would bring, and the artificial feeling it will have for defendants). However, some of the negative views on the use of video from the police station are different (e.g. comments were made about the environment that defendants would be in

and who would be present and the negative implications this would have and the impact it would have on representation rates and bail outcomes).

Defence lawyers were overall more negative about the use of video links from police stations to courts than from prisons to courts. This may be because the police station is regarded as a more hostile environment and/or due to distrust of the police and/or due to the nature of hearings that will be dealt with over the link from police stations (first hearings). First hearings are also dealt with via the video link from prisons to courts. One of the legal advisors (interview participant 17) interviewed (the exact quote has already been set out in s. 7.2.2), however, said that defendants do not appear for first hearings over the link from prisons very often – they generally appear at court in person for this hearing - so defence lawyers and defendants will have usually met each other at court prior to them appearing on the link, enabling them to build a relationship and develop a rapport; whereas this will not be the case when a defendant appears via the video link from the police station for their first hearing (unless they have been represented by that solicitor previously) and some of the defence lawyers interviewed suggested that their ability to communicate with defendants and take instructions will be consequently hindered.

More research is needed on this scheme to evaluate further the effects that it has on defendants' experiences – with defendants' views being obtained if possible.

Terry et al (2010) evaluated the use of live links from police stations to courts as part of a pilot study, which ran for 12 months in two magistrates' courts and covered 15 police stations. Interviews and surveys were done with a range of participants including defence lawyers, judges, magistrates and prosecutors; and court hearings were observed. Another evaluation has been done examining the new booking tool used in organising first appearance remand hearings held by video (Fielding et al 2020). Observations of video-enabled and traditional in-person hearings in magistrates' courts were carried out, as were semi-structured interviews with a range of courtroom participants.

In the current study a participant was concerned about the impact that the use of live links from police stations to courts would have on representation rates. In Terry et al (2010: 23) a lower proportion of defendants were legally represented in the virtual court sample (54%), compared to 68% in the control area. Legal aid was available without means testing in the

pilot, so it was assumed that financial considerations were not a significant factor.

Practitioners made a number of suggestions as to why they thought representation rates were lower: the belief that some defendants wanted to 'get it over with' and they thought that requesting to be legally represented would delay the process (this was also witnessed during courtroom observations); some defence lawyers failed to arrive at the police station in time for the hearing and with the defendant's agreement, the hearing went ahead without them (this was also witnessed during observations); and some defence lawyers were reluctant to attend virtual court hearings because of logistical reasons and/or due to them feeling uneasy about the process (Terry et al 2010: 23). In Fielding et al (2020: 5-10) defendants in the video court were also less likely to have legal representation than those appearing in the non-video hearings (Fielding et al 2020: 5-10).

Some participants in the current study also raised concerns about the reliability of video technology. In Terry et al (2010: 23), concerns were also mentioned in relation to this.

Practitioners also said that time delays were common when speaking and this was witnessed during the observations. This was said to cause problems when an interpreter was present or where the defendant had language difficulties (Terry et al 2010: 7). Overlapping speech was also a problem within Fielding et al (2020). The performance of audio-visual equipment was said to be dependent upon existing court infrastructure and inconsistencies were found in relation to how custody suites were set up (e.g. the quality of the camera and microphone and their positioning), which had implications for the visual and audio quality in hearings (Fielding et al 2020: 5-10).

In Fielding et al (2020: 5-10), it was concluded that the video court made it more challenging for defence lawyers to build a rapport with their clients. Furthermore, in Terry et al (2010: 22), the physical separation of defendants and the courtroom raised some concerns amongst the practitioners. It was said to have made it harder for defence lawyers and prosecutors to communicate before and during the hearings when defence lawyers appeared from the police station. This is something that was also raised by some defence lawyers in the current study.

A defence lawyer in the current study also said how appearing from the police station could have a negative impact on defendants' behaviour. This was supported by some magistrates and judges who were interviewed in Terry et al (2010: vi). They thought that the court had difficulty imposing authority remotely and defendants took proceedings less seriously than

would be the case if they appeared in person. This may have knock-on consequences for bail or sentence decisions if magistrates think that the offence is not being taken seriously. In Fielding et al (2020: 5-10), little difference was noted between the behaviour of defendants appearing in the video court after the introduction of the booking tool and those conducted in the non-video court.

As shown, some of the concerns and findings that occurred in Terry et al's (2010) study were raised in Fielding et al's (2020) research and in this current research. It is, however, important to bear in mind that in the current research, the vast majority of defence lawyers, legal advisors and ushers interviewed had not used a link from the police station or observed it being used. Nevertheless, this study provides an indication of their views. Furthermore, all of the participants interviewed had used live-link from prisons or observed it being used, so they had relevant experience of using live-links, just within a different context.

7.7 Chapter conclusion

The above discussion has shown how the experiences of defendants are likely to differ depending on whether they appear in person at court or via video link from prison or from a police station – both in positive and negative ways. This chapter has shown how the use of video links has expanded within the criminal courts and is now being used for more hearings than ever before. As discussed in relation to defendants appearing in person at court, the experiences that defendants have when appearing via video link will also similarly vary.

One of the major issues that has arisen from this chapter is the impact that the use of video links has on the ability of defendants to participate within criminal proceedings. Video links can enhance the experiences that some defendants have and increase their ability to participate within the process (e.g. due to defendants not having to travel to court and the reduction in waiting time). However, video links can have the opposite effect, too (e.g. due to: the unreliable and remote nature of it, and the negative effect it has on the ability of defendants to see their lawyers and communicate with them before, during and after proceedings). Further reform in the area needs to prioritise participation of defendants to ensure that the obstructions to participation do not outweigh the benefits. Otherwise, the barriers to participation will continue to increase and ability of defendants to participate in court proceedings will be further eroded.

8.0 Chapter Eight: Impact of Self-Representation and Suggestions for Improvement from Participants

Now that the experiences defendants have at court have been discussed, the current chapter will consider the impact that self-representing has on conviction and sentence, as well as on the length and number of hearings. The data for this are merely perceptions of the various groups of people interviewed, as there are no national statistics available. The chapter ends by considering suggestions put forward by interviewees as to how unrepresented defendants could be further assisted when representing themselves at court.

8.1 The effect of being unrepresented on the outcome and sentence of the case

Does being unrepresented have an effect on the outcome of the case (that is, on the verdict) and/or the sentence (if the defendant is convicted)? In relation to conviction, the two judicial prosecutors interviewed said they did not think it did, though one later went on to say that she was not sure because judicial prosecutors do not conduct trials, so they do not see the outcome of them. In contrast, all of the defence lawyers interviewed said that they thought that it could have an impact, though note as has already been discussed in the methodology section, defence lawyers could be said to have a vested interest in trumpeting the importance of legal representation and the need for it, so this should be taken into consideration when interpreting the results.

Nevertheless, the reasons given by the defence lawyers varied. Most related to concerns around the plea and the view that unrepresented defendants do not always know the strength of their case, understand the law, or are aware that they may have a defence. Thus, they may enter incorrect pleas, which might affect case outcomes (as discussed in s. 6.3.1). Furthermore, it was thought that unrepresented defendants may struggle to express any defence, and they are less likely to be able to present their case, which could have implications for the outcome. Another reason provided by some defence lawyers was because, in their opinion, unrepresented defendants tend to experience difficulties in relation to preparing for trials and getting all of the required evidence and cross-examining witnesses (as discussed in s. 6.1 and s. 6.4).

There was no general consensus, however, to whether being unrepresented has an effect on the sentence imposed. Those who said that it does brought up similar kinds of factors to those that were brought up above in relation to conviction, as above, including, knowing how to effectively mitigate (see s. 6.5.1). Other defence lawyers interviewed, however, said that being unrepresented usually does not influence the sentence imposed due to the existence of guidelines and the use of pre-sentence reports, which they suggested that magistrates usually follow and comply with. One of the judicial prosecutors also said that they did not think it has an impact, and the other said that while it can do in certain circumstances, usually it did not:

It can [have an effect] with the [exceptional] hardship argument, like I mentioned⁶⁹, but otherwise, no. It's quite cut and dry. It depends what they say. If it's an accident where a variety of points, like 3-11, it just depends on how they present themselves, if they are very sorry and then the facts that we have given, but generally apart from that it doesn't make a difference. Everything is quite set in stone with the sentencing - three points - because they follow guidelines and it tells them what points to give them so apart from accidents it shouldn't make a difference with points. (Interview participant 20 – JP)

Ushers were not asked about whether they thought representation has an effect on the outcome and/or sentence, because they would not feel able to comment on the decisions of magistrates.

In the current study, then, being unrepresented was thought to have an effect on the outcome (conviction), but there was a mixed response in relation to sentence. It is important to note that perceptions from observations have not been included, as it was not possible to control for a number of factors that that could be relevant to the sentence the defendant received (e.g. previous offending history and differences in the facts of the case and the number of aggravating and mitigation factors).

In order to bring greater clarity to the area and to see whether representation does have an effect on conviction and sentence – and if so, how much of an effect - it would be beneficial if more quantitative research was done and the factors mentioned above were controlled for. This was also recommended in Transform Justice's (2016) study, where it was concluded that qualitative data had raised some concerns which should be further examined. Judges were

⁶⁹ See s. 6.1.

more confident than prosecutors that the outcomes of trials and sentencing were the same regardless of whether someone was represented or not. Prosecutors felt that unrepresented defendants were more likely to be disadvantaged in terms of sentence than verdict. Nevertheless, like in the current study, there was concern amongst prosecutors that unrepresented defendants pleaded guilty when they had a defence and not guilty when they did not and there was concern whether they always understood what they had been charged with. The plea that is entered affects the outcome of the case and the sentence that they are given – if they plead guilty or are found guilty after a trial.

In Thomson and Becker (2019), which concerned the Crown Court, most of the interviewees thought that unrepresented defendants got the same outcome as represented defendants, although a few judicial interviewees said it was impossible to assess whether the outcomes were any different. Some other interviewees said that a higher proportion of guilty verdicts resulted from unrepresented defendants' cases, whilst others thought that there would be more chance of unrepresented defendants' cases going to trial (thus them entering a not guilty plea).

In two older studies – Zander (1969: 639) and Bottoms and McClean (1981: 105) - a greater percentage of defendants pleaded guilty than in this current study and a greater percentage of unrepresented defendants pleaded guilty than represented defendants (this was the opposite in this current study). In the former study, 80% of defendants had pleaded guilty (86% of unrepresented defendants had and 55% of represented defendants had); and in the latter study, 93% of defendants had done so (99% of those were unrepresented and 81% were represented). Reasons for guilty pleas were given but reasons as to why the guilty plea rate may have been higher amongst those who were unrepresented were not said. However, we are not told possible reasons as to why the guilty plea rate may have been higher amongst those who were unrepresented. There is no clear picture emerging as to whether representation has an effect on the outcome of the case and the sentence imposed.

8.2 What impact do unrepresented defendants have on the length of court proceedings and the number of hearings?

What impact unrepresented do defendants have on the length and number of court hearings? Is the length of court proceedings the same, or are they lengthened or shortened? Does having

defendants unrepresented give rise to more or fewer court hearings? What are the reasons for this? The focus will largely be on the data collected during the interviews, as only a small amount of quantitative data was collected on this when observing. I also did not examine court records, or follow cases the whole way through proceedings (from the beginning), so it cannot be said how many adjournments occurred for each case and what type. It is illegal to record court hearings whether by video or audio, so it was also not possible to time the hearings using a digital recorder (I looked at my watch instead and noted down the start time and the end time). Only impressions and averages can, therefore, be provided about how long proceedings and hearings took.

8.2.1 General observational data

The majority (71%⁷⁰) of all hearings, except trial hearings, were 20 minutes or less. A greater number of hearings were 20 minutes or less in Court A than B (79% in Court A and 64% in Court B) and more hearings were 21-40 minutes in Court B (13% in Court A and 24% in Court B). The mean length of hearings at both Courts A and B is set out below.

Table 13: The mean length of hearings at Court A and Court B

	<u>Unrepresented defendants</u>	<u>Represented defendants</u>	<u>Unrepresented defendants</u>	<u>Represented defendants</u>	<u>Missing data</u> ⁷¹
<u>Hearing type</u>	<u>Mean length in minutes</u>		<u>N</u>		<u>N</u>
Sentence passed	13	21	45	116	12
Adjournments	12	12	22	82	3
Case management	12	17	9	49	3
Trials	89	109	17	14	1
All hearings ⁷²	26	21	95	286	22

Overall, then cases involving represented cases on average were shorter. Nevertheless, in relation to case management hearings, trials and sentencing hearings, when the defendant was unrepresented, these hearings were shorter on average than when the defendant was

⁷⁰ Missing data concerning the length of hearings have been excluded from analysis – 5% of data were missing in both Court A and Court B (22 hearings).

⁷¹ See the above footnote (footnote 70).

⁷² This includes the following hearing types: ‘sentenced passed’, ‘adjournments’, ‘case management’, ‘trials’ and ‘other’ (see s. 5.1.2 for what type of hearings are included in this category).

represented; though as other factors were not controlled for, it cannot be said whether this was due to the fact that defendants were unrepresented or/or was due to other factors (such as the nature of the case).

8.2.2 Interview data – what were interviewees' perceptions of whether unrepresented defendants lengthen or shorten proceedings?

The majority of defence lawyers interviewed felt that unrepresented defendants resulted in proceedings taking longer than would usually be the case if a lawyer had represented the defendant, which can cause problems for the court. For example, when one defence lawyer was asked whether unrepresented defendants lengthen or shorten proceedings, he said:

They undoubtedly lengthen the time required for any type of hearing and that can put quite serious pressures on the court if they have a full list. You only need two or three unrepresented defendants in a court list to cause total chaos - courts may therefore overrun. (Interview participant 5 - DL)

The reasons why participants said that they slowed down proceedings varied. For one, unrepresented defendants may talk about irrelevant information during the court hearing that does not need to be discussed:

Unrepresented defendants, their cases probably take longer and if an unrepresented defendant wants to try and explain their case they may well try to tell the court things that the court doesn't want to hear - things that are irrelevant to the case at hand and that may prolong it. (Interview participant 4 - DL)

According to one interviewee, this issue is particularly the case at trials due to their fundamental nature:

Trials are all defined down to what the issue is but you will find somebody who is not represented will want to talk about something that happened 3, 4, 5 years ago and then they'll want to build it up on that and unfortunately you can't bring that all in. They are told not to bring that in. Things last a lot longer. (Interview participant 2 - DL)

However, this view was not borne out by the data from the current study, where trials were longer in represented cases.

Due to unrepresented defendants' general lack of understanding of the law and court proceedings, it was felt time also needed to be spent explaining things to them – which would tend not to be the case if the defendant were represented, as the lawyer would have provided explanations before the hearing started:

It can make stuff longer so it might be that, obviously if the solicitor has already briefed a client and they're giving their client's case to the court, that's already happened outside of court; so it can make proceedings longer because obviously, we have to have more involvement with an unrepresented [defendant] and we're having to ask them questions and elicit information from them that the solicitor would already have had in advance. (Interview participant 18 – LA)

The findings on the extent to which things were explained to unrepresented was discussed in Chapter Six (particularly s. 6.7.2(b)) and suggest that the level of assistance and the extent to which things were explained to unrepresented defendants varied. This will inevitably have an impact on the duration of proceedings and whether hearings took longer with an unrepresented defendant or not.

Defendants who plead not guilty must complete a case management form. When the defendant is represented, this will be done by the lawyer, generally before or during court proceedings (whilst other cases are being dealt with). When the defendant is unrepresented, the legal advisor or judge (depending on individual practice and whether a judge is sitting or not), will tend to assist unrepresented defendants in completing it. This, according to a small number of those interviewed, also results in proceedings being lengthened and time being wasted, and it results in additional work for court staff – which is not something that court staff welcome:

A not guilty plea where you've got to complete a case management form and identify all of the issues for trial, you can easily spend an hour or so doing that with an unrepresented [unrepresented] defendant, whereas it shouldn't take that long because all the forms should have been filled in before the case is called on to court but that doesn't happen with unrepresented defendants. (Interview participant 12 - DL)

They can be lengthier because you're going through, as I said before, in the road traffic court, you're taking your time to explain the process so it can be slightly longer and with the form [case management form] and things that's always going to take longer than if you've got a solicitor doing it for them. (Interview participant 16 – LA)

Case management hearings involving unrepresented defendants were observed to take place in Court A, but not in Court B. In Court A, when an unrepresented defendant had pleaded not guilty, the legal advisor or judge did assist them to complete the case management form, which is something that they did not do when the defendant had legal representation. A defence lawyer spoke about the possibility of defendants making mistakes when answering the questions and she suggested that this could result in witnesses being called to come to court, who are not required – because their statement could have been pre-agreed, for example; or alternatively, a witness may not be called, who is required, resulting in the trial possibly having to be adjourned. In her view, both scenarios result in court time being wasted:

On a not guilty plea there's a pre, they call it a PET form but I don't know what PET stands for, p e t. I call it a pre-trial, a case management form and there's loads of questions on there. You have to put out your basics of your case; you have to advise whether you know the person has had advice on whether if they plead guilty they get a reduction in sentence, if they don't come to court. You also have to decide which witnesses they want to come to court ... If we do it [complete the form] boom, job's a good un and we've done all the work beforehand but when they are in court and they've pleaded not guilty and they are unrepresented, it is a very lengthy 'well what do you say about this? Do you want this person to come to court?' and they don't know. They haven't got a clue. You know they don't know what they are doing there. They won't, some of them won't even know what a trial is and what the effects of them pleading guilty and not guilty are so it's a long procedure and it's stressful, unpleasant and they're asked questions that they don't know the answer to so there's the possibility of mistakes being made and witnesses not being called who they need or the other way round. Witnesses having to come to court which just aren't necessary. It's quite painful to watch. Have you seen? (Interview participant 3 - DL)

One legal advisor suggested that in reality, though, legal advisors are restricted in relation to how much time that they have to spend completing the form with unrepresented defendants:

The not guilty plea hearings are quite difficult with unrepresented defendants because there's a really long form that they need to fill in, as you may have seen, with a lot of sort of technical stuff in – and although it would be nice to spend, sort of half an hour with people to fill that in, in reality that's rare and it's not our role either to sort of sit and take instructions. We're supposed to hand it to them and say 'you fill it in' and that's quite tricky for people who are unrepresented and not used to the terminology on the forms and things. (Interview participant 16 – LA)

This suggests that not all legal advisors will be able to spend a lot of time assisting unrepresented defendants with the form and some may not even help them at all, which may cause problems for an unrepresented defendant if they are struggling to understand what they are required to do and will affect their ability to participate.

Only a small number of interviewees thought that unrepresented defendants shortened proceedings. According to one defence lawyer (interview participant 9), ‘they tend not to know what to say so they say nothing at all’. Both of the judicial prosecutors said they thought that represented cases took longer. For example:

I would suggest that represented cases can take longer than unrepresented cases because the ... solicitor will want to fully present all of the mitigation to the court and explore every avenue possible before we actually list for trial. (Interview participant 19 – JP)

Furthermore, one legal advisor said that unrepresented defendants can shorten proceedings, but he said it depends upon the defendant involved:

In a straightforward case, I think it’s shorter often with an unrepresented defendant, particularly compared to some of the solicitors that we have. Again I think it goes back to, if it’s a tricky offence, if it’s a technical one and you have to do a lot of explanation, that kind of thing, it could take a bit longer and if you’ve got someone who’s just – I was in a trial last week and lady who just really had some quite challenging mental health difficulties. We had a legal representative who was appointed, who dealt with the cross-examination only and was very good actually in dealing with it but she just needed more time and she got the time, but it just, it did take probably an hour longer – it took us three and half hours rather than two and half hours or something like that but that’s unusual and even if that defendant was represented fully, they would still have been challenging, so it often comes down to the person, not the process I think. The process doesn’t change whether you are legally represented or not. It’s people and the technical parts of it that can delay things. (Interview participant 17 – LA)

Due to unrepresented defendants tending to say less than a defence lawyer when they had to cross-examine and make their plea in mitigation (also see s. 6.4.1 and s. 6.5.1), the impression was gained when observing that time could be saved as a consequence of these things. When defendants are unrepresented, prosecutors are not allowed to make a closing speech at the end of the trial, so some time is also saved as a result of this.

8.3 Do unrepresented defendants give rise to more or fewer hearings?

As well as some of the interviewees saying that unrepresented defendants lengthen proceedings, some participants also noted that unrepresented defendants can cause additional hearings, as a result of their case being stood down for them to seek legal advice or because of them pleading not guilty, in circumstances where if they would have had advice from a lawyer, this may not have been the case.

As suggested, magistrates have the discretion to grant or deny an adjournment. When asked whether an adjournment would generally be granted or denied in the traffic court, one judicial prosecutor said:

It depends on the magistrates [whether a request for an adjournment will be allowed or not]. It depends on their decision. The legal advisor will ask the question – why they haven't sought legal advice before' when say the case is adjourned for Single Justice two months ago. 'You've had two months from the last court hearing where you entered your not guilty plea to get legal advice and you had a further two months before that when you first received all of the paperwork through the door from the police to get legal advice so you've had a long time'. They will question it and then it's up to the magistrates. I mean, they can't really do much if someone is pleading not guilty, then they can't deal with it today, but they might just list it for a trial, not a case management hearing for them to get legal advice, and if they want to change their plea then they can write into the court, and it will be dealt with like that. (Interview participant 20 – JP)

A legal advisor (interview participant 18) also mentioned how unrepresented defendants can cause additional hearings in situations where they have not had a 'chance to instruct a solicitor'. Thus, the hearing has to be adjourned for that reason and in cases where they 'sack their solicitor' at the trial stage, again the hearing will have to be adjourned in certain circumstances for the court to arrange for a court-appointed lawyer to attend. A legal advisor, when asked whether unrepresented defendants have any impact on the number of hearings, she said:

Not the number of hearings. Probably, maybe less from unrepresented defendants because lawyers obviously pick up issues and problems with evidence and so on. (Interview participant 16 – LA)

In relation to proceedings being stood down for the unrepresented defendant to seek legal advice, in the observations this happened in 9 out of 107 (8%) hearings which were classed as adjournments in Court A and Court B. In 5 out of 107 (5%) hearings, the hearing was adjourned after the prosecutor or defence lawyer had requested for it to be for a range of reasons (the defendant was represented in all of these hearings) and in 4 (4%) hearings, the hearing was adjourned because an unrepresented defendant had not brought the appropriate evidence. The effect of representation on the number of hearings did not, therefore, seem to be considerable.

A key reason for an adjournment was, though, that in 64 (60%) of the hearings, the hearing was adjourned because the bench had requested a pre-sentence report. Only a small proportion of these defendants were unrepresented (in 7 – 11% - out of 64 of the hearings the defendant appeared unrepresented). Pre-sentence reports were not requested more often for unrepresented defendants than represented ones, so additional hearings did not occur as a consequence of that. This is likely to be because most of the unrepresented defendants observed had been charged with an offence where the sentence would either be a fine and points on their licence or a discharge, so a pre-sentence report would not have been regarded as being necessary. In one hearing, in Court B, the hearing was briefly stood down, so that the unrepresented defendant could read their probation report (though this was not classed as an adjournment hearing for the purpose of this research). The other reasons for the hearing being adjourned were that sentencing had been adjourned because the court had run out of time or because the case had been sent to the Crown Court for sentencing or the hearing was adjourned for an interpreter. Thus, when pre-sentence reports are taken into account, proceedings were adjourned more for represented defendants than unrepresented defendants, though as suggested this may be due to the offences that they had been charged with rather than whether or not they were represented or not.

To summarise, it appears that there is mixed evidence in relation to the impact that unrepresented defendants have on the number of hearings and the duration of court proceedings and there does not appear to be a difference between the two courts studied. The observations show instances of different types where either represented or unrepresented defendants' cases gave rise to adjournments. However, these views were not mirrored by the results from the most of those who were interviewed, who said that unrepresented defendants

do lengthen proceedings. The impression was also gained that some court personnel saw unrepresented defendants as being problematic for efficiency reasons.

Previous research shows that there is no clear consensus on the matter. Bottoms and McClean (1976) found that it took longer to dispose of represented than unrepresented defendants' cases. This was partly due to the fact that the defence solicitors sought adjournments more often than unrepresented defendants did. Adjournments requested by the prosecutor were also more frequent in cases where the defendant was represented than when they were not. An explanation for this was that cases where defendants were represented tended to be more serious and thus, more time may have been required for both parties to be able to prepare themselves before the trial could proceed. Pre-sentence reports (then called social enquiry reports) were, however, requested slightly more often by the bench in cases where the defendant was unrepresented. Bottoms and McClean (1976: 46) suggested that the bench asked for a report to be done when they felt that they did not know enough about the case and the defendant, and this was more likely to be the case when the defendant was unrepresented, due to them often being less articulate than a defence solicitor and unable to effectively mitigate.

In another early study, it was also found that unrepresented defendants said very little in mitigation and they rarely made a sentencing suggestion (Shapland 1981). In contrast to Bottoms and McClean (1976), though, more sentence reports were not requested for unrepresented defendants. Therefore, as in the current study, more reports were actually requested for represented defendants than for unrepresented defendants, suggesting that the latter cases were dealt with more quickly.

Nevertheless, in Astor (1986: 234), the vast majority of legal advisors that were interviewed supported the duty solicitor scheme (and thus representation), as they thought that the scheme saved time, allowed clerks not to worry about injustices to confused defendants and meant that the courts did not have to deal with unrepresented defendants who may be inarticulate and/or emotional and/or aggressive. Saving time was emphasised by participants as a particular advantage. When interviewees in the current study discussed the duty solicitor scheme and whether it should be expanded or not, some also thought that having a duty solicitor made hearings proceed more efficiently (see s. 8.4.1 where this is discussed in more depth).

In Kemp (2010), court observations found that unrepresented defendants were generally encouraged to see a solicitor by court staff. However, occasions were noted in a few courts where court staff did not encourage unrepresented defendants to see a solicitor – as they were under pressure to deal with cases quickly and solicitors were associated with adjournments and delays (Kemp 2010: 75). In the present study, defendants were also not always asked if they were happy to proceed unrepresented or if they wished for the hearing to be adjourned (discussed in more detail in s. 6.7.2(b)).

In Transform Justice (2016), the consensus was that hearings involving unrepresented defendants last longer. In Transform Justice (2016: 23), participants said that unrepresented defendants slow down proceedings due to, for instance, the need for court staff to undertake additional actions to support unrepresented defendants, such as filling in the case management form, printing off case papers and explaining things in more detail; hearings having to be adjourned or delayed to allow unrepresented defendants to see a solicitor; unrepresented defendants raising irrelevant matters; and unrepresented defendants calling witnesses whose statements could have been pre-agreed. However, a couple of interviewees thought hearings with unrepresented defendants could take less time, particularly trials, due to unrepresented defendants' general inability to cross-examine alleged victims/witnesses. Some judges also mentioned how lawyers can unnecessarily slow down proceedings, due to them being long-winded on occasions.

Furthermore, Thomson and Becker's (2019) research in the Crown Court found that most of the judges and prosecutors interviewed thought that hearings took longer when the defendant was unrepresented compared to when they were not; and that unrepresented cases result in more hearings and adjournments than those with representation. The reasons stated echoed those set out in Transform Justice's (2016) research. Similar things that were mentioned in Transform Justice (2016) and Thomson and Becker (2019) were also raised in this study. For instance, unrepresented defendants talking about irrelevant matters and needing extra assistance from court staff. However, as mentioned some also questioned the extent to which legal advisors explained things, for example, to unrepresented defendants and the depth that they went into and said how unrepresented defendants generally said very little and defence lawyers often spoke for longer. This was also supported by the observational data.

In relation to whether unrepresented cases result in more hearings, official statistics suggest that they do in the Crown Court. In 2017, for example, 39% of represented defendants had two or fewer hearings in the Crown Court, whilst 15% required six or more hearings. In comparison, 23% of defendants whose representation was unknown or who were unrepresented had two or fewer hearings and 24% had six or more hearings (Ministry of Justice 2018a: 17). This may differ in the magistrates' courts, though, but statistics are not available in these courts. The current study found unrepresented cases took very slightly more time at hearings overall, but could not look at the number of hearings. Professional participants' views, though, seemed to be driven by the work needed to explain matters more fully to unrepresented defendants and to view these cases as more onerous in terms of numbers of hearings. It is not clear whether this was playing out in actuality.

8.4 Interviewees' suggestions about improvements to help unrepresented defendants

Finally, during the interviews, the interviewees considered the ways in which things could be improved to assist unrepresented defendants and mitigate some of the problems that some of them experience. Further suggestions will be put forward in Chapter Nine. It is, nevertheless, important to consider the perspectives of court actors as they are the ones who work in the court system and, thus, have a considerable amount of experience and knowledge. Their views will, therefore, inform my own theoretical analysis (see Chapter Nine). When asked what might be done to help unrepresented defendants, responses from the interviews were diverse.

8.4.1 Legal aid/expansion of the duty solicitor scheme – interviews with participants

Some defence lawyers, when asked how things could be improved to assist unrepresented defendants, suggested that both the means test and the duty solicitor scheme should be removed or expanded:

Do away with the magistrates' court means test for crime. Alter the duty solicitor scheme scope. (Interview participant 4 - DL)

I think the means test on legal aid ought to rise with inflation because eventually you'll get a situation where even people working part time on minimum wage won't get legal

aid and I also think, going back to what I said a minute ago, the duty solicitor scheme should revert to what it used to be. (Interview participant 11 - DL)

Two defence lawyers questioned the cost savings of not expanding legal aid and the duty solicitor scheme:

Expansion of the legal aid scheme or the duty scheme. I'd be very interested to see, the Legal Aid Agency ... their department who processes the legal aid applications for the magistrates' court must be quite big and I'd be interested to see what the cost savings are because most of our clients will qualify for legal aid and that legal aid application has to be processed, so I'd be really interested in seeing if it saves money or not or if it actually costs money. If they were to say, everybody that goes to the magistrates' court, except for minor motoring, can either get legal aid or can see duty [the duty solicitor], whether that would cost more ... because you could get rid of a whole department of the Legal Aid Agency ... It's like the tax disk argument. We don't have tax disks in our cars anymore and there's been an increase apparently in people not paying for their tax but that pales into insignificance compared with the department that it took to send out millions and millions of tax disks every year. It just makes you think, there's a massive cost savings there, so what would be the cost saving there? (Interview participant 3 - DL)

Have them represented. Pay for everybody to be represented. In the long run I think it's quicker and cheaper. (Interview participant 7 - DL)

Any such expansion of legal assistance would, of course, potentially benefit solicitors. That said, defence lawyers might call for the expansion of legal aid for other reasons than professional vested interest. For instance, some interviewees felt that the duty solicitor scheme should be because of the possible consequences of being convicted or sentenced:

Even if an offence is non-imprisonable the sentences that a court is capable of handing down can still have a considerable impact on not only the defendant but also their family. (Interview participant 5 - DL)

Others thought that the scheme should be expanded due to efficiency reasons. When asked why they thought the scheme should be expanded, the following defence lawyers, for example, said:

Because I think it moves proceedings along. It quashes any hopeless defences and it limits what is said in court. (Interview participant 7 - DL)

It used to be that way when I started. The duty solicitor could give you advice on anything and you tended to find if it was someone who was up for say no insurance, you wouldn't necessarily go in court with them, but at the very least you could have a chat with them with the case papers beforehand and give them a bit of a steer in the right direction, so yeah I do think it should be expanded. I've never really understood why it was restricted because the cost to the tax payer is the same because when you're duty, you're at court all day anyway so I've never understood why it was limited. (Interview participant 11 - DL)

The latter quote shows that expanding the duty solicitor scheme to cover non-imprisonable offences does not necessarily mean that the solicitor would have to advise and speak on the defendant's account in court in all circumstances. It would depend upon the individual and the circumstances of the case. There may be instances where the defendant suffers from mental health problems or has a speech impediment. I observed examples like this during my time at Court A, and these defendants would certainly have benefitted from having a lawyer speak for them.

Nevertheless, one defence solicitor disagreed that the scheme should be expanded, as he was concerned about the consequences that expansion would have for the duty solicitor:

No ... because then we'd be inundated. The amount of people that appear – you've been in court, you've seen how many people turn up – especially in [court A] on Tuesdays and Thursdays and every court will be the same. They'll have days where they have loads of people and it's unfair on the duty solicitor. (Interview participant 10 - DL)

Another two defence lawyers stated that it should be expanded for some defendants who have been charged with an imprisonable offence, but perhaps not all:

It definitely should if they go not guilty, although there are, there are other circumstances perhaps they might have a particular vulnerability. (Interview participant 3 - DL)

See I do duty solicitor and invariably if I get 8 to 9 people in court on a day, there are usually 5 or 6 that I don't see - mainly because they are there for speeding. They're going to get points and they're going to get a fine or they are there for a s. 5 public order offence, they're going to get a fine or discharge. These people take a lot of your time but if you've got 8 other people to see who have a very real possibility of going to custody, you've got to give them a lot of your time. I'm not convinced that it needs to

be expanded to non-imprisonable offences - certainly not all non-imprisonable offences. Maybe some but not all. It depends on the circumstances. (Interview participant 2 – DL)

When the last interviewee quoted was asked to expand on this and say in which circumstances he thought it should apply, he said:

Erm, certain drink drive matters, depending upon the reading and accidents that sort of thing: First time offender who's never been in trouble who may well lose their job because of a conviction. Erm but that's about it really - certainly not motoring, not speeding or using mobile phones.

A few of the ushers interviewed did not think that the scheme should be expanded due to financial reasons. One of these ushers also suggested that it should not be expanded, as in her opinion, representation in these types of cases (when defendants have been charged with non-imprisonable offences) does not affect the sentence imposed; and another implied that it should not, as in certain cases in the court where she works (though this may not happen everywhere) the duty solicitor will assist in these types of cases if necessary in any case. A legal advisor also agreed that the duty solicitor should not be expanded due to financial reasons and because legal representation in those cases, where defendants are not eligible to see them, is not required as, in her view, court staff are able to assist them:

This is where local cultures and practices may change but certainly in the courts where I am the duty solicitor, unless it was a very busy day, would often say 'look it doesn't fall within the rules but I can see this is someone who needs a bit of help' and they will assist. They are not obliged to. They'll often do it not necessarily in their capacity as a duty solicitor but as an officer of the court and they may also do it on the basis that they may well get instructed on the strength of it, I don't know. On other occasions, if you get prolific offenders but they are here for maybe quite low-level offences that don't attract legal aid, again some solicitors will deal with them on the basis that if they deal with this case now then if they get charged with a more serious offence in the future, which is possible, I'll get that work too, so some of it's client care, so most of the time we manage to be able to operate reasonably effectively. (Interview participant 17 – LA)

Generally, then, unlike most of the defence solicitors interviewed, the legal advisors, ushers and judicial prosecutors interviewed did not think that the duty scheme should be extended to all defendants charged with a non-imprisonable offence, although, as shown, some discussed the possible benefits of extending it to certain defendants. They also tended to assume that where there was real difficulty (for example, a very vulnerable defendant), someone would

step in to help. However, as courts move to more virtual hearings, it is not clear that this backstop will be able to continue.

8.4.2 Other improvements to assist unrepresented defendants - interview findings

Other suggestions to help unrepresented defendants were given by interviewees. A defence lawyer (interview participant 4) suggested that legal advisors could be ‘trained ... in more detail’ to deal with unrepresented defendants, and some lawyers mentioned that there should be greater access to law centres so that defendants are able to get free advice. Furthermore, another defence lawyer (interview participant 12) that there should be ‘shorter court lists, so there’s a realistic prospect of everyone actually being dealt with in one day and there being sufficient time to deal with each person’. This implies that proceedings would not proceed as quickly as is currently the case and adjournments would be less likely, due to their not being enough court time to deal with a case. This would mean that defendants have to return on another day which will have cost and time implications and will exacerbate any feelings of anxiety. The same defence lawyer stated that there should be ‘...an usher for each court, rather than an usher spread over multiple different courts who hasn’t got time to speak to anybody’. Ushers are important members of staff in the court for both unrepresented and represented defendants as they can provide them with information and they are a point of contact for defendants if they have any questions.

A final suggestion given by a defence lawyer (interview participant 5) was that a procedure should also be put in place so that the courts are able to ‘know in advance whether a person is going to be unrepresented’ or not, or if they require an interpreter, so this can be sorted out for them in advance of the hearing. This would prevent hearings from having to be adjourned until another day, and thus delays, confusion and the wasting of money. The legal advisors interviewed did say, though, that there are procedures in place relating to organising interpreters for defendants. For instance:

There’s a national protocol for booking an interpreter so if it’s, if the hearing is within 48 hours, so if someone is charged and detained, for example, it’s the police responsibility to book an interpreter. If the defendant is charged and bailed and the hearing is more than 48 days [hours] from charge, it’s the courts’ responsibility but the police will inform us. There’s a box on a form that they fill in and it tells us that we need to book an interpreter; so sometimes we don’t have an interpreter and that can be

where perhaps the police managed in the police station without an interpreter but we don't feel that we can or where there's an increasing number of cases now where people haven't necessarily been arrested and charged from a police station but are sent these postal requisitions, which is just like a summons really and so they may turn up at the first hearing and that's the first time that we know that they speak, you know Romanian is their first language and their English is perhaps adequate for their day-to-day living but not necessarily for dealing with a disqualification from driving and all that kind of thing, so yeah the number of interpreters we need has grown massively over the last 20 years; so we have more issues with interpreters because we have a lot more. (Interview participant 17 – LA)

This should happen [the police should inform the courts if an interpreter is required]. It doesn't always, but it should happen so yeah, if it's an overnight remand case or if it's a GAP or NGAP case [anticipated guilty plea or not guilty plea], the police should notify us if the defendant needs an interpreter – and if it's a GAP or NGAP case, we would still book them but the police still need to let us and if it's an overnight remand case the police will book them. If I'm honest that doesn't always happen and we'll often get cases at court and we have not been told that they need an interpreter. (Interview participant 18 – LA)

These legal advisors did suggest then that there are sometimes some issues in relation to organising interpreters.⁷³ Thus, improvements could still be made.

Furthermore, another defence solicitor (interview participant 2) thought that defendants should do more to assist themselves by getting in contact with a solicitor prior to the hearing and making 'enquiries to find out whether or not they are eligible [for legal aid]'. The need for defendants to do more to help themselves was echoed by an usher:

I think the guidance is available, and people are there to help them if they want help. Some people come in and they don't want help and you give them, you know, well you know there is a list of solicitors, you know, we do have a list of solicitors. We don't say, you know, this solicitor is better than that but there are plenty of solicitors in [place name] and we just say 'well look there are plenty of solicitors if you want to get in touch with somebody'. We can't say 'well they're better than them' – we wouldn't do that – and people will try and help. (Interview participant 14 – U)

⁷³ Kemp (2010: 72-73), found that the police did not always arrange an interpreter to attend court, or notify the court when defendants needed an interpreter, so defendants did not always have one for their first hearing.

Another usher suggested that court staff are limited in what they can do to help some unrepresented defendants and that not all unrepresented defendants wanted the help of the duty solicitor. When asked how things could be improved to assist them, she responded by saying:

Personally, I try and help them as much as I can. Everything you know – sometimes people are, you know, adamant that they don't want to be represented, but I would always, always recommend – if they are eligible – to see a duty solicitor, always.
(Interview participant 15 – U)

A legal advisor did suggest, though, that there should be a charity-based organisation, like the Personal Support Unit in the civil courts, to support unrepresented defendants in magistrates' courts:

I'm aware that in other cases, like civil cases, and I'm only aware because I spoke to someone who did the job recently, that they sort of have charity volunteers in the foyer of the court that help people with paperwork and, you know, bits of legal advice and things, so it might be useful if the magistrates' court had something – not duty because duty is for the higher level offences but something for the lower level offences, where people could get a bit of advice, but I suppose we absorb that role in the absence of that sort of charity or assistance. (Interview participant 16 – LA)

This echoes the recommendations of Transform Justice (2016).

A legal advisor discussed how he thinks things have improved for unrepresented defendants, due to the increasing use of online technology and the simplification of criminal proceedings. The latter was also mentioned by a defence lawyer when discussing the extent to which defendants understand court proceedings (see also s. 6.6.4). However, though proceedings in court may have been simplified, the same cannot be said necessarily for administrative processes generally.

I think they have been [improved] in some respects, I mentioned that a lot of unrepresented defendants used to come for the low-level bulk type cases and lots of those now are dealt with by online plea so if you get a road traffic summons these days, you can go online, you can plead guilty, you can put in your mitigation, you can put in details of your means, you can put in a not guilty plea, you can put in why you're disputing and going to trial and that kind of thing but actually a lot of people now deal with it without physically coming into court. That's not for everyone and we do not

prevent people from having a court hearing. They can always choose to have a court hearing but lots of people plead guilty online and write some pretty good mitigation, so for those that are capable of doing that don't necessarily want to go to a court hearing. I think that's much more convenient and doesn't impact negatively on the outcome of the case, so some of the things with technology has helped. We know that not everyone has got access to technology and not everyone would want to or perhaps be able to engage with the court in that way but at least it's another option that people didn't have 5 years ago and I think that's been a great assistance. (Interview participant 17 – LA)

Another legal advisor mentioned how there needs to be more digital support and assistance for defendants, though, and said those who cannot engage with the courts digitally are disadvantaged compared to those that can:

What I will say is and this is where things are moving forward digitally – perhaps more digital support for defendants [would be a good thing] because we're now moving to common platform so everything is going to be digital and that's how all of the agencies will access everything. We've still got defendants that we have homeless defendants, we have defendants with significant mental health and special needs issues, they might not have access to digital portals. They might not have Wi-Fi. They might not even have an address. They might not have a mobile phone, so there is a huge – I wouldn't actually say it's a huge proportion but there is a proportion of our clients as such that just aren't able to engage digitally with the courts so a lot of the plea is now moving online and they just don't have access to it or they don't have the capabilities to engage with us digitally so that is to their disadvantage and that's where obviously the court would have to step in and still be printing things out for them so that obviously impacts on the court as well having to do that so that for me is a disadvantage to them. (Interview participant 18 – LA)

The recommendations provided by interviewees to improve the experiences that unrepresented defendants have at court were, therefore, diverse. Greater financial investment will be required to implement most of the improvements suggested.

8.5 Training

Both of the interviewed judicial prosecutors and three of the ushers interviewed in Court A said that they had not received any formal training; though one usher (interview participant 14) said: 'well we are trained on how to deal with defendants – and we treat them all the same'. However, given the problems that some unrepresented defendants have been shown to

experience in the present research, it should be clear that equal treatment can result in unequal outcomes.

When asked whether they thought it would be helpful to have training, there was a consensus that it would not be required given that it is something that it is learnt whilst doing the role:

I think it is something that you pick up as you go along with the job, so I suppose I am saying, no, I haven't had special training – nothing specific where I go on a training course and they say look, 'they're not represented. This is how we approach it'. It's just the case of I've just picked it up with the job when I was taught initially when I first started ... I don't think I'd gain anything extra from it if I'm being honest with you. (Interview participant 13 – U)

There's no training. There's no training for the job in general. You just attend and observe. You gather experience and just get started, but there is definitely no specific guidance on how to talk to represented or unrepresented [defendants]. You just develop your own style of communication and a bit of radar really – a bit of a feel for those that are worth talking to and those you want to avoid. I don't think any training would help so to speak. I think it's just about following your instincts really. (Interview participant 20 – JP)

The legal advisors interviewed were asked whether they had received any specific training relating to unrepresented defendants. Some responded that:

We've got this big sort of project at the minute called the human voice of justice, where it is all about, even when, you know, you're writing to somebody who is unrepresented or when you're speaking to somebody, the type of language you should use and terminology and thinking about the way that lawyers are trained to word things, that it is sort of too verbose and that we should be better at tempering things to people who are unrepresented, so that maybe something that is already on the horizon so yeah, I think it would be useful. (Interview participant 16 – LA)

Yeah, so legal advisors do get training on how to deal with unrepresented defendants – and I touched on this human voice of justice, so what we're told is to not assume that obviously defendants understand what's going on. Not to assume that because they are not saying much in court it is not that they have not got things to say. It could be that they are nervous or frightened. It's about asking the right questions and changing how you speak to people so that they understand, so we might have to change the wording that we use and the way that we speak to people to make sure that they're comfortable and they are able to express what they need to with us, so yeah. (Interview participant 18 – LA)

Like the aforementioned ushers, though, the legal advisors implied that they mostly learnt how to respond to unrepresented defendants as result of on-the-job training that they had received:

Yeah, I'm sure over the years, in parts of training sessions we've dealt with [unrepresented defendants] but that is particularly in trials, not so much in sentencing and as I say non-imprisonable sort of stuff, but yeah, we've had training. Part of training sessions, maybe not that recently, but questioning from unrepresented defendants – it all sort of ties in to when we train on evidence and trials really. How you would conduct that slightly differently with an unrepresented defendant – but not reams of it and I can't think that there's any Judicial College training or anything like that, just practical training from experience, legal advisors. (Interview participant 16 – LA)

Yeah, on the job training I suppose in terms of when we're first appointed, you're trained on the law and that kind of stuff but a lot of that is down to you to get yourself up to speed really but in the courtroom it's about court craft and good management I suppose and over the years we've had, I've a mentor who helps with things, someone who is very experienced. We have had formal training on engaging with unrepresented defendants. Not just that but as part of overall what we would describe as court craft because a big skill in this job is – the legal bit is relatively straightforward but managing people is an important skill and not just managing unrepresented defendants, but managing magistrates who although they are trained, are lay magistrates, and they sometimes need a bit of help to engage effectively with unrepresented defendants - managing solicitors, managing other people in the courtroom because that's a big part of our role to make sure that court time is used efficiently so yeah, we've had quite a lot of training over the years but a lot of it you build up over knowledge and experience. (Interview participant 17 – LA)

Two of the legal advisors were asked whether they thought it would be helpful to have more training. Both of them said that they thought that it would be. One said that it would be for those first starting the role and she suggested that the introduction of the human voice of justice scheme was a sign that more training may occur in the future - and the other emphasised the need for the training to be of a good standard and discussed the value of previous training that he had had (and said how it was relevant to unrepresented defendants – see the quote below). Most of the suggestions, though, were training for new starters in the roles. The difficulty there is that if new kinds of communication or awareness become important, existing staff may not be covered (for example, in relation to virtual communication or unconscious bias). The mentoring and 'learning on the job' which were

described will tend to continue local court cultures and emphasise the ‘continuity’ aspect of criminal court procedures.

Well, you’re always learning, aren’t you? So, I think if the training is good ... I mean I do in court observations as part of my management role of other legal advisors and you learn you know ... you pick up things. Oh I never thought of doing it that way so watching each other you learn quite a lot as well. Sometimes you think I don’t think I would do it that way actually or that was a really good way to do it. It’s just learning to explain things. We also did some, what I thought was some really good training for youth court work where even when youth offenders are represented, you’ve still got to make sure that they understand what is going on and some legal jargon is quite difficult to understand. You read the charge out and say ‘do you understand that?’ and you think well I’m surprised you do because I don’t understand what that says so we did quite a lot of training on engagement – speaking directly to defendants in court – that’s a big part of youth court and so just explaining who people are, who’s in the courtroom, what the procedure will be, but doing it in a very – without becoming patronising but in a very plain English sort of way, so we had quite of a lot of training from speech therapists and people like that who came in - so things like, the type of words used, the type of words to avoid, about dealing with things in a chronological order rather than jumping around, taking breaks in proceedings, that was quite good and we had quite a lot of training on that. That was specifically about the youth court but it was useful for all of the courts actually. (Interview participant 17 – LA)

This quote suggests there may be a difference in culture between the youth courts and adult courts and how defendants are perceived and how they are treated. Therefore, the legal advisors interviewed have had more training than the ushers have had in relation to unrepresented defendants. Unrepresented defendants have their own specific needs, as they are required to take a more active role in court proceedings. A specific training scheme for court users relating to unrepresented defendants might result in a more consistent approach between individual court staff both based within the same court and in different ones.

8.6 Summary

Overall, the experiences that unrepresented defendants could be substantially improved. There appeared to be few differences between the reactions of those interviewed from Court A and Court B. To gain a better understanding of the area, it would be beneficial to ask unrepresented defendants themselves how they think things could be changed to assist them. For example, research could examine what resources exist for unrepresented defendants, and

how these could possibly be improved. Even if legal aid and the duty solicitor scheme were expanded – as a significant number of defence lawyer interviewees said that it should – there will still always be those who choose to self-represent, for a number of reasons (see, s. 5.3), and information needs to be available and assistance needs to be in place for these defendants.

Suggestions as to how unrepresented defendants could be supported have been made in previous research. Shapland (1981: 164), for example, suggested that unrepresented defendants should be helped during the speech in mitigation, by being asked specific questions in a question-and-answer framework. This was because her study found that unrepresented defendants said very little before being sentenced. In *Transform Justice* (2016: 29), the problems that unrepresented defendants experienced with understanding proceedings, being able to cross-examine properly, and providing effective mitigation were discussed. As a result, it was recommended that: legal advisors and ushers should be provided with training in how to deal with unrepresented defendants; better online and printed information should be made available to help unrepresented defendants prepare and conduct their case; the legal process and law should be simplified; legal aid should be granted to all defendants in cases where a lawyer has been appointed to cross-examine some/all witnesses; and the income threshold for legal aid should be updated so that it was in line with the rise in inflation. Thomson and Becker's (2019: 11) interview participants also made a number of further suggestions as to how unrepresented defendants should be supported in the Crown Court. For instance: leaflets or videos should be used to explain the court process; training should be provided for newly qualified prosecutors on how to respond to unrepresented defendants; a duty solicitor scheme should exist in the Crown Court, like it does in magistrates' courts; and judges should be provided with discretion to grant legal representation where they feel like it would be appropriate. Other research has also been critical of defendants' ability to participate in court proceedings (e.g. Jacobson et al 2016; Carlen 1976; Bottoms and McClean 1976), as has the current research (see Chapter Six).

Some progress appears to have been made on the basis of the present research, in relation to the simplification of proceedings, the development of the duty solicitor scheme, and the existence of the human voice of justice guidance (see, HMCTS n.d.) – and other guidance - which seeks to improve accessibility and the ability of lay users to participate in the court system. However, the recommendations and the criticisms made in the earlier studies are

similar to those put forward by the research participants interviewed in this research. This means that some of the issues that were said to be present in Carlen (1976), Bottoms and McClean (1976) and Shapland (1981) are still present now. Some new issues have also arisen relating to the use of virtual hearings and the move to dealing with things online and the greater focus on dealing with matters efficiently, which also have further implications for defendants.

9.0 Chapter Nine: Discussion Chapter and Conclusion

Chapters Five to Eight set out the findings from this research study, and some of the main themes that arose out of the results were touched upon. This chapter further discusses these themes. It starts by recapping why it is important that defendants can participate effectively in court proceedings, and it then goes on to discuss a new theory (called defendant engagement theory) which has been developed, which focuses on the importance of participation and draws upon and combines specific elements of a number of theories. The findings from the study will then be considered focusing on defendants' ability to participate in proceedings, as well as issues around vulnerability and the support that is available to assist defendants. The reforms that have been implemented and the barriers to participation will then be considered, and finally, suggestions to facilitate engagement and participation will be set out.

This chapter shows how defendants tend to struggle to effectively participate in court proceedings; and that this is particularly the case for unrepresented defendants, those who have not been to court before, and those with additional support needs. Some provisions do assist these defendants to participate in the process, but improvements could still be made. This chapter argues that although defendants struggle to participate for a range of reasons, the continuing emphasis on efficiency and crime control values further exacerbates this and undermines defendants' due process rights.

9.1 Why is it important that defendants can participate effectively?

Chapter Two discussed a number of theories which shows the importance of enabling the effective participation of defendants (whether represented or unrepresented): procedural justice, human rights, liberal-democratic theories and the due process model. These will be summarised now.

The main focus in procedural justice theory is on how fair procedures and processes are perceived to be (Donner et al 2015). If defendants feel as if 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; Tyler and Wakslak 2004). 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 that 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; Tyler et al 2007). If there is minimal confidence in the system and it is not viewed as being fair and legitimate, members of society may be less willing to follow the law and cooperate with the system, for example, by reporting crimes and giving evidence. Vigilante groups may even form, where groups of citizens take the law into their own hands and try and detect and/or punish criminals, which can lead to the wrong individual being targeted, or disproportionate or inhumane punishments being inflicted due to the subversion of official safeguards (Booth 2013). Confidence in the system is also needed to ensure that the system continues to work in a consensual way, which is key in a liberal-democratic society – or at least in one that claims or aspires to be a liberal democracy.

Effective participation is also important for due process, human rights and liberal democratic reasons. Effective participation is needed in order to minimise the chances of miscarriages of justice happening in courts in England and Wales and to try and ensure that defendants are treated fairly and receive a fair hearing and this is why it is guaranteed in art. 6 ECHR. If defendants are unable to effectively participate, then their rights and their ability to exercise them are undermined. Court proceedings need to be understandable in order for defendants to be able to exercise their rights and to call and hold the state to account – which is a key part of criminal proceedings (Ho 2010; Owusu-Bempah 2017). A liberal democratic society that values the freedom of the individual must seek to ensure that the state does not act oppressively or arbitrarily, to prevent wrongful convictions from occurring (Duff 2007; Ho 2010). Individuals should be provided with an opportunity in court to test, comprehend and examine the case put forward by the state in order to protect their rights – particularly their right to liberty and freedom – and in order to prevent misuse of state power (Ho 2010).

9.2 Development of a new theory and relevance of the theories identified in Chapter Two

Despite the importance of defendants being able to effectively participate in court proceedings, a main finding in this research has been that unrepresented defendants tend to struggle to do this (the findings will be explored in more detail in s. 9.3). Based upon some of

the principles of the theories discussed above and in Chapter Two a new theory has been developed which strikes at the heart of this issue, and expands on previous theorists' discussions, called 'defendant engagement'. Defendant engagement theory is required because previous theories that relate to defendants' experiences have, in practice, insufficiently prioritised or discussed issues around defendant participation and understanding.

The core of defendant engagement theory is that defendants should be treated and perceived as central players in court proceedings, rather than marginal or peripheral players. There should be an expectation that all defendants – whether represented or unrepresented – can effectively and actively participate in court proceedings by themselves, should they wish to.

For the purposes of this theory, effective participation means that defendants themselves (with any necessary support) are able to understand, pay attention to, follow, hear and see court proceedings. Active participation means the opportunity to speak on one's own behalf at all stages of proceedings, regardless of whether one is represented or not.

This theory is influenced by the normative theory developed by Duff et al (2017), Owusu-Bempah (2017) and Ho (2010). Duff et al (2007: 3; 153) argue that in a liberal democracy defendants should be treated as participants and not objects, and should be able to effectively participate in proceedings in order to hold the state to account. The key premise of Owusu-Bempah's theory is that defendants should not be required to participate in court proceedings, in the sense of answering questions or providing information, or be penalised if they do not do so. This is based upon the liberal conception that defendants should have the choice whether to co-operate or not, and the idea that the criminal process is a mechanism for holding the state to account for its accusations, with which defendants should not be compelled to actively assist (Owusu-Bempah 2017; Ho 2010). According to this theory, an individual's liberty can only be restricted as a result of them being convicted, and therefore the State must bear a heavy burden in proceedings against its citizens (Ho 2010: 88).

Defendant engagement theory is also influenced by Wolhers' (2018) arguments relating to hybrid representation. At present, defendants in England and Wales have two options. They can either self-represent or be represented by a defence lawyer (representation through a layperson, such as by a McKenzie friend, is only rarely available). The present research

found that, if they self-represent, defendants play a more active role during court proceedings, although they are generally at a disadvantage in terms of knowledge and understanding. If they are represented by a lawyer, defendants are then subordinated to acting largely as passive spectators during proceedings due to the professionalised nature of court proceedings and lawyers taking control of the case (Wohlers 2018: 135; Duff 2007: 203-204). However, as will be discussed in s. 9.4 and as discussed in Chapters Five and Six and Seven, defendants are a diverse group of individuals with different needs and wishes; and as shown in Chapter Five, some defendants wish to have more control over their case and that is why they choose to self-represent, despite the disadvantages associated with it.

In response to these issues, Wohlers (2018) promotes a third alternative, which exists in Germany: hybrid representation. This is where a defence lawyer and a defendant effectively act as co-counsel, although the defendant may take the lead (Colquitt 2003: 57; 75). The defence lawyer assists the accused in conducting and presenting their case, allowing defendants, therefore, to take a more active role in proceedings, whilst still benefiting from the assistance of a lawyer during court proceedings. If the defence lawyer could not agree with the defendant on a matter and it could not be resolved, then the lawyer must either go along with the wishes of the defendant or withdraw themselves from the case (Wohlers 2018: 143). This approach would entail a big change in the relationship between the lawyer and the client. Concerns have been expressed about the disruptions and delays that it could potentially cause for trial process and court actors (see Colquitt 2003: 99-119). Germany has, however, shown that this model can work and these concerns can be addressed (Wohlers 2018: 146). Instructions could be provided by the court to the jury to mitigate any risk regarding confusion, and judges have considerable discretion to ensure that order is maintained in courtrooms and there is no evidence to suggest that cases involving hybrid representation cause any more disruptions or control issues than one involving a self-represented defendant (Colquitt 2003: 99-108).

In the current study, defendants who were unrepresented were observed to take more of a participatory role by calling witnesses, cross-examining witnesses, for example, making a closing speech and speaking before being sentenced. This was not the case in relation to those who were represented, although whether represented defendants wished to or not is not known (see Chapter Six). When defendants are represented (and thus, the lawyer takes the lead role in proceedings), this can act in some instances as a further barrier to participation by

denying defendants a voice within the process, which may result in them being marginalised, silenced and alienated during court hearings.

To facilitate participation, defendant engagement theory argues that defendants, whether represented or not, should be able to have a direct voice in proceedings and they should be given the choice as to how they wish to exercise this. As is the case when defendants are unrepresented, judges may exercise their discretion and deny the defendant the ability to actively participate in order: to protect the interests of other participants (for example, the restrictions on unrepresented defendants being able to cross-examine certain witnesses was discussed in s. 6.2.7); to maintain order in the face of disruptive behaviour; or (in exceptional instances) to protect the defendant themselves. As with the ability to self-represent, only those of full age and mental capacity (see ss. 2-3 of the Mental Capacity Act 2005) should be able to undertake this role.

The findings from this study suggest that there are advantages and disadvantages of self-representing (see Chapters Six, Seven and Eight) and there will also be advantages and disadvantages if defendants do participate in court proceedings, in the ways suggested above. As discussed within this thesis, particularly in Chapter Six, defendants do tend to experience problems relating to understanding the court process and their ability to engage with it, and thus in order for them to take more of an active role and to have more of a voice within the process, informing and educating defendants about court procedures must become a much more central concern and priority than is currently the case.

Defendant engagement theory, therefore, is based upon the fundamentally liberal-democratic values of autonomy, dignity and fairness. Autonomy refers to the ability of an individual to make their own choices and decisions; dignity is associated with the idea that the value and worth of all individuals should be recognised; and fairness in this context refers to the idea that the needs of the individual should be taken into account to ensure that everyone can participate on an equal basis (Owusu-Bempah 2017: 9-10; McCrudden 2008; Aristotle 1947). Human rights principles also play an important role in relation to the rights of defendants being able to participate in criminal proceedings and have a fair hearing. These values seek to ensure that the state is held to account, and act as safeguards to prevent the oppressive and arbitrary use of state power. Such abuses would undermine key values in a (genuine) liberal democracy. They would also have a negative impact on levels of confidence and legitimacy

in the system, and the extent to which individuals complied with laws and cooperated with the system, which are associated with procedural justice principles.

9.2.1 How is defendant engagement theory different to the other theories mentioned?

Defendant engagement theory is grounded in principles arising from a number of different theories that are all relevant to participation and the experiences that defendants have. This theory, however, is different to those of previous theorists. In human rights theory, the focus is on the existence of an implied right to participate, as a result of the rights set out in art. 6(3) of the ECHR, whereas the focus of defendant engagement theory is not just the existence of the right, but how in practice defendants can make the most effective use of those rights in everyday life. The findings of this study reveal that, although defendants have participatory rights, human rights theory does not adequately reflect the reality of the experiences that defendants have at court. It does not account for the ways in which defendants are marginalised in the process and the wider practical problems that they encounter. Defendant engagement theory seeks to address these issues.

In relation to procedural justice theory, generally in the literature the emphasis is largely on the quality of treatment (e.g. whether individuals are treated with dignity and respect by those working for law enforcement bodies or the court) and the quality of decision-making procedures (e.g. whether the decision making is neutral and whether decision makers can be trusted). There is less emphasis on the participant's understanding of proceedings.

Furthermore, procedural justice theory's discussion of the different factors to determine whether the procedure was fair or not tends to ignore differences in context, despite the impact that those differences can have on individuals' experiences and the nature of their interaction with the relevant legal authority (Burdziej et al: 2018). This research has also illustrated differences in relation to experiences that defendants have, what they are required to do and the things legal authorities should do to ensure fairness, even within the same authority – the magistrates' courts (see Chapters Six and Seven). Defendant engagement theory, therefore, focuses upon fairness within the context of the criminal courts and solely in relation to participation and the defendant.

As in defendant engagement theory, though, participation/voice is emphasised within procedural justice theory. In Tyler (2001), for example, voice was measured by asking respondents if they were able to make their views known, and whether the court gave people the opportunity to tell their side of their story (see, s. 2.6). Procedural justice theory, however, is unclear about the ways in which, and the stages at which defendants should be able to participate (and have a voice) within the criminal court process.

Furthermore, neutrality within procedural justice theory was measured in Tyler (2001) by considering, for example, whether individuals felt that they had been treated the same as everyone else (see, s. 2.6). Remember, again, that defendants are a diverse group of individuals with differing support needs. In order to best facilitate their engagement with the court process, support needs to be tailored to the individual. Thus, it is not about whether the defendant has been treated the same as everyone else, but rather whether their needs have been taken into account in order to facilitate participation. Procedural justice theory is also largely based upon instrumental values (in that aims are generally about maximising compliance in and cooperation with the system, rather than a commitment to justice as a value in its own right), and it is concerned with perceived legitimacy and whether fairness is seen to be done. By contrast, defendant engagement is principally concerned not just with perceived legitimacy (without denying its importance), but also on the fundamental justice and fairness of the system as a whole. Thus, this theory is based upon both intrinsic and instrumental values.

The due process model (Packer 1964) focuses on the rights of defendants and the importance of safeguarding defendants from oppressive state practice and wrongful convictions. However, the theory does not specifically mention or focus on defendants' understanding of proceedings. This is advanced upon in defendant engagement theory.

As pointed out above, this theory has adapted and built upon Duff et al's (2007), Owusu-Bempah's (2017) and Ho's (2010) arguments. Ho's argument, however, concerned the trial, whereas defendant engagement theory applies to all criminal hearings, as my findings show the importance of defendants being able to participate throughout criminal proceedings. Again, in Ho's argument the stress is on the existence of the right to participation and not on whether defendants can effectively participate in practice and how they should be assisted to do this.

Duff et al (2007: 108; 153; 101) argue that defendants should not only actively participate in the process in order for them to be able to hold the state to account but also that there should be an expectation that they participate in order for them to be held to account for their conduct. Due to what has been discussed (see, s. 9.2), though, relating to the importance of autonomy being respected and the importance of choice within a liberal democratic society, this is not the case within defendant engagement theory, and this is where defendant engagement theory differs. As evident from what has been said above, this is in agreement with Owusu-Bempah (2017). Defendant engagement theory differs to Owusu-Bempah's theory, though, because in defendant engagement theory the right of the defendant to not participate or speak is acknowledged but the importance of the defendant being enabled to participate and speak, should he or she wish to do so, is also stressed.

Owusu-Bempah's (2017: 3) normative theory is concerned with how legislative changes to the law concerning, for example the right to silence and disclosure means that defendants can be penalised for not cooperating in criminal proceedings and how this should not be the case. The present research has not focused upon this. Instead, the emphasis has been on the ways in which unrepresented defendants participate in the process, their experiences of doing so and their ability to participate in criminal proceedings. Attention in Defendant engagement theory, therefore, is on the ways in which defendants *should* be able to participate in the process, not the ways in which they should not be made to participate and the consequences of non-participation. Hence defendant engagement theory indicates that defendants, whether represented or unrepresented, should be enabled to effectively participate in the court process, and if they wish, actively participate (in the sense of being able to have to have a direct voice in proceedings).

9.3 Defendants' ability to effectively participate in court proceedings

Defendant engagement theory is important and needed because as has been suggested, the current research has shown that unrepresented defendants do not always seem to know what is happening or what they are required to do or what they will be required to do in their next hearing, which suggests a lack of understanding. Some of the results chapters discussed how not all unrepresented defendants: know what evidence to bring to court; or receive or read their paperwork before entering a plea (see s. 6.1, s. 6.2.2, s. 6. 2.3, s. 7.2.2 and s. 7.6.3). From the findings, unrepresented defendants also do not always know what plea to enter,

understand the implications of entering a specific plea, or understand what they are required to do during cross-examination (see s. 6.3.1 and s. 6.4.1). Furthermore, the scheme where a lawyer is appointed to cross-examine witnesses on behalf of the defendant can also cause confusion for those self-representing at court.

It was also found that some unrepresented defendants struggle at the sentencing stage in relation to knowing what to say and being aware of and understanding sentencing guidelines; and they do not always understand, for instance, the legal terminology used, court procedures, rules of evidence and disclosure, and ceremonial rules that have to be followed during hearings.

The use of video hearings from prisons and police stations was also considered to examine the effect that this has or will have on those self-representing (see s. 7.1 and s. 7.6). The findings suggest that unrepresented defendants' ability to participate could be undermined further due to the use of virtual technology, issues around remoteness, the artificial nature of the technology, understanding, technological issues, and issues with organising representation and being able to access paperwork.

However, this research also found that represented defendants may struggle in the magistrates' courts, too. Some participants questioned the ability of represented defendants to always understand criminal law and rules of evidence and understand and follow what is happening during court proceedings (see s. 6.6). Some interviewees also discussed how represented defendants do not always understand their sentence or the language used. The extent to which they can participate effectively in court proceedings generally appears to be limited. Those who have not been to court before particularly struggle (see s. 6.6).

Furthermore, in this study, it was recognised that learning difficulties, physical disability, or mental health issues present additional barriers to effectively engage and participate in court proceedings. These defendants are usually regarded as vulnerable. So, for example, Chapter Six (s. 6.2.2 and s. 6.6.1) discussed difficulties arising out of literacy or language competence issues. Such defendants will not always be able to read their pre-sentence reports or their case paperwork, effectively or at all, and thus will require extra assistance. In s. 6.7.1(b), it was also discussed how the dock is particularly unsuitable for defendants who have a physical disability or mental health issues and would make participating for them more difficult.

In s. 6.3 and s. 6.4, although vulnerability was not specifically mentioned, if a defendant has a learning disability or some other form of vulnerability, then it is likely that these things will be more difficult and challenging for them than another defendant who does not have the same issues. This was also discussed in s. 6.6 and s. 8.4. Due to these issues, it is important that extra assistance and support is given to those who require it in order to try and assist them to better understand and navigate the process. This is essential in the name of key principles of fairness and due process. As discussed in s. 2.7.2 and s. 6.9, treating defendants fairly does not necessarily mean treating them all the same, as they are a diverse group of individuals with different needs and will experience different challenges when participating in the court process. This must be recognised when considering defendants' experiences at court, and the ways in which they should be assisted to participate in the process.

Thus, both represented and unrepresented defendants tend to experience difficulties when going to court. The specific barriers that they face will be individualised and dependent upon the individual, the nature of the case, whether or not they have representation, the quality of the representation that they have, and their own specific needs. Some of the additional needs that some defendants have will be considered below, in the context of vulnerability.

9.4 Defendant vulnerability

As discussed in s. 2.3.1, vulnerability is a term which has different meanings. In s. 2.3.1, it was discussed how in the criminal justice system, certain defendants with certain characteristics are generally regarded as vulnerable. However, the issues discussed in this thesis and in earlier research (e.g. Carlen 1976; Jacobson et al 2014; Welsh 2016; Transform Justice 2016; JUSTICE 2019; Jacobson and Cooper 2020), suggest that all defendants can be vulnerable at points in the proceedings. This is due to issues around understanding and feelings of marginalisation and alienation during the process. These vulnerabilities restrict defendants' ability to effectively engage and participate in proceedings.

Furthermore, all defendants are in a vulnerable position due to the power imbalance that exists between the defendant and state. Publicly or privately funded defence lawyers represent an attempt to redress this imbalance (Dehaghani and Newman 2017: 1029). A theme in this current research has been that the court environment is heavily weighted in

favour of the state and the system is inherently unfair due to the resources that the state has (see s. 6.6.1 and s. 6.7.2(a)). This means that unrepresented defendants will always be placed at a disadvantage, implying that a lawyer is therefore needed in response to level the playing field. Participants also talked about the problems that unrepresented defendants tend to experience when representing themselves (see, Chapter Six and Chapter Seven), suggesting that they were placed at a disadvantage as a consequence and most defence lawyers thought that the duty solicitor scheme should be expanded to assist unrepresented defendants (see s. 8.4.1).

However, although legal representation is important, so is the quality of that representation and the nature of the solicitor client relationship. Research suggests that the quality of advocacy is not always high, and that the solicitor-client relationship is not always a good one (e.g. Baldwin and McConville 1977; Newman 2013; Hunter et al 2018; Solicitors Regulation Authority 2018). Even when this is the case, represented defendants still cannot necessarily effectively participate in the process (Jacobson et al 2015). If a defendant – represented or unrepresented – has any additional needs, then their ability to participate will be further hindered and their experience will be more difficult than for someone who does not. Thus, a defendant may be vulnerable for a number of different reasons, and to a greater or lesser extent.

Unrepresented defendants could be regarded as doubly vulnerable because (a) they are a defendant, with fewer resources than the state, and (b) they are unrepresented. Unrepresented defendants have to navigate a system on their own, when that system is designed for lawyers and the other professionals who work there, rather than for laypersons. This is particularly obvious in relation to the instructions surrounding virtual hearings and the related court reform process, which are aimed at legal professionals (see, for example, Gov.uk 2020b; Gov.uk 2020c). Some guidance has been made available to lay users around the use of telephone and video hearings during the coronavirus outbreak and how to access them, but there is no specific mention of unrepresented defendants in these documents (see, Gov.uk 2020d; Gov.uk 2020e).

The approach taken in relation to vulnerability in this thesis is similar to that advocated by Skynns (2019) in the context of suspects in custody at police stations. Skynns (2019) collected data in five cities in four jurisdictions. She carried out 480 hours of observation, talked

informally to staff and detainees across 18 police detention facilities, and 71 semi-structured interviews were carried out with police officers and other criminal justice practitioners and detainees in England (Skinns 2009: 3-4). Skinns proposed that the police should work from the assumption that all citizens are vulnerable to some extent (unless shown otherwise) to try and overcome the issues associated with police officers trying to identify vulnerability (due to it being difficult to identify).

This argument around vulnerability could also be applied to defendants at courts, due to the issues which have been identified above relating to understanding and the imbalance of power. It could be considered that all defendants will have points at which they are vulnerable, with there being a greater likelihood of vulnerability for unrepresented defendants. Within courts, whilst vulnerability may be identified, for example, by staff working at the police station, by defence lawyers, or by court staff, there are still issues with identifying and passing on information about vulnerability – some health issues may not be diagnosed, for example, or some individuals may seek to hide their vulnerability or it may just go unrecognised (Fairclough 2018, 2017; Talbot 2012; Jacobson and Talbot 2009). It was noted in s. 6.6.5 how defendants who have specific needs such as mental health issues will not always be aware of this or they may not want to disclose it. Concern has been expressed about the level of knowledge professionals at court have in relation to vulnerabilities, their ability to recognise them, and their ability to effectively respond to them once they have been identified (JUSTICE 2017; Fairclough 2017). In s. 6.7.2(b), a legal advisor discussed having to tailor the language and terminology they use when speaking to unrepresented defendants. She said this is done based upon whether the defendant appears to be visibly struggling with the language or not. Due to the reasons discussed above, though, this is not an easy assessment to make. Learning difficulties, for example, may not always be obvious or noticeable (see s. 6.7.2(b)). The issues relating to vulnerability which Skinns (2009) identified in her research, then, are also apparent within a court setting suggesting that the way in which vulnerability is viewed within these environments should change. The approach taken in relation to vulnerability has an impact on the support that is available to defendants which will be discussed below.

9.5 Support that is available to assist defendants

The support that is available to help defendants to participate in court proceedings was discussed in s. 2.3.1. The Equal Treatment Bench Book was mentioned and how judges should respond and change court proceedings to help unrepresented defendants. For example, basic rules and the purpose of the hearing should be explained at the beginning of the hearing. As shown in this research, though, these things do not always happen, as a result of the exercise of discretion by court personnel (s. 6.7.2(b)). Even when they do happen, unrepresented defendants may still fail to understand (s. 6.7.2(b)).

The Criminal Practice Direction (2020) also sets out the ways in which proceedings can be adapted to assist defendants regarded as vulnerable (see, s. 2.3.1). For example, regular breaks should be allowed, clear and understandable language should be used, and proceedings should be held on the same level. Furthermore, the Equal Treatment Bench Book (Judicial College 2018) sets out the ways in which court proceedings may need to be adjusted. However, JUSTICE (2017: 62) found that defendants rarely sit outside the dock with everyone on one level. Similarly, the current research did not observe this or any of the other adaptations mentioned relating to breaks and defendants being able to sit with family members or others (it was not possible to know whether the defendant had visited the courtroom before the trial or not because defendants were not interviewed). None of these adaptations were, however, mentioned by the professionals interviewed.

In s. 6.6.1, an usher and a few defence lawyers interviewed discussed the use of legal jargon in court, which defendants – both represented and unrepresented – tend to struggle to understand. This suggests that clear and understandable language is not always used. Jargon was also used by court professionals whilst observing and as noted in s. 6.7.2(b) the level of explanation of legal terminology varied largely depending on, for example, the legal advisor themselves, how much time was available and whether the defendant was represented or not.

Furthermore, apart from this research, there have been few other studies examining the impact of the national liaison and diversion model (discussed in s. 2.3.1) or similar proposals. Participants in the present study did not bring up these schemes when asked about the assistance received by defendants at court. This may be because the schemes were not

generally being used by defendants who self-represent – but without further information it is only possible to speculate on this.

Some measures are, therefore, theoretically in place in order to try and facilitate the participation of defendants at court, although improvements could still be made, and further research on their impact is needed. Furthermore, unlike policy relating to witnesses or victims, attention is usually only on specific defendants who are deemed particularly vulnerable rather than all defendants (Kirby 2017). The provisions that have been discussed focus on those who are unrepresented or who are classed as vulnerable because they have a physical disability, learning disability or mental illness, and not on other defendants. This is despite the issues that have been discussed already relating to the extent to which all defendants can effectively participate in court proceedings. Moreover, as I have already argued above, all defendants can be vulnerable in court proceedings.

In addition to the provisions discussed above, certain defendants may be eligible to use special measures to help them participate in court proceedings (as discussed in s. 2.3.2). It is not known, though, how often special measures are requested by unrepresented defendants, how often they are granted, and how useful defendants perceive them to be. These things were not mentioned by any of the participants interviewed in this research project and so further research is needed. However, JUSTICE (2017: 66) does suggest that intermediaries were rarely appointed for defendants. Fairclough (2017) examined the use of the live link for represented defendants and found that even when defendants qualified to use it, the provision was much less likely to be used than would be the case for prosecution witnesses. This was due to a number of reasons: lack of awareness of the existence of the provision which allows vulnerable defendants to give evidence in that way; poor identification of defendant vulnerability (and therefore, eligibility for special measures) amongst the legal profession; and the view that it would be of no practical benefit for defendants to use the live link to give evidence (Fairclough 2017: 215). These issues may explain why no intermediaries or other special measures were observed in the cases observed in this study. A defence lawyer (see s. 6.6.5) expressed concern about defendants being able to make an application on behalf of their witness if they needed special measures. This would also be the case if they needed to make an application on their own behalf too.

The existence of these provisions is, therefore, not enough on its own, even with represented defendants, and issues around identifying vulnerability, increasing awareness, taking steps to ensure that unrepresented defendants are informed about how to make special measures applications and changing perceptions will also need to be addressed (Fairclough 2017). In order to try and ensure that unrepresented defendants are aware of special measures, and know how to apply for them, a support service should be developed to assist unrepresented defendants at court. Information and practical support could be provided in relation to special measures and other court matters (the support service will be discussed further later in the chapter). As mentioned in s. 3.3.3, a support service currently exists for those self-representing in civil and family cases, but not in relation to those self-representing in the criminal courts.

9.6 Crime Control, and Due Process Values

The limitations of available support discussed in the s. 9.5 undermine defendants' participation in the criminal process and the values promoted in the due process model and defendant engagement theory. Several of the reforms taking place over the past two decades seem also to be in line with crime control values – and will also have undermined these things.

As discussed in Chapter Two, crime control values favour the repression of criminal conduct and the protection of the community from crime. The emphasis is on speed and a lot of trust is placed in the police's fact-finding ability. Due process values prioritise ideals relating to fairness and the protection of individuals' rights, distrust is shown for the police and, thus, safeguards should be in place to protect innocent individuals from being convicted (Packer 1964).

9.6.1 Court reforms – court closures, reducing delays, and cuts to staff

The objectives of the Ministry of Justice at the time of the current research are set out in its Single Departmental Plan 2019-2022 (Gov.uk 2019b). They include: ensuring access to justice in a way that best meets people's needs; support a flourishing legal services sector; providing a transparent and efficient court system; protecting the public from harm caused by offenders; and reducing rates of reoffending (Gov.uk 2019b). The focus, as far as the

Ministry of Justice is concerned, has largely been on reducing costs and increasing efficiency within the court system. For example, between 2010 and 2019 over half of magistrates' courts in England and Wales were closed (House of Commons Library 2020) and there are plans to close further courts in the future (Comptroller and Auditor-General 2019). This makes it more difficult for defendants and other lay users to attend court, in terms of both monetary costs and time (Jacobson and Cooper 2020). As noted in s. 6.6.1 defendants can struggle to attend court due to financial difficulties and although defendants can be from all socio-economic groups, reference was made to those from lower socio-economic groups who are unemployed or who are on a low income, who he thought would particularly struggle in relation to this.

Court closures also mean there will be a greater workload for the ushers, legal advisors, judges and magistrates who work at court, which will impact on how much assistance they are able to provide. This study has found that legal advisors are already limited in relation to how much help they can provide to unrepresented defendants due to their role becoming more demanding and them having less time to provide this type of assistance due to busy court lists (see s. 6.7.2(a)). Additional court closures will have a further negative effect on this, and thus on how effectively unrepresented defendants can participate in the process.

Due to austerity cuts, over the last decade or so, there has also been a reduction in the number of staff in courts (JUSTICE 2019: 11). Note that participants in this research have suggested that the availability of more ushers would assist defendants, due to the heavy workloads that courts have and the number of cases that have to be dealt with. Other suggested improvements included expansion of the duty solicitor scheme and the shortening of case lists, to give a greater chance that everyone will be dealt with on that day, avoiding the need for adjournments and the defendant having to return another day and ensure sufficient time to deal with individual cases (see s. 8.4.1 and s. 8.4.2).

This emphasis on speedily dealing with cases, which undermines defendants' due process values (particularly the need for fair procedures) and their ability to participate (see also Kirby 2017). In-particular, decision-making relating to adjournments and the treatment of defendants in court, is influenced by the general lack of time (see s 6.3, s. 6.5, s. 6.7). It has also influenced the approach taken towards guilty pleas – as there has been an increasing focus on encouraging defendants to plead guilty (Kirby 2017). The present research found

that courts tend to focus on getting guilty pleas in and that unrepresented defendants can feel pressurised to enter guilty pleas to speed up the process, or as a result of misunderstanding the implications of their plea (s. 6.2.4 and s. 6.3.1). The main incentives to plead guilty arise from the sentencing discount scheme, which is set out in s. 144(1) of the Criminal Justice Act 2003. If defendants plead guilty, then they will be entitled to a sentencing discount and reduced court costs. However, this places pressure on them to plead guilty as early as possible, even if the defendant believes himself/herself to be innocent. Reducing delays, however, can aid participation in the system because as seen in relation to video hearings, this was seen to be a benefit for defendants (see s. 7.2.1 and s. 7.6.3). Reducing delay is also a positive for witnesses and victims, because they will have to spend less time waiting to do provide evidence, or because they may not have to give evidence at all (Burman and Brooks-Hay 2020). There is, however, a need to get the balance right to ensure that due process rights are not overlooked with the aim of achieving efficiency within the system.

Furthermore, many reception areas were, at the time of the fieldwork, also unstaffed at courts in England in Wales (JUSTICE 2019: 40). This means that there is no one specifically there to signpost lay users, including defendants, when they arrive at court to help them navigate the building and answer questions that they may have about court processes, for example. Defendants will have to try and find an usher, but as suggested in s. 8.4.2, there are increasingly fewer ushers working and the time that they have is limited, so their ability to provide this type of assistance will be restricted. Witnesses will be able to go to the Witness Service offices – but the Witness Service is not available to defendants. Court users can make an appointment to speak to a member of staff at court counters, although when observing it was noticed that these appointments were generally only accessible during limited hours of the day. There is a need for continuing monitoring of services available at court to lay users, perhaps with the start of court user groups, involving local residents and lay people, as in the USA, as introduced by the Center for Court Innovation in several cities and court systems there (see Centre for Court Innovation 2021).

9.6.1(a) Cuts to the legal aid budget

There have also been reductions in spending in relation to criminal legal aid. De-investment in legal aid is something that has been increasing since the mid-2000s (Flynn and Hodgson 2017: 1). The media increasingly report stories regarding legal aid in a negative way, where

lawyers are presented as milking and manipulating the system, while their clients are portrayed as undeserving of state funding (Dehaghani and Newman 2017: 1210). Consequently, state funding of criminal legal aid is the ‘least loved arm of the welfare state’ (Freeland 2006); and cuts to legal aid have taken place without much negative backlash from most voters (Dehaghani and Newman 2017: 1210). There was a 10% cut in fee rates across all legal aid services in 2011 and further cuts later occurred, including an 8.75% reduction to criminal legal aid in 2014 (Flynn and Hodgson 2017: 1; Newman 2013).

The reduction in pay for criminal legal aid work, the high costs involved in qualifying as a practitioner, and the long hours that have to be worked as a defence advocate makes attracting high quality lawyers to the profession difficult (JUSTICE 2019; Smith and Cape 2016). Cuts to funding can also have a negative impact on the service that is provided by those working in the industry. A study commissioned by the Solicitors Regulation Authority and Bar Standards Board suggested that although advocates’ skills in dealing with young and vulnerable witnesses had improved, overall the quality of advocacy had declined (Hunter et al 2018; Solicitors Regulation Authority 2018). Fifty judges were interviewed, and two thirds said that one barrier to good advocacy was advocates taking on cases beyond their level of experience. Moreover, one half of the sample thought that declining levels of pay and the associated low levels of morale within the profession also had a negative impact (Hunter et al 2018: iv). Changes in the criminal justice system such as economic and time constraints, changes to technology, and the size of court caseloads can also act as barriers to good advocacy (Hunter et al 2018: v). This is due to representatives having less time to spend preparing cases and technology not always working as it should (Hunter et al 2018: 38).

In addition, Newman (2013) interviewed 29 lawyers, who discussed the pressures of having to deal with clients efficiently and described how their practice had turned into ‘factory’ work where they were having to deal with lots of clients and push them through the system as quickly as possible in order for their firms to remain financially viable (Dehaghani and Newman 2017: 1218). The lawyers interviewed described how such practices led to them not always being prepared to deal with clients, and having little opportunity to read case files in advance of a particular hearing. In the interviews in the present study, the ushers and legal advisors interviewed said that generally solicitors see and read their paperwork on the day. The legal advisors interviewed suggested that this was usually due to solicitors only being instructed on the day of the hearing and, thus, not being aware of the case before hand (see s.

6.2.1). Interestingly, defence lawyers did not discuss this topic in interviews – possibly because the interviews focused largely on unrepresented defendants and not on lawyers’ experiences of representing defendants. This was also the case for ushers and legal advisors, but this topic came up due to them being asked about their role in providing defendants with paperwork at court.

Legal funding constraints may also affect the treatment of vulnerable defendants. In Dehaghani and Newman (2017: 1217) participating lawyers recognised that some clients, such as those with learning difficulties, would need more time being spend on them. They felt, however, that this was not possible given the lack of sufficient financial remuneration. Government cost-cutting was, therefore, provided as an explanation for why corners had to be cut, with a knock-on effect upon defendants’ potential disadvantage in court proceedings (Dehaghani and Newman 2017: 1222). The present research touched on this in s. 7.3. It was suggested that the time-slots that lawyers have with their clients before the hearing can be disadvantageous in certain cases and more time is needed with some clients, as building rapport, explaining things and taking instructions may be more time consuming and more difficult with certain defendants, who may have additional support needs.

In spite of these pressures, as discussed in s. 6.7.2(a) and s. 6.7.2(b), during court proceedings themselves a key thing focused on by some of the legal advisors, judicial prosecutors and defence lawyers interviewed was that explanations were provided to unrepresented defendants, and that this was done to a greater extent than with represented defendants. This suggests that this is not usually the norm when defendants are represented.

It should not, however, be assumed that just because a defendant is represented, no further explanations in court will be required. As discussed in s. 2.7.1, once the hearing starts, defendants may have forgotten some of the things that they have been told prior to the hearing. Furthermore, not all lawyers explain everything to their clients, or they may explain things quickly and inadequately due to a lack of time, skill or willingness to do so (e.g. Baldwin and McConville 1977; Newman 2013). This will negatively impact on the ability of represented defendants to be able to participate in court proceedings, reducing them to a passive actor and preventing them from instructing their counsel from a position of knowledge.

9.6.1(b) The increasing use of technology, the status of defendants and the tension between crime control and due process values

Another major change in the criminal courts, which has sought to save money and time, has been the introduction of video links from prisons to courts. Participants in the present study mentioned some positives, including the reduction in costs and the time that is saved when hearings are conducted in this way. However, concerns were also raised around the impact that virtual hearings have on defendants' ability to communicate with their lawyers and court personnel, participate and hear, the negative impact that it potentially has on outcomes, and (especially vulnerable) defendants' ability to see family members and friends (s. 7.1 and s. 7.6). Other research has shown mixed results in terms of the impact that video hearings have on defendants' experiences (e.g. Plotnikoff and Woolfson 1999, 2000; Terry et al 2010; Transform Justice 2017a; Fielding et al 2020).

Despite these issues, however, as a result of the coronavirus pandemic and the subsequent lockdown measures in 2020, more hearings are taking place remotely across the criminal, civil and family courts. The Coronavirus Act 2020 expanded the availability of video and audio links in court proceedings. It is unclear whether these hearings will continue over the link after the pandemic is over, at all or to the same extent. If they do become more widespread, what implications will this have for defendants and on due process rights (for example, the right to appear in person at court, and defendants' right to effectively participate in the process and what impact will it have on levels of legal representation)? Will defendants have a choice whether they appear in person or not? Who will appear in person and who will appear virtually? Will everyone appear remotely or only some individuals? If so, which ones and who decides? Which cases will be heard in this way? All cases or only certain ones? Again, who will decide this?

These are all important matters that will impact on the experiences that defendants have at court and their ability to participate and which raises issues in relation to how defendants should be and will be supported to participate in proceedings when attending court in this way. As noted in s. 8.4.2, the use of digital platforms and technology is not suitable for all defendants, particularly those who do not have access to technology or who lack the necessary skills. Participants referred in particular to low-level traffic cases which can be dealt with online, without the need for a hearing, rather than defendants having to attend

court (although they do not have to be). These same issues will, however, apply in relation to hearings being held virtually. These court users should, therefore, be borne in mind in relation to further reforms.

The above discussion then has focused on the reforms that have taken place in the criminal justice system, and has shown the prevalence of crime control values within them. When considering what values the criminal justice system embodies as a whole, and how defendants are treated in court, it should be remembered that due process values (particularly the ability of defendants to effectively participate in proceedings on their own) are not and have not always been at the forefront, which is in contrast to what is being promoted in defendant engagement theory.

As discussed in s. 3.1 defendants have been described in earlier research as being dummy players in court who were ‘seen but not heard’ (Carlen 1976: 86), suggesting that they had little status and were forgotten characters; and more recent research suggests this is still the case. In Jacobson et al (2016: 195), for example, interviewees described how they were not actively engaged in the judicial process – they were mere passive, disengaged observers. The process is something that happens to them, rather than them being actively involved in it. They are seen as objects, not key stakeholders (see also Owusu-Bempah 2020: 2). In order for defendants to be able to effectively participate and engage in the system, they will need to be seen as central to court proceedings.

The present findings show increasing tension between due process and crime control values, and an increasing tendency in the magistrates’ courts to prefer the latter. In particular, interview participants thought that defendants were unrepresented in this study was *financial*: defendants not being entitled to legal aid, the means test being introduced and not changing in line with inflation, and the interests of justice test being interpreted more strictly than used to be the case (see s. 5.2 and s. 5.3). These reasons are due to reforms that have taken place to reduce expenditure. Crime control values were also evident in the finding that some defendants decided to self-represent because they did not want to wait to see the duty solicitor. Court lists were long and duty solicitors could have large number of defendants to deal with. Some interviewees were opposed to an expansion of the role of the duty solicitor, due to the costs of doing so and the impact that this would have on the duty solicitor’s workload (see s. 8.4.1). Cost and time reasons were also the main reasons why it was found

that represented defendants were usually given priority over unrepresented defendants (see s. 6.7.1). Defence lawyers did not usually immediately speak to their clients after a virtual hearing due to, for example, issues around organising a link and the cost and time implications of going to see them in prison. As mentioned above, how much assistance could be provided to unrepresented defendants, in respect of how much things were explained to them and whether the hearing was stood down for them to seek advice, for example, also appeared to be influenced by time factors and pressures relating to increased workloads (see s. 6.3.1, s. 6.3.4, s. 6.7.1. and s. 6.7.2(a)). Some interviewees were also concerned by the fact that in their view unrepresented defendants' hearings take longer than represented cases. They stressed the impact that this has, and it was suggested that unrepresented defendants are perceived as problematic as a result (see s. 8.2.2). All of these factors and attitudes impact on defendants' ability to participate in the system, as there are implications in relation to whether they are entitled to be represented by a lawyer, when they get to speak to their lawyer and how much time they get to spend with them, how much help they are provided with in order to understand the court process and how they are viewed by those working at court.

This is not to say that crime control values are not and should not be considered at all – the state does not have infinite resources, and the avoidance of delays can be in the interests of all stakeholders in court proceedings. Neither is it being said that there was no evidence of due process values in this study's findings. Some defendants had the opportunity to be represented by the duty solicitor, for example. Adjournments occurred for them to seek legal advice, papers were printed off to be given to unrepresented defendants to read, and they were asked if they wanted to cross-examine witnesses and give evidence and whether they wanted to say anything at the sentencing stage (see, s. 6.3.3, s. 6.2.1, s. 6.4.2, s. 6.5.1 and s. 6.5.4). Explanations were also provided by some court personnel (see, s. 6.3.4, s. 6.4.2, 6.7.2(a) and s. 6.7.2(b)).

There is a danger, however, in continuing to implement reforms which prioritise crime control values and which are aimed at reducing costs and speeding up the process, in that due process values will continue to be eroded, defendants will be further alienated, and their ability to participate will be made more difficult, all of which is important in the name of legitimacy, fairness and access to justice. These things are important regardless of what offence a defendant has been charged with and in what court their case is concluded, because if they are convicted, they will still face some sort of criminal consequences. This is why

priority should be given to emphasising the defendants' key role within the process and on their ability to understand and take part in court proceedings rather than this being overlooked. In order for steps to be taken to address this, however, it is important to know what the barriers to participation are.

9.7 Is the magnitude of the struggle to participate increasing in the magistrates' court and is it the same for all?

Defendants in practice struggle to participate and engage in court proceedings for a number of reasons, including: differences in class and race which can exist between defendants and court professionals; the nature of criminal proceedings; and the rituals, arcane language, and layout of the courtroom (see s. 6.7.1). The magnitude of the struggle is not the same for all. This was apparent in this research – for example in discussing vulnerable defendants - but is also a theme in the earlier literature, as well (e.g. Carlen 1976; Bottoms and McClean 1976). The reforms and developments described above have some negative implications in regards to participation. These are not the only factors, though, which undermine defendants' participation in the process. Others include the sheer number of offences created, the complex nature of them, the complexity of sentencing and the increasing professionalisation and regulation of court proceedings.

Criminal offences have been created in large numbers in England and Wales. It has been estimated that between 1997 and 2008, when a Labour government was in power, around 3,605 new offences were created - around 320 offences a year on average – and the number rose to 4,289 by 2009 (Wincup 2013; Morris 2008). A new coalition government was elected in 2010, and the Ministry of Justice in 2011 published statistics relating to the number of criminal offences that had been created in the 12 months ending May 2011. There was a 75.6% reduction in the number created compared to that in the 12 months ending May 2010 – 174 new offences were created compared to 712. Chalmers and Leverick (2013), however, examined the creation of offences over two time periods and found that more criminal offences were created than were suggested by these statistics: in fact, 634 offences were created in 2010. The criminal process for all offences of course starts in the magistrates' court.

Welsh (2016) and Stevenson et al (2010) suggest that some of the offences created in recent years have been excessive. Over-criminalisation does have widespread implications for individuals and the criminal justice system (Husak 2008). However, for the purposes of this thesis we should focus particularly on whether the criminal law is accessible to lay users in the face of this extension of, and rapid change in, the criminal law. In relation to this, Stevenson et al (2010: 516) stated that:

Contemporary criminal law, both substantive and procedural, is unquantifiable, poorly organised and unknowable making it virtually impossible for lawyers, professionals and especially the public to understand and engage with the criminal justice process.

This is due to the sheer volume of criminal offences, the fact that they are often set out in a number of different provisions and the uncertain, complicated, and ambiguous way in which they are generally drafted (Spencer 2008: 586-587).

In 1980, JUSTICE (1980) reviewed the Stone's Justices Manual (used in magistrates' courts) and identified 7,208 offences. Ashworth (2013) revised this figure based on 1999 data, and estimated that there were around 8,000 criminal offences, while in 2008 Chalmers and Leverick suggested that there were around '10,000 different criminal offences in English law'. These assessments are complicated by the amount of legislation, the different types and sources of statutory provision, and the fact that criminal offences are repealed as well as being created. In Chalmers and Leverick (2013) whilst all Acts of Parliament, Acts of the Scottish Parliament, statutory instruments and Scottish statutory instruments over two one year periods were reviewed, the approach was still not complete, since 'criminal offences can be created by other means' (Chalmers and Leverick 2013: 547). For example, crimes may be created by local authorities and national regulators. Indeed, 'not only do we not know how many criminal offences there are, we are not even sure how many bodies have the power to create them' (Chalmers and Leverick 2013: 547). If expert academics with institutional resources behind them cannot accurately assess the scope and scale of the modern criminal law, then laypersons (including defendants) cannot hope to have a clearer understanding.

For those who are able to access the internet, there is a website online which sets out the statutes that are in existence, which has improved accessibility (see, legislation.gov.uk). All primary legislation from 1988 and secondary legislation from 1987 are available. However,

not all legislation is available on it, records may not show the most recent reforms to statutes, and, whilst most types of primary legislation are held in revised form, only some secondary legislation is (Gov.uk n.d.). Even if legislation can be viewed online, it does not necessarily mean that it will be understandable given that there is the issue in relation to how criminal laws are drafted (Spencer 2008 and Chalmers and Leverick 2013): ‘much of it being enacted without effective legislative scrutiny and all but incomprehensible to lawyers and laymen’ (Gibb 2010). If expert, trained lawyers and judges themselves struggle to understand the content of the law, then it will be even more difficult for a defendant to do so, particularly if they are vulnerable. This, therefore, makes the service of lawyers even more important than would otherwise be the case.

This change in substantive and procedural criminal law is mirrored by the increasing complexity of sentencing law. Examples of this complexity include the introduction of mandatory minimum sentences (see s. 2.5(1) for more information), the requirement that community orders include a ‘punitive’ requirement, without any guidance of when and where a particular requirement will be punitive (Newburn, 2013); and the rapid and regular pace of change around the recognition of previous convictions during sentencing (Roberts and Pina-Sánchez, 2015). Again, therefore, the legal terrain of sentencing is very complex and lack of knowledge can make understanding and engagement more difficult. It was found in this research that this is something defendants, particularly unrepresented defendants and those who had not been to court before, tended to struggle with (see, s. 6.5 and s. 6.6). A Sentencing Code has recently been enacted with the aim of simplifying the sentencing regime (Sentencing Council 2021). As a result of the Sentencing Code, sentencing procedure law has been consolidated into one single act. This may address some of the issues discussed above. The Sentencing Act 2020, though, is very lengthy (it has seven chapters and fourteen parts, for example). Furthermore, although it ‘seeks to make the law more readily accessible’ (Ormerod 2020: 1), it has also been said it has been ‘drafted with the needs of judges in mind’ (Ormerod 2020: 1), not lay users. Thus, the extent to which this will be helpful and will provide greater clarity to unrepresented defendants is something that will have to be further considered.

In addition, court proceedings are now more professionalised since the early socio-legal studies were done by Carlen (1976), Bottoms and McClean (1976), and Darbyshire (1981). In Welsh (2016), interviewees said that the increasing professionalisation and regulation

(especially through hard law) of criminal proceedings, including the introduction of the Criminal Procedure Rules – which were implemented with the aim of increasing efficiency within the court process (see s. 2.3) – have also increased the complexity of the area; as has the introduction of case management hearings. These reforms present issues for (unrepresented) defendants, as specialist knowledge is required in relation to the law and administrative issues, due to the language used, and the number of regulations and amount of legislation, which makes it more difficult for defendants to represent themselves in court. The present research has identified concerns about case management forms, understanding the law and legal rules amongst most of those interviewed in this study and this was the case for represented and unrepresented defendants; and so was the pace in which the hearings were conducted and the lack of explanations or their brief/quick nature (see s. 6.6, s. 6.7 and s. 8.2.2). The move towards virtual hearings was also said to cause some issues for defendants (see s. 7.1 and s. 7.6). A range of reasons, therefore, explain why defendants, particularly unrepresented defendants, can experience problems at court. Going forward if court hearings continue to be professionalised, then understanding is likely to become even more difficult for defendants and other lay users.

9.8 Suggestions to facilitate engagement and participation

A number of practical changes could be made to try and assist the participation of defendants at court and are discussed below. Some of the suggestions are relevant to both unrepresented defendants and represented defendants.

9.8.1 Support at court

More support needs to be made available to defendants, particularly unrepresented defendants, at court. As discussed in Chapter Three, the Witness Service provides free and independent support for both prosecution and defence witnesses in every criminal court in England and Wales. Emotional support and practical information is provided by trained volunteers to assist witnesses (Citizens Advice n.d.). Pre-trial visits can be arranged, for example, and on the day of the trial, volunteers sit with witnesses in a separate room away from the defendant. A similar scheme exists for self-representing litigants in the civil and family courts (although, at the time of writing, it is not available in all courts). Research has recognised (e.g. Plotnikoff and Woolfson 2004; Trinder et al 2014; Jacobson et al 2016) that

these individuals may be vulnerable and might find the process of going to court confusing and intimidating, and, therefore, that they may require extra support and assistance during the process. The present study has found that defendants may also feel this way (which is reflected in other research: e.g. Transform Justice 2016; Jacobson and Cooper 2020), and thus a similar support service should be put in place for them. The support service would provide a service similar to those described above – no legal advice would be provided, but information could be provided regarding court processes and the existence of special measures.

9.8.2 Information

There are four documents available on the GOV.uk website to help defendants understand the criminal process (what to expect at court and what will take place) and the terminology used at court (Ministry of Justice 2019c; 2019d; 2019e; and 2019f). The information in these documents will be relevant to both represented and unrepresented documents. Based upon this study, additional information should be provided in these sorts of documents. Additional explanations should be provided of some of the other terms that this study has shown defendants can struggle to understand relating to acquittal, bail, and sentencing. This includes: duty solicitor, case management forms, special measures, witness, disclosure, court-appointed lawyer, cross-examination, pre-sentence reports, adjournments, video-hearings, bail applications and appeal. Additional information about what happens at hearings should be provided specifically for unrepresented defendants, regarding: when they will be provided with their case paperwork, who will provide it, and what they should do if they have not received it or cannot read it; what they will be required to do at a bail hearing, case-management hearing, trial (particularly in relation to the process of cross-examining witnesses and giving evidence) and sentencing hearing; and the use of sentencing guidelines and pre-sentence reports. Based upon the interviews and observations, these are the key areas that unrepresented defendants tend to struggle with.

Defendants who are informed about what is going to happen at court and know what to expect are more likely to be able to participate in the process than those who are not as well informed. These four online documents should also be made available at court (whether they currently are is not known) and at any other services that provide support to unrepresented defendants. They should be regularly updated and well publicised – and videos could also be

produced aimed at defendants attending court. Videos would be helpful for those who experience difficulties reading, for example, and would provide a better visual representation of court buildings and their layout. Some videos are available online from a number of sources, but the Ministry of Justice should produce one to ensure accuracy, as they have done for witnesses attending court to give evidence (see, Ministry of Justice 2012).

However, in certain circumstances, written and online resources will not always be enough and defendants will need to speak to someone face-to-face or over the phone. This will be particularly the case for defendants who have poor English skills or poor reading and writing skills or are unable to access online resources. A member of staff working for a support service, for example, could provide assistance in relation to this rather than the usher, who presently has to provide this sort of support in an ad hoc manner (as discussed in s. 9.6.1).

9.8.3 Training

Generally, the ushers, legal advisors and judicial prosecutors interviewed suggested that they had not received training in relation to unrepresented defendants or had not received comprehensive training that solely focused on them. All criminal court staff should have training on the needs of unrepresented defendants, the problems that some unrepresented defendants may experience at court, and suggestions should be made as to how best to respond to unrepresented defendants. This would help to minimise the inconsistent approaches that staff take when dealing with unrepresented defendants (as mentioned in Chapter Six). Other research has also suggested that all judges, magistrates and legal advisors should have comprehensive training in relation to vulnerable defendants who have mental health and/or learning difficulties, so that they are familiar with the different ways in which someone could be vulnerable and recognise what appropriate steps and adjustments need to be made (e.g. McLeod et al 2010; JUSTICE 2017). As discussed earlier, this will also be relevant to unrepresented defendants, as some unrepresented defendants will also experience these issues. This research has highlighted how different kinds of defendants may be more or less vulnerable. Attention should be paid in training to the particular needs that vulnerable defendants face, and the way in which different forms of vulnerability can intersect and interact. Furthermore, training should be provided exploring effective participation, why it is important, the barriers that obstruct it, and the ways in which court actors can facilitate it (these are set out below).

9.8.4 Reviewing the approach taken in court and the language used

Much of the unacceptable variation in practice and the difficulties defendants face are down to court culture. Defendants are not seen as important and equal participants in relation to professionals (Rock 1993). The efficiency of the court system is prioritised over and above court actors' role in facilitating the fair and effective participation of defendants within the adversarial court process (as indeed the aims of the Ministry of Justice set out: Ministry of Justice 2019). A change in court culture would be required to further aid participation. In particular, explanations should be provided to defendants about who the people are in court and what their roles are, what the purpose of the hearing is and what is going to happen. In order to ensure that unrepresented defendants are sufficiently prepared for hearings, in instances where defendants are unrepresented, the judge could summarise what the defendant will need to do and by when. Effort should also be made to ensure that defendants have an opportunity to speak and ask questions, eye contact should be made with defendants when the judge is addressing them or when they are speaking to the judge and they should be spoken to respectfully.

In this research, the language used in court has been found to cause problems for defendants in relation to understanding and their ability to engage and participate in court proceedings. Technical, legal or abbreviated language should be avoided where possible. When the use of such language is unavoidable, an explanation should be provided and defendants should be given the opportunity to ask questions in response.

9.8.5 The use of the dock

The negative impact of placing defendants in docks was discussed in s. 6.7.1(b). It hinders defendants' participation in the process due to it segregating and isolating them, making it difficult for them to hear proceedings and speak to their representative (if they have one). It also tends to underline their non-status by physically separating them from the trial's other actors (Mulcahy 2013). Its use should, therefore, be reviewed to consider when and in what circumstances it will generally be necessary for a defendant to go into the dock for security reasons, what possible alternatives could be used instead and what the benefits and drawbacks of these alternatives would be in relation to facilitating participation.

9.8.6 Special measures/adjustments and liaison and diversion service

As discussed in s. 2.3.1, more research is needed in relation to the adjustments that can be put in place for defendants and the liaison and diversion schemes that are in existence. Only through research can issues be identified and suggestions be put forward for potential improvements to be made. It is interesting that this thesis has constantly needed to point out other research gaps, given the difficulties encountered in doing the current research (see, s. 4.4.2). It almost looks as though the courts do not wish to encourage research or scrutiny, except by those employed officially or along parameters set out by the government. Yet these are public facilities demonstrating the rule of law. In that respect, it is crucial to encourage independent research which can point to better practice.

This chapter discussed the potential to accentuate the use of special measures for vulnerable defendants (see, s. 9.5). At present, the scattered nature of these measures causes confusion (see, s. 2.3.2(b)). Furthermore, more resources should be made available for special measures, and eligibility for special measures should be expanded for defendants, so that the criteria are the same as they are for witnesses due to the consequences involved for defendants (Owusu-Bempah 2020; Fairclough 2017, 2018). That said, changes to the law will not be sufficient on their own: awareness of special measures will need to be improved, attitudes towards special measures will also have to be changed and issues around identifying vulnerability will have to be addressed (Fairclough 2017). All these matters related to vulnerability are currently being addressed in relation to police investigation with vulnerable victims and witnesses, and to police custody (e.g. Dehaghani 2017, 2019, 2020; Skinns 2019). The courts seem to be lagging behind.

9.8.7 Provision of a lawyer

Even with additional support, there will be some unrepresented defendants who will particularly struggle during court proceedings and will experience problems. When magistrates or judges believe that this is the case, they should have the discretion to require that the duty solicitor represent the defendant if they so wish, or that the duty solicitor at least speaks to the defendant to offer them advice at their first hearing (an equivalent provision to that at police stations). A few participants in this study noted that sometimes duty solicitors will assist some defendants even when they are not eligible, but it is unknown how

widespread this is and on what basis this is done (see, s. 8.4.1). Some participants interviewed in this study were worried about the effect that extending the duty solicitor scheme would have in financial terms, but the needs of defendants and their ability to understand and effectively take part in proceedings must trump these concerns due to the issues that were discussed above when discussing defendant engagement theory.

Representation, however, should not be compulsory except in exceptional circumstances as is currently the case in England and Wales (Wohlers 2018: 135). Individuals should have the right to represent themselves in court if they wish to do so. As discussed earlier on in this chapter, liberal democratic societies are founded upon a number of principles and respect for personal autonomy is one of them. The value of representation should be explained to defendants, but if they decide not to have it then this should be respected. There is a risk if legal representation is required in all cases, then court proceedings and courts will also become even more lawyer focused, which would make proceedings harder for defendants and other lay users to understand and engage in.

9.8.8 Miscellaneous suggestions to enhance participation

More research needs to be done about the impact virtual hearings have on participation, particularly in relation to unrepresented defendants and those with additional support needs, before the use of video hearings is expanded any further. Furthermore, the professionals who work in court should be more diverse in terms such as class and race, in order to reduce feelings of marginalisation and exclusion amongst defendants and other court users (Owusu-Bempah 2020: 17). Thresholds for legal aid are currently being reviewed (MOJ 2019b); criminal legal aid should also be reviewed and the current means test should be brought in line with inflation, which would likely result in an increase in the number of defendants being entitled to legal aid. The interviewees in this study suggested that financial reasons were a key factor in defendants' choice to self-represent. Whilst the provision of a lawyer does not guarantee that defendants can effectively participate or engage in court proceedings, it addresses some of the issues that defendants tend to experience when they represent themselves.

Now that suggestions for improvement have been set out, the limitations of the research project and suggestions for additional research will be discussed, before turning to the overall conclusion.

9.9 Limitations of this research project and suggestions for future research

A key limitation of the research is that although a range of participants were interviewed and defendants were observed, due to the real difficulties and delays on access, unrepresented defendants were not interviewed themselves. Future research must endeavour to do this, because as discussed previously (see Chapter One and Chapter Four) it is important that their voice is heard, given that they are the ones actually going through the process of self-representing themselves. Thus, their views may differ to those who work at court. Further research could interview those self-representing in the magistrates' court and the Crown Court to see if any similarities and/or differences are evident between these sites.

In this research project, data could not be gained on the resources, if any, that are used by self-representing defendants to prepare for their case and going to court. This was discussed by the participants during the course of the interview, suggesting that participants were unaware of it. This suggests that interviewing the defendants themselves is necessary to gather data on this point. Greater awareness of the resources these defendants use and the difficulties that they experience using or accessing them would allow meaningful improvements to be made to these resources, and therefore, to the quality of defendants' experiences (as well as to the speed and efficiency of court proceedings).

This chapter has set out and explored some of the ramifications of defendant engagement theory. This theory still needs further development and future research should further consider what it would mean, in practice, to run a justice system that follows the principles of defendant engagement at different trial stages and in different hearings. Chapter Two discusses the issues around the definition of effective participation provided by the ECtHR, and the need for further clarification, particularly in relation to unrepresented defendants. This thesis has, however, not sought to provide a legal definition or developed a test in an attempt to address these issues - this is something that must be developed further in future research. This is due to the inability of this research to recruit defendant participants to inform the development of its central theory.

9.10 Overall conclusion

This chapter has discussed how and why defendants struggle to engage in court proceedings, and why it is important that they should be able to do so, if they wish to. It has been argued that all defendants are potentially vulnerable, but those who are unrepresented are at a particular disadvantage as they do not have a lawyer present to assist them. The relevance of a number of theories has been discussed and a new theory of defendant engagement has been put forward with defendant participation and understanding being its key concern. Practical changes to facilitate participation have been set out in an attempt to improve understanding and engagement, and some of the limitations of the research have also been examined. This chapter has also highlighted the lack of research that has been done focusing on defendants. This itself shows the priority of the system and its lack of care as to whether all court users are able to understand and participate.

This research has made a contribution to the area as up-to-date findings have been obtained in relation to the experiences of unrepresented defendants in magistrates' courts in England and Wales. A range of participants have been interviewed, whose views have not been obtained either recently or at all in this area. Moreover, a range of under-researched hearings were observed, including virtual hearings. Whilst defendants' ability to effectively participate has been discussed by Owusu-Bempah (2020) and Jacobson and Cooper (2020), for example, discussion has largely centred around represented defendants rather than unrepresented defendants, who are the key focus of this thesis.

The main findings in this study relate to the problems that defendants, particularly unrepresented defendants, experience when attending court, and these problems were largely evident in the previous research done from the 1970s onwards. This shows that despite the steps that have been taken to enhance participation (which were discussed earlier on in this chapter) over the last 50 years, defendants are still generally silenced, marginalised and confused during court proceedings. Whilst in theory, due process and human rights exist for defendants and are essential in an adversarial system, more needs to be done to enable defendants to understand and exercise all of these rights in practice. Although these rights do guide court actors and shape court proceedings, they are increasingly taking a back seat and efficiency values are instead being championed. This undermines defendants' ability to engage and effectively participate in the process. To enhance legitimacy and confidence in

the system, a change of approach is, therefore, required: more focus should be on promoting due process rights and rebalancing the system in favour of these rights, defendants should be treated and seen as key actors, courts should be an inclusive environment and court proceedings should be made accessible to all.

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Appendices

Appendix 1: Participant information sheet

A study exploring the experiences of defendants in the criminal courts

Dear Participant

I would like to invite you to take part in a study. Before you decide whether to participate or not, you need to understand what the research is about and what it would involve for you, so please read through the following information carefully.

This study is not being conducted for, or on behalf of, the Ministry of Justice (MoJ), or Her Majesty's Courts and Tribunals Service. It is a private research project being conducted by me, under the supervision of the University of Sheffield, but I have received permission from the MoJ to approach individuals, who are either working at this Court, or who are attending Court, to request that they participate in interviews. It is entirely the choice of each individual that I contact, as to whether or not you agree to take part in this research project, and whether or not you agree to be interviewed. This is explained in more detail below. If you are a party to a case being heard at this Court, please note, that whether or not you agree to take part in an interview, will have no effect whatsoever, upon the outcome of the hearing for which you are attending.

What is the purpose of the study?

The study will examine the experiences of adult defendants at court, and it will explore the reasons why defendants self-represent. It also aims to gain an insight into the resources used by those self-representing and to investigate the impact that defendants have on court proceedings and the role of the judge, lawyers, clerks and other court staff.

What research methods will you be using?

I will be observing proceedings in two magistrates' courts and conducting semi-structured interviews. I will not be interfering with court proceedings nor provide any input to anyone concerned with a case. I am a researcher. I am not involved with any cases, and I have not had, nor will I have, any access to any court files.

Why have I been chosen to be observed and/or interviewed?

You have been chosen for this research because you have either been identified as someone who has represented themselves, or you have identified yourself as being as such, or because you currently work in the criminal courts in some capacity (for example, you may be a clerk or lawyer).

Do I have to be interviewed?

No: you do not have to take part if you do not want to. If you decide you would like to be interviewed, though, I will ask you to provide verbal or written consent prior to taking part. If you do decide to participate, you will still be able to withdraw at any time without giving a reason. There will be no adverse consequences of this.

What will being interviewed involve?

If you would like to be interviewed, then please email Charlotte Walker (researcher) (crwalker1@sheffield.ac.uk). You will be interviewed on a day that is suitable for you, and you will be interviewed face-to-face or via telephone depending on what is convenient for you. It is expected that the interview will take no longer than 45 minutes and with your consent, it will be recorded.

Will my taking part in this study be kept confidential?

Every effort will be made to ensure anonymity, whilst not comprising the detail of the data required. You will be given a made-up name for the research. I will be the only person who will have access to the consent forms and to the computer records where your real name will be stored. I will also be the only person who will have access to the audio recordings. The University of Sheffield will act as the Data Controller for this study. This means that the University is responsible for looking after your information and using it properly. In order to collect and use your personal information as part of this research project, we must have a basis in law to do so. The basis that we are using is that the research is ‘a task in the public interest’. Further information, including details about how and why the University processes your personal information, how we keep your information secure, and your legal rights (including how to complain if you feel that your personal information has not been handled correctly), can be found in the University’s Privacy Notice <https://www.sheffield.ac.uk/govern/data-protection/privacy/general>.

What are the possible risks and benefits of taking part?

We do not anticipate any problems arising from you participating. If you would like to stop the interview for any reason, then you will be able to do so. Although it is unlikely that you will directly benefit from taking part, it will give you the opportunity to talk about your experiences. The research will also bring attention to the areas discussed, and it may result in improvements being brought about in the future (e.g. changes may be made to court procedure when dealing with unrepresented defendants).

What will happen to the results of the study?

The results of my study will be written up and form the basis of my PhD thesis. The findings may be published in an academic journal and presented at conferences; however, your identity will remain anonymous.

Who is funding the research?

The research is a PhD project funded by the Economic and Social Research Council (ESRC).

Where can I get more information?

You can email Charlotte (crwalker1@sheffield.ac.uk), or if you have any concerns, you can contact one of her supervisors: Professor Joanna Shapland (J.M.Shapland@sheffield.ac.uk) or Dr David Hayes (D.J.Hayes@sheffield.ac.uk).

Thank you for taking the time to read this information sheet.

Appendix 2: Participant consent form

Consent Form

Project Title: A study exploring the experiences of defendants in the criminal courts

Researcher: Charlotte Walker (crwalker1@sheffield.ac.uk)

Participant Identification Number:
Please Initial Box

1. I confirm that I have read and understand the information sheet dated explaining the above research project and I have had the opportunity to ask questions about the project.

2. I understand that my participation is voluntary and that I am free to withdraw at any time without giving any reason and without there being any negative consequences. In addition, should I not wish to answer any particular question or questions, I am free to decline.

3. I understand that my responses will be kept strictly confidential, and I give permission for the researcher to have access to my anonymised responses. I understand that my name will not be linked with the research materials, and I will not be identified or identifiable in the report or reports that result from the research.

4. I agree for the anonymised data collected from me to be used in future research.

5. I agree for the interview to be audio recorded.

6. I agree to take part in the above research project.

Name of Participant Date Signature

Researcher Date Signature
To be signed and dated in presence of the participant

Consent form version number

Appendix 3: Interview schedule (ushers)

Icebreaker questions

1. How long have you worked as an usher?
2. Can you talk me through your role in the average court case?

Main interview questions

3. How often do you encounter unrepresented defendants in the magistrate's court?
 - 3a. At what sorts of stages do you encounter them? So, in what type of hearings?
 - 3b. Do you think there has been any change in the number of defendants self-representing in recent years, and if so, why and to what extent?
4. From my observations and interviews with solicitors a number of reasons have emerged as to why defendants self-represent. I am going to read out some of them now. Can you say whether you have come across any defendants who self-represent for these reasons and whether you think they are common or rare?

So have you come across defendants who self-represent because:

- i. They don't see the value in having a solicitor because they say they are guilty/innocent; **(do you think that it is a common or rare reason?)**
- ii. They want to save time and don't want to wait;
- iii. They do not know they are entitled to see the duty solicitor or are eligible for legal aid;
- iv. They are unable to see the duty solicitor twice;
- v. They are not entitled to legal aid and they cannot afford to be represented or are unwilling to pay for it;
- vi. They want to represent themselves so that they can talk directly to the court;
- vii. They haven't managed to find and instruct a solicitor; and/or
- viii. They have had a disagreement with their solicitor
- ix. Are there any other reasons that you're aware of?

5. What problems do you think unrepresented defendants experience when representing themselves (if any)?

****Probing questions (if they don't mention these things when answering 5 then ask these) →**

5a. Do you know if unrepresented defendants experience any difficulties when they first arrive at court?

5b. Do you know if they experience any problems in relation to preparing for their hearing?

5c. Do you know if they experience any problems in relation to organising their witnesses for trial?

5d. Do you know if they experience any problems in relation to taking their oath?

6. Are there any benefits to self-representing?

7. When a defendant is unrepresented at a plea hearing, when are they usually given their paperwork? Will this be the first time, they will have seen their case papers?

7a. Is that also the case for unrepresented defendants appearing in the traffic court?

7b. When a defendant is represented at their plea hearing, do you know when their legal representative would have access to their paperwork?

8. Are there any particular things you would need to say or do if a defendant was unrepresented? Do you give unrepresented defendants anything at all or not?

8a. Do you do anything differently with witnesses in cases where the defendant is unrepresented?

9. How do you think things could be improved to help unrepresented defendants?

9a. Do you think the role of the duty solicitor should be expanded to include those who have been charged with a non-imprisonable offence or not?

9b. Would that include those who have been charged with minor traffic offences?

10. Have you had any training in relation to unrepresented defendants?

10a. Would it be helpful to have training?

10b. Any ideas about what you would like the training to involve?

10c. If you have had training, what are your thoughts on it? Have you got any suggestions as to how it could be improved?

Video technology

I would now like to ask you some questions in relation to video technology, as I've not observed many hearings where video technology has been used, so it would be helpful to hear about it.

11. To what extent is video technology (so defendants appearing via video link) used in the court where you work? Have you seen it being used for plea hearings, bail hearings, sentencing hearings, trials, or all of the above?

12. What can you see when the defendant appears via video link? What can't you see when the defendant is appearing from prison? What are the surroundings like?

13. Are there any difficulties with video technology in relation to defendants, particularly unrepresented defendants?
- 13a. What kinds of difficulties?
14. Would you say that video technology causes unrepresented defendants considerable difficulty/some difficulty/little difficulty/no difficulty/it benefits them?
- 14a. What about represented defendants?
15. What effect does appearing via video link have in your view on the experiences both represented defendants and unrepresented defendants have? Is it a positive one or a negative one or both?
- 15a. What about unrepresented defendants/represented defendants (depending on which one they mention)?
16. Do you think it improves efficiency or creates inefficiency or both?
- 16a. In what ways?
17. At the end of the hearing, what usually happens? Do you know if lawyers are able to speak to their client to see if they have any questions and understood what took place?
- 17a. Do you think this is something that defendants would want to happen or not?
- 17b. When defendants are unrepresented do you know if they speak to anyone at the end of the hearing?
18. So at some places video technology is being piloted from police stations so defendants don't have to come to court for their first hearing. Have you observed this type of hearing or been involved in one in anyway?
19. Do you think the scheme will have a positive and/or negative impact on defendants' experiences or no impact?

Appendix 4: Interview schedule (legal advisors)

Icebreaker questions

1. What is the name/title of your job role?
2. How long have you worked in your role? / as a legal advisor?
3. Can you talk me through your role in the average court case?

Main interview questions

4. How often do you encounter unrepresented defendants in the magistrate's court?
 - 4a. At what sorts of stages do you encounter them? So, in what type of hearings?
 - 4b. When does the court first find out a defendant is going to be unrepresented? Do you know if the police inform the court if they think a defendant is going to be unrepresented and whether they'll need an interpreter?
 - 4c. Do you think there has been any change in the number of defendants self-representing in recent years, and if so why? And to what extent?
5. From my observations and interviews with solicitors a number of reasons have emerged as to why defendant's self-represent. I am going to read out some of them now. Can you say whether you have come across any defendants who self-represent for these reasons and whether you think they are common or rare?

Have you come across defendants, which seem to self-represent because:

- x. They don't see the value in having a solicitor because they say they are guilty/innocent **(do you think that is a common or rare reason?)**;
 - xi. They want to save time and don't want to wait;
 - xii. They do not know they are entitled to see the duty solicitor or are eligible for legal aid;
 - xiii. They are unable to see the duty solicitor twice;
 - xiv. They are not entitled to legal aid and they cannot afford to be represented or are unwilling to pay for it;
 - xv. They want to represent themselves so that they can talk directly to the court;
 - xvi. They haven't managed to find and instruct a solicitor; and/or
 - xvii. They have had a disagreement with their solicitor
 - xviii. Are there any other reasons that you're aware of?
6. What problems do you think unrepresented defendants experience when representing themselves (if any)?
 - 6a. Do you think they experience any particular types of problems during plea hearings?

7. In relation to plea hearings, when a defendant is unrepresented, do you know when are they usually given their case paperwork? Will this be the first time that they will have seen their case papers? Who gives them their paperwork?
- 7a. Is this also the case for unrepresented defendants appearing in the traffic court?
- 7b. When a defendant is represented for a plea hearing, do you know when their legal representative would have access to their paperwork? How would they get access to them?
8. Going back to problems - do you think unrepresented defendants' experience any particular types of problems during bail hearings?
- 8a. Do you think they experience any particular types of problems during sentencing hearings?
- 8b. If a pre-sentence report is prepared for a sentencing hearing, do you think this has any effect on unrepresented defendants' experiences? And if so, what effect?
- 8c. Do you think they experience any particular types of problems during trials or not?
- 8d. (Probe question – **if cross-examination is mentioned when in the last question**): In relation to trials, in certain circumstances, as you'll know, a lawyer is appointed by the court to cross-examine when the defendant is unrepresented. What effect do you think this has on defendants' experiences?
9. Based upon what we have discussed, then, in what types of hearings are the problems particularly noticeable, would you say (so plea hearings, sentencing hearings, trials etc.) or are they noticeable throughout?
10. What benefits do you think unrepresented defendants experience (if any)?
11. How well, if at all, do you think unrepresented defendants understand what is happening during court proceedings?
- 11a. What do they seem to have difficulty with?
- 11b. Would you say that unrepresented defendants understand proceedings very often/fairly often/sometimes/rarely/never?
12. Are there any particular things you/a legal advisor/judge would need to say or do if a defendant was unrepresented?
13. Have you found that you/a legal advisor/ a judge have needed to respond slightly different to unrepresented defendants? If so, why? In what ways?
14. How well do you think unrepresented defendants manage during court proceedings?
15. How do you think unrepresented defendants are treated by legal representatives for other participants (like the victim, for example)?

16. What, if any, practical problems do unrepresented defendants give rise to?
17. Do you think unrepresented defendants have any effect on the length of proceedings or the number of hearings?
- 17a. If so, what type of hearings? And why?
18. How do you think things could be improved to help unrepresented defendants?
- 18a. Do you think the role of the duty solicitor should be expanded to include those who have been charged with a non-imprisonable offence or not?
- 18b. Would that include those who have been charged with minor traffic offences?
19. Have you had any training in relation to unrepresented defendants?
- 19a. Would it be helpful to have training?
- 19b. Any ideas about what you would like the training to involve?
- 19c. If you have had training, what are your thoughts on it? Have you got any suggestions as to how it could be improved?

Video technology

I would now like to ask you some questions in relation to video technology, as I've not observed many hearings where video technology has been used, so it would be helpful to hear about it.

20. To what extent is video technology (so defendants appearing via video link) used in the court where you work? Have you used it for plea hearings, bail hearings, sentencing hearings, trials, or all of the above?
- 20a. Is there any guidance you refer to when using video links for defendants? Any instructions that you follow?
- 20b. Do you know how long defence solicitors are able to speak to their clients before a hearing involving a video link? Do they have time slots?
- 20c. How long are these slots for? Is this the same for all types of hearings? Can they extend them?
- 20d. Do defence solicitors have to book a video booth slot so that they can speak to their client beforehand? How does it work?
- 20e. Are there time slots for dealing with cases in court too? How long are these? Is this the same for all types of hearings? Can they be extended?
21. What can you see when the defendant appears via video link? What can't you see when the defendant is appearing from prison? What are the surroundings like?

22. Do you think video technology (so defendants appearing via live link) causes any difficulties in relation to defendants, particularly unrepresented defendants?

22a. What kinds of difficulties?

22b. In what kinds of hearings?

23. So would you say that video technology causes unrepresented defendants considerable difficulty/some difficulty/little difficulty/no difficulty/it benefits them?

23a. What about represented defendants?

In relation to problems, when observing, I've noticed that sometimes there have been problems with hearing – so the microphone in courts not working. Is it anyone's responsibility to check if the microphones are working? Does anyone specially check this if it's a virtual hearing?

24. So what effect does it have in your view on the experiences both represented defendants and unrepresented defendants have? Is it a positive one or a negative one or both?

25. Do you think it improves efficiency or creates inefficiency or both?

25a. In what ways?

26. At the end of the hearing, what happens? Do you know if lawyers are able to speak to their client to see if they have any questions and understood what took place?

26a. Do you think this is something that defendants would want to happen or not?

26b. When defendants are unrepresented do you know if they speak to anyone at the end of the hearing?

27. So at some places video technology is being piloted from police stations so defendants don't have to come to court for their first hearing. Have you observed this type of hearing or been involved in one in anyway?

27a. Do you know if this is something that is going to be introduced at your court in the near future?

28. Do you think the scheme will have a positive and/or negative impact on defendants' experiences or no impact?

Appendix 5: Interview schedule (defence lawyers)

Icebreaker questions

1. How long have you worked as a criminal defence solicitor?
2. Do you advise clients at the police station, as well as represent clients at court?
3. Do you work at X [court name] or X [court name] or both?

Main interview questions

4. How often do you encounter unrepresented defendants in the magistrates' court?
 - 4a. Do you think there has been an increase in the number of defendants self-representing in recent years?
 - 4b. Are there any recent trends or policies, which have had an effect on the ability of defendants in magistrates' court cases to obtain legal advice?
5. Why do you think some defendants self-represent?
6. What problems do you think unrepresented defendants experience when representing themselves (if any)?
 - 6a. In what types of hearings are these particularly noticeable? Plea hearings, trials, sentencing hearings?

Probing questions:

- Do you think they experience any problems at the plea hearing or not?
 - Do you think they experience any problems at the bail hearing or not?
 - Do you think they experience any problems at sentencing hearings or not?
 - Do you think they experience any problems at the trial or not?
 - Do you think it makes a difference as to whether they plead guilty or not guilty, in relation to the difficulties that they face?
7. What advantages do you think unrepresented defendants experience (if any)?
 8. How well, if at all, do you think unrepresented defendants understand what is happening during court proceedings?
 - 8a. What do they seem to have difficulty with?
 - 8b. Would you say that unrepresented defendants understand proceedings very often/fairly often/sometimes/rarely/never?
 9. How in your experience do court staff (i.e. legal advisors and ushers) and magistrates and judges respond to unrepresented defendants?

- 9a. What assistance do court staff offer to unrepresented defendants?
10. How do you think unrepresented defendants are treated during court proceedings? By court staff? By the judiciary and magistrates? At plea hearings? Sentencing hearings? At trials?
- 10a. So, how fairly would you say unrepresented defendants are treated? Very fairly/somewhat fairly/the same as everyone else/unfairly/very unfairly?
11. What, if any, practical problems do unrepresented defendants give rise to?
- 11a. Are there any benefits of defendants being unrepresented?
12. Do you think being unrepresented has any effect on the outcome (so conviction)?
- 12a. Do you think being unrepresented has any effect on the sentence?
13. Do you think the role of the duty solicitor should be expanded to include those who have been charged with a non-imprisonable offence or not?
14. How do you think things could be improved to help unrepresented defendants?

Video technology

15. What are your experiences with the use of video technology? So defendants appearing at court via the live link?
- 15a. Have you used it or seen it being used at plea hearings? Bail hearings? Sentencing hearings? At trials?
16. What can you see when the defendant appears via video link? What can't you see? What are the surroundings like?
- 16a. Is it something, which causes any difficulties in relation to defendants, particularly unrepresented defendants?
- 16b. What kinds of difficulties?
- 16c. In what kinds of hearings?
- 16d. So, would you say that video technology causes unrepresented defendants considerable difficulty/some difficulty/little difficulty/no difficulty/it benefits them?
17. What effects does it have in their view on the experiences defendants have?
18. Do you think it improves efficiency or creates inefficiency or both?
- 18a. In what ways?

18b. So would you say it improves efficiency very much/to some extent/has no effect/decreases efficiency/very much decreases efficiency?

19. At the end of the hearing, what happens? Are you able to speak to your client to see if they have any questions and understood what took place?

20. So at some places video technology is being piloted from police stations so defendants don't have to come to court. Do you think this will have a positive or negative impact on defendants' experiences or both?

20a. Do you think it will have any implications for unrepresented defendants?

Appendix 6: Interview schedule (judicial prosecutors)

Icebreaker questions

1. How long have you worked as a police prosecutor?
2. Can you talk me through your role in the average court case?

Main interview questions

3. How often do you encounter unrepresented defendants in the magistrates' court?
 - 3a. Do you think there has been any change in the number of defendants self-representing in recent years, and if so why? And to what extent?
4. Why do you think some defendants self-represent?
5. When a defendant is unrepresented in the traffic court, when are they usually given their case paperwork? Will this be the first time they will have seen their case papers?
 - 5a. Is that also the case for represented defendants appearing in the traffic court?
6. What problems do you think unrepresented defendants experience when representing themselves (if any)?
 - 6a. At what stage/in what types of hearings are these particularly noticeable? Plea hearings, case management hearings, sentencing hearings?
7. Are there any particular things you would need to say or do if a defendant was unrepresented compared to if they were represented?
8. Have you ever had to prosecute via a video link? What kind of case was that?
 - 8a. The courts are now moving to having more courts operating virtually. Has that been the case for the traffic court yet?
 - 8b. Do you think virtual courts or video hearings pose problems if there is an unrepresented defendant? What kinds of problems?
 - 8c. Do you think virtual courts or video hearings pose any problems for defendants – represented or unrepresented defendants?
9. What advantages do you think unrepresented defendants experience (if any)?
10. How well, if at all, do you think unrepresented defendants understand what is happening during court proceedings?
 - 10a. What do they seem to have difficulty with?

- 10b. Would you say that unrepresented defendants understand proceedings very often/fairly often/sometimes/rarely/never?
11. How in your experience do court staff (i.e. legal advisors and ushers) and magistrates and judges respond to unrepresented defendants? How do they treat them?
- 11a. Are there any particular things a legal advisor/judge/usher would need to say or do if a defendant was unrepresented compared to if they were represented?
- 11b. How fairly would you say unrepresented defendants are treated? Very fairly/somewhat fairly/the same as everyone else/unfairly/very unfairly?
12. What, if any, practical problems do unrepresented defendants give rise to?
13. Do you think unrepresented defendants have any effect on the length of proceedings or the number of hearings?
- 13a. If so, what type of hearings? And why?
14. Do you think being unrepresented has any effect on the outcome (so conviction)?
- 14a. Do you think being unrepresented has any effect on the sentence?
15. How do you think things could be improved to help unrepresented defendants?
16. Do you think the role of the duty solicitor should be expanded to include those who have been charged with a non-imprisonable offence or not?
17. Have you had any training in relation to unrepresented defendants?
- 17a. Would it be helpful to have training?

Appendix 7: First observation schedule

Date: Case No: Def No: Duration of Hearing (mins):
Courthouse: Time Started: Time Finished:
Bench Composition: Magistrates District judge Virtual Court: Yes No
Male – 1 2 3 Female – 1 2 3
D present? Yes No D on bail: Yes No D DOB:
Multiple defendants? Yes No If yes, connected to observation form numbers

D: M / F Interpreter required: Y / N Plea: G / NG / No indication
D rep: Not represented Duty Solicitor Own solicitor Previous convictions: n / y

Alleged offence:

Purpose of hearing: Plea Trial Sentencing Bail/Remand Other:

Outcome:

1. Convicted (plea/after trial)
2. Acquitted
3. Adjournment for trial
4. Adjournment for sentence/reports
5. Bail granted/ refused
6. Sent to the CC
7. Sentenced
8. Other.....

If sentenced, sentence type:

1. Immediate custody - Length of sentence:
2. Suspended sentence - Length of sentence
3. Community order - Length: Specify:
4. Conditional discharge - Length:
5. Absolute discharge
6. Fine/compensation/costs/victim surcharge -Amount:
7. Disqualification (driving offence) -Period of disqualification:
Penalty points:

Decision communicated to d: Y N

Appendix 8: Second observation schedule

Date: Case No: Def No: Duration of Hearing (mins):
Courthouse: Time Started: Time Finished:
Bench Composition: Magistrates District judge Virtual Court: Yes No
Male – 1 2 3 Female – 1 2 3
D present? Yes No D on bail: Yes No D DOB:
Multiple defendants? Yes No If yes, connected to observation form numbers

D: M / F Interpreter required: Y / N Plea: G / NG / No indication
D rep: Not represented Duty Solicitor Own solicitor Previous convictions: n / y

Alleged offence:

Purpose of hearing: Plea Trial Sentencing Bail/Remand first hearing
adjourn pre-trial/caseman

D stood in dock? Y / No If no, where?

If UR askd if hppy to proceed without a l? Y / N / NA (j/mag/la) Askd if want to see a D/S? Y / N / NA → (j/mag/la)

Tld its free? Y / N / NA (j/mag/la) CS identified? Y / N (j/mag/la) asked if given papers? Y / N / NA (j/mag/la)

Asked - time to read papers? Y / N / NA (j/mag/la) Asked - w they understd the papers? Y / N / NA (j/mag/la)

Explanation - if it's a either way offence? Y / N / NA (j/mag/la) Is the charge read out? Y / N (j/mag/la)

Asked whether they understand the charge? Y / N / NA (j/mag/la) Consequences of pleading g/ng? Y / N / NA (j/mag/la)

Outcome:

1. Convicted (plea/after trial) 2. Acquitted 3. Adjournment for trial 4. Adjournment for sentence/reports)

Type of report requested 5. Bail granted/ refused 6. Sent to the CC

7. Sentenced 8. Other

Told consequences of not turning up to their next hearing (if they've got one)? Y / N / NA – (la/judges/magistrates)

If sentenced, sentence type:

- | | | |
|---------------------------------------------|----------------------|------------------------------|
| 1. Immediate custody | -Length of sentence: | |
| 2. Suspended sentence | -Length of sentence: | |
| 3. Community order | -Length | -Specify: |
| 4. Conditional discharge | - Length: | |
| 5. Absolute discharge | | |
| 6. Fine/compensation/costs/victim surcharge | | -Amount: |
| 7. Disqualification (driving offence) | | -Period of disqualification: |
| | Penalty points: | |

Decision communicated to d: Y N (j/mag/la) Asked - further questions/want to say anything? Y / N (j/mag/la)

Asked -understood sentence/outcome? Y / N (j/mag/la) Told consequences of driving, if dq? Y / N / NA (j/mag/la)

Info given on how to pay financial penalties? Y / N / NA Told consequences of not paying FP? Y / N / NA (j/mag/la)