



# Unrepresented accused in the Magistrates' Court of Victoria

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## Foreword

There has not been enough observational research and attention devoted to understanding the impact of unrepresented litigants in both criminal and civil matters. In particular, research has provided little insight into the impact of an unrepresented accused on judges and magistrates, court staff, prosecution and accused in criminal matters. An accused individual who is not represented can be a vulnerable participant in the criminal justice system, having regard to the consequences for him or her of a conviction or sentence.

This report seeks to address the issues arising from unrepresented accused by engaging in a detailed study of their interaction in Victoria's summary jurisdiction. Through a combination of quantitative data analysis, qualitative interviews and literature research, the authors provide a detailed insight into typical appearances by represented and unrepresented accused in the Magistrates' Court of Victoria, the State's busiest court. This process allowed the research team to observe hearings, including trials, in 757 criminal matters; a sizeable sample which informs the conclusions of this report. The authors interviewed 11% of the magistrates in Victoria.

On behalf of the AIJA, I would like to thank the authors of the study, Dr Natalia Antolak-Saper (Faculty of Law, Monash University), Professor Jonathan Clough (Faculty of Law, Monash University), and Professor Bronwyn Naylor (Graduate School of Business and Law, RMIT University). I also acknowledge the work of their research assistants, Jaimie Chapman, Hannah MacPherson and Ariella Gordon, in supporting this insightful project.

The report sheds needed light onto the consequences of an accused not being represented, not only for themselves but for judicial officers, court staff and the prosecution. The authors have made some observations about possible reforms which, although not discussed in detail, may provide a basis for further discussion and stimulate research into this important aspect of the criminal justice system.

This report provides useful insights into the accuracy of commonly held perceptions about unrepresented accused, whether they cause hearings to be longer and their understanding of the situations in which they find themselves. The authors have also helpfully demonstrated the significant impact that unrepresented accused have on the work of judicial officers and court staff.

The AIJA is proud to continue its role of supporting research such as this into the administration of justice.

**The Honourable Justice Steven Rares**

Federal Court of Australia

President, Australasian Institute of Judicial Administration

August 2021

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We are very appreciative of the support of the Magistrates' Court of Victoria, in particular, the current Chief Magistrate Lisa Hannan, and former Chief Magistrate Peter Lauriston, each of whom facilitated the opportunity to conduct the research, especially during challenging times. We would also like to thank those staff of the Magistrates' Court of Victoria who provided invaluable assistance and input into the conduct of the research.

We would like to thank the magistrates who kindly took time out of their busy schedules to share their experiences with us. Their personal and practical insights were of immense value and provided important context to the observed data.

We would like to thank our research assistants, Jaimie Chapman, Hannah MacPherson and Ariella Gordon. Their diligence and resourcefulness were unparalleled, and it was truly a joy to work with such a wonderful team.

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We hope the insights from this study will make an important contribution to future research and evidence-based reform in the area of unrepresented accused.

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## Part 1: Introduction

For decades, access to justice has been a constant challenge to the criminal justice system in Victoria and, more broadly, Australia.<sup>1</sup> A central ingredient of the rule of law, access to justice can be understood as including, amongst other things, access to legal representation.<sup>2</sup> Without legal representation, an individual is seriously inhibited from effectively participating in the criminal justice system, and their rights may not be adequately protected or exercised.<sup>3</sup> 'An unrepresented accused is disadvantaged, not merely because almost always he or she has insufficient legal knowledge and skills, but also because an accused in such a position is unable dispassionately to assess and present his or her case in the same manner as counsel for the Crown.'<sup>4</sup>

Such is the importance of legal representation in criminal matters that a limited right to representation is recognised under both domestic and international law.<sup>5</sup> However, none of these provide a right to legal representation at public expense. Consequently, an accused who is unable to afford representation and is not entitled to legal aid must appear without representation. A smaller but still significant number of people may have access to representation but nonetheless choose to represent themselves. There is a strong view amongst the courts and the legal profession that the number of people appearing without representation is increasing. Against a backdrop of constrained legal aid budgets, this impacts not only the individual accused, but also the courts in which they appear and the justice system more broadly.

These issues are particularly pronounced in courts of summary jurisdiction which hear the vast majority of criminal matters. Although typically less serious, summary offences, including indictable offences triable summarily, may have significant consequences for an accused person, including imprisonment, disqualification/loss of licence, and loss of employment. In addition, as the principle in *Dietrich* does not apply in the summary jurisdiction, these courts generally have no option but to proceed without representation, placing an additional burden on an already overstretched criminal justice system.

To date, research into lack of legal representation has tended to focus on the challenges that self-represented litigants ('SRLs') present in civil cases. Relatively less attention has been given to the criminal jurisdiction, despite the fact that unrepresented accused pose unique challenges with significant consequences both for individuals and the criminal justice system. This study is intended to address this gap in the literature.

1 See, for example, Commonwealth Government, Commission of Inquiry into Poverty, *Law and Poverty in Australia: Second Main Report* (Australian Government Publishing Service, 1975), Part II - Legal Services.

2 Victorian Department of Justice and Regulation, *Access to Justice Review* (Vol. 2 Report and Recommendations, 2016) Ch 8.

3 *Baker v Campbell* (1983) 153 CLR 52 at 118 (Deane J); Steering Committee on Justice Efficiencies and Access to the Justice System, *Report on the Self-Represented Accused*, International Centre for Criminal Law Reform & Criminal Justice Policy (Report, 2010) 3.

4 *Dietrich v The Queen* (1992) 177 CLR 292 at 311-315 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ in the majority) ('*Dietrich*').

5 See for example, *Collins v R* (1975) 133 CLR 120; *R v Zorad* (1990) 19 NSWLR 91; *Sacco v The Queen* [2018] VSCA 353 at [25]. Also see, Asher Flynn, Jacqueline Hodgson, Jude McCulloch and Bronwyn Naylor, 'Legal Aid and Access to Legal Representation: Redefining the Right to a Fair Trail' (2016) 40(1) *Melbourne University Law Review* 207, 209-211. For further discussion, see Part 4 below.

## Part 2: Aims and Methodology

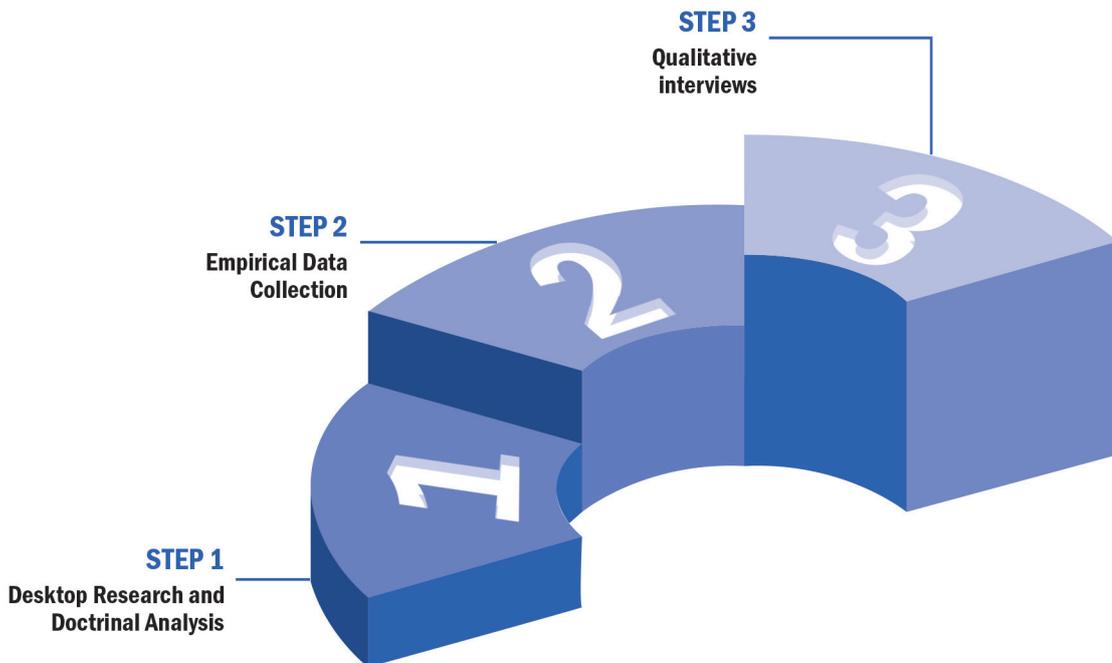
This study, funded by the Australasian Institute of Judicial Administration ('AIJA'), aims to broaden our understanding of the extent and nature of unrepresented accused in the Magistrates' Court of Victoria. The Magistrates' Court was selected because of the limited research in relation to unrepresented accused in courts of summary jurisdiction. This is despite the Court's broad criminal jurisdiction, with over 90% of all criminal matters being dealt with by the Magistrates' Court.<sup>6</sup> For example, in 2019-2020, there were 606,220 criminal hearings in the Magistrates' Court, with 135,840 criminal cases finalised.<sup>7</sup> Further, since Victoria Legal Aid ('VLA') applies restrictive criteria in the allocation of limited funding for representation in summary matters,<sup>8</sup> it was anticipated that a significant number of accused would be unrepresented in the Magistrates' Court.

This report contains six parts. Part 1 provided the introduction and background to the project. This Part sets out the aims and methodology. Part 3 summarises the literature on unrepresented accused in criminal matters, while Part 4 describes the Victorian legal framework. Part 5 contains the results and discussion of the court observation data and qualitative interviews conducted with magistrates. Finally, Part 6 provides concluding remarks and suggestions for future research.

The first study of its kind in Australia, this project aims to provide an empirical account of criminal law matters involving unrepresented accused in the Magistrates' Court of Victoria by:

- I. ascertaining the characteristics and number of adult criminal cases that move through the Court without legal representation; and
- II. identifying key issues about the impact of lack of representation both on accused persons and the justice system more generally, drawing on the expertise of magistrates.

To achieve these aims, the project drew on a mixed quantitative and qualitative methodology involving the following three steps:



<sup>6</sup> Magistrates' Court of Victoria, *Annual Report 2019-2020* (Report, 1 December 2020) 6.

<sup>7</sup> *Ibid* 9. It should be noted that the work of the court was seriously impacted by the onset of COVID-19 which, according to the Chief Magistrate, 'created the biggest disruption to operations in MCV's history': *Ibid* 4.

<sup>8</sup> See Victoria Legal Aid, '3 - Criminal Law Guidelines', *VLA Handbook for Lawyers*, (Web Page, 1 September 2021) <<http://handbook.vla.vic.gov.au/handbook/3-criminal-law-guidelines>>.

## Step 1: Desktop Research and Doctrinal Analysis

A research assistant was employed to undertake a comprehensive search of existing domestic and international literature on the issue of unrepresented accused in criminal trials. The results of this research are summarised in Part 3 below. This phase of the project also involved a doctrinal analysis of legal principles relevant to unrepresented accused. This analysis focused on the 'right' of an accused to be provided with legal representation, and the related right of an accused to represent themselves. The results of this analysis are discussed in Part 4.

## Step 2: Empirical Data Collection

This phase of the project involved direct observation of Magistrates' Court proceedings. With the permission of the Court, Chief Investigators ('CIs') Antolak-Saper and Clough conducted initial observations to determine the feasibility of data collection. The challenge was to observe sufficient matters with the resources available, and in a manageable time frame. In consultation with then Deputy Chief Magistrate Popovic and Court staff, it was decided that mention courts<sup>9</sup> would produce the greatest range of matters, and the greatest likelihood of observing a significant number of matters involving unrepresented accused. This would, however, largely exclude serious contested matters, bail applications, specialist lists such as sexual offences, and specialist courts such as the drug court. Although not known at the time, this decision also allowed researchers to complete their observations before the onset of COVID-19 had such a dramatic effect on the courts.

The observations were carried out by two research assistants. The assistants were provided with coding sheets which are attached at Appendix A. This sheet was prepared by the CIs in consultation with then Deputy Chief Magistrate Popovic. The research assistants were trained over a three-week period by the CIs before embarking on independent data collection. To limit researcher bias, CI Antolak-Saper would, at random, conduct data collection and coding alongside the research assistants to ensure that the data was being accurately captured and coded. The research assistants would contact the CIs for clarification should any questions about coding arise.

A total of 24 full-day sessions involving 19 separate magistrates were observed in the selected courtrooms between August and October 2019. This involved a cumulative total of 757 criminal law matters observed and codified. The findings from this data observation and collection are summarised at Part 5 below.

## Step 3: Qualitative Interviews

A central element of the research design was semi-structured interviews with magistrates with experience in hearing criminal matters with unrepresented accused. This approach provided the opportunity to obtain multiple and layered viewpoints on the impacts of unrepresented accused on judicial officers, participants in the criminal justice system, and the criminal justice system more broadly. The semi-structured interviews allowed for consistency of interviewing but also permitted the research to be responsive to the range of issues, perspectives and approaches that can emerge in open ended conversation. The interview questions were drafted in consultation with the Court, and adopted McNamara's drafting recommendations to ensure that they were designed in such a way as to facilitate maximum detail from the interview.<sup>10</sup> With the permission of the Court, magistrates were invited to participate in confidential, digitally recorded interviews, conducted according to an interview schedule addressing the following themes:

- participants' experiences of accused who do not have legal representation;
- participants' experiences of processes for matters concerning unrepresented accused; and
- participants' experiences of challenges associated with a lack of legal representation in criminal matters.<sup>11</sup>

9 'Mention courts' are courts designated to hear mention hearings: *Magistrates' Court Act 1989* (Vic), s 5A; *Criminal Procedure Act 2009* (Vic), s 53.

10 Carter McNamara, *General Guidelines for Conducting Interviews*, Free Management Library, (2009).

11 The interview questions are attached in Appendix B.

The interviews were conducted between February and June 2021. Contact with magistrates was facilitated by the Court, with magistrates responding directly to the researchers. In total, 14 magistrates participated in the interviews. As at the time of writing, there are 123 magistrates in Victoria,<sup>12</sup> representing a response rate of 11%. This is a respectable response rate given the work pressures faced by magistrates, particularly during COVID-19, and the fact that interviews had to be conducted outside court sitting times. The interviews were digitally transcribed and coded.

The results of both the observation and interview studies are discussed in Part 5 below. The research was conducted in accordance with approval granted by the Monash University Human Research Ethics Committee.

## Terminology

There is an unfortunate lack of precision and consistency in the terminology used to describe those who appear before the courts without legal representation.<sup>13</sup> This is despite the fact that it is well-recognised that inconsistent terminology, and associated challenges in collecting and classifying data, are major impediments to research and reform in the area.<sup>14</sup>

The term 'self-represented litigant' has undoubtedly achieved the greatest currency, both in the literature and the courts,<sup>15</sup> and may be used broadly to describe 'a person with a matter before a court or tribunal who is not represented by a lawyer or other professional.'<sup>16</sup> However, the term lacks precision in criminal matters for two reasons. First, although defined in such a way as to apply to any proceeding, the ordinary usage of the term 'litigant' suggests a party to civil proceedings rather than an accused in a criminal matter. Secondly, although the term 'self-represented' rightly acknowledges that some litigants choose to represent themselves, it may obscure the fact that most people are unrepresented for financial reasons. Particularly in the case of accused in criminal proceedings, where failure to appear can be followed by arrest, the notion of 'self-representing' is more complex.

While it is true that SRL is the term most commonly used in Australia,<sup>17</sup> this may in part be explained by the fact that researchers, governments and courts have primarily focused on lack of representation in civil and administrative matters. It is also understandable that in research focusing on civil and criminal matters, SRL may be seen as a generic term encompassing both.<sup>18</sup> However, where the focus is exclusively on criminal matters, it is unnecessary and arguably confusing to describe unrepresented parties as SRLs.<sup>19</sup> Given this report's focus on lack of representation in summary criminal matters, the term 'unrepresented accused' is used to describe an accused who has been unable to obtain legal representation. Where relevant, 'self-represented accused' is used to refer to an accused who has chosen to represent themselves. The term SRL may be used where the context refers to both civil and criminal matters, and/or where it is used in the literature.

In the observation study, it was not always possible to determine whether an accused was unrepresented or self-represented. The term 'unrepresented' was therefore applied to any accused who was without representation, for whatever reason. There were no observations during the study where the accused was assisted by a non-lawyer such as a 'McKenzie friend'.<sup>20</sup> Accused who were not present and were without representation were considered as 'unrepresented' on the basis that the magistrate is still required to consider the interests of the unrepresented accused without the assistance of a legal representative. We also classified those who appeared and were adjourned to seek legal advice as being unrepresented.

12 Magistrates' Court of Victoria, Judicial Officers, *Magistrates' Court of Victoria*, (Web Page, 6 May 2021) <<https://www.mcv.vic.gov.au/judicial-officers>>.

13 Victorian Department of Justice and Regulation (n 2) 472.

14 Liz Richardson, Genevieve Grant and Janina Boughey, *The Impacts of Self-Represented Litigants on Civil and Administrative Justice: Environmental Scan of Research, Policy and Practice*, (The Australasian Institute of Judicial Administration, 2018) 8.

15 Other terms include 'litigant in person', 'unrepresented litigant' and 'pro se litigant': Melissa Smith, Esther Banbury and Su-Wuen Ong, *Self-Represented Litigants: An Exploratory Study of Litigants in Person in the New Zealand Criminal Summary and Family Jurisdictions*, (Ministry of Justice Research Report, 2009) 14. For a thorough literature review on SRLs see, Elizabeth Richardson, Tania Sourdin, and Nerida Wallace, *Self-Represented Litigants: Gathering Useful Information* (Final Report) (Monash University Publishing, 2012).

16 Victorian Department of Justice and Regulation (n 2) 471.

17 *Ibid* 472

18 See for example, Smith, Banbury and Ong (n 15); New Zealand Law Commission, *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*, (Report No 85, 2004).

19 See for example, Department of Justice, Canada, *Court Site Study of Adult Unrepresented Accused in the Provincial Criminal Courts, Part 1: Overview Reports* (2002); Department of Justice, Canada, *Court Site Study of Adult Unrepresented Accused in the Provincial Criminal Courts, Part 2: Site Reports* (2002); Ministry of the Attorney-General, Ontario, *Report of the Review of the Large and Complex Criminal Case Procedure* (Report) (29 October 2015), Chapter 7 – Managing the Unrepresented Accused.

20 *McKenzie v McKenzie* [1970] 3 All ER 1034; *Collier v Hicks* (1831) 109 ER 1290; *Smith v R* (1985) 159 CLR 532.

## Limitations of this research

The results presented in this report should be interpreted in light of some limitations. Given the paucity of literature on the issue, this study was exploratory in nature and intended to be a pilot project to inform future research. The observations made provide a snapshot of unrepresented accused in the courts chosen over a narrow period. Greater accuracy and an analysis of long-term trends would require more extensive data collection over a longer period.

Some studies have shown that the ways in which these issues are addressed vary considerably at different sites.<sup>21</sup> In the Australian context, there may be variations between metropolitan and regional courts, as well as different practices between states. Although the busiest court, the study was limited to observations in the Melbourne Magistrates' Court. We did not observe matters in suburban or regional courts. As noted above, our focus on mention courts largely excluded other matters such as serious contested hearings, bail hearings, specialist lists and specialist courts.

Stakeholder interviews were also mainly from metropolitan courts (seven from Melbourne, six from suburban courts), with one respondent from a regional court (Geelong). However, this was not by design and reflected those magistrates who responded and made themselves available for interview. As a non-random sample of approximately 11% of magistrates, it cannot be assumed that these views are representative of all magistrates. Within the constraints of the project, we were not able to interview other stakeholders such as police prosecutors, defence counsel, court staff, and relevant agencies such as VLA.<sup>22</sup>

This study did not analyse court files, which limited the level of information that could be collected in relation to specific matters and meant we could not systematically track matters through the system. For example, it was not possible to track patterns of representation for an accused person across the life of the matter. It was fortuitous whether the same researcher observed a person returning with representation during another court session. Where this did happen, it was recorded. We were not in a position to obtain demographic information on unrepresented accused.

As with most studies in the area, our focus was on the binary question of whether an accused person was represented or not. We were not able to address the question of quality of representation, or to differentiate types of representation.

It should also be noted that this study was unusual as having been interrupted by a global pandemic which has the potential to impact the results. The observations were conducted prior to the onset of COVID-19 in 2020. The interruptions caused by the pandemic meant that the interviews could not be conducted until 2021. We have recorded the views of interviewees that expressly referred to COVID-19, but it is acknowledged that the views of the interviewees may have been influenced by the major disruption caused to the courts and the criminal justice system during that time.

Finally, we have undertaken some limited statistical tests to determine whether differences that have emerged are greater than those that would exist by chance. We have commented on the strength of some of the findings, however, as this is not a scientific study, this does not reflect robust empirical testing.

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<sup>21</sup> Department of Justice, Canada, *Court Site Study of Adult Unrepresented Accused in the Provincial Criminal Courts, Part 1: Overview Reports* (2002) 12.

<sup>22</sup> Cf *ibid* 7.

## Part 3: Literature Review

Despite the unique challenges that arise in respect of unrepresented accused in the criminal jurisdiction, both for the individual and the criminal justice system more broadly, the issue is relatively under-researched in the Australian context. The most significant Australian studies and reports on legal representation have all focused exclusively or primarily on SRLs in civil and administrative proceedings.<sup>23</sup> There is very limited Australian literature specifically on unrepresented accused. In 2002, a study was prepared for the West Heidelberg Community Legal Service on unrepresented litigants in civil and criminal matters. This involved qualitative interviews with magistrates as well as some court observations in three magistrates' courts.<sup>24</sup> In 2016, the Victorian Government conducted an extensive review of access to justice, including SRLs. 'Access to justice' was defined in terms of criminal and civil matters, and specifically discussed the issue of representation in the criminal courts.<sup>25</sup>

Internationally, in addition to major studies on SRLs in Canada,<sup>26</sup> New Zealand,<sup>27</sup> and the United Kingdom,<sup>28</sup> there are a number of studies which have focused on unrepresented accused specifically, though many are now quite dated. For example, a 2002 study by the Department of Justice, Canada studied representation of adult criminal accused in nine provincial courts with the purpose of measuring the frequency with which accused persons were appearing without representation, and the impact of this lack of representation. The study involved analysis of disposed cases, court observations and interviews with key informants.<sup>29</sup>

A 2004 New Zealand Law Commission report into access to justice, included discussion of the importance of representation in both civil and criminal matters,<sup>30</sup> while in 2009, the New Zealand Ministry of Justice conducted an exploratory study of resources and advice available for self-represented litigants in both the family and criminal summary jurisdictions.<sup>31</sup>

In the United Kingdom, a 2009 study was conducted into the feasibility of collecting data from magistrates' courts via observations and surveys of accused.<sup>32</sup> More recently, in 2019 the Ministry of Justice published, '*Unrepresented Defendants: Perceived Effects on the Crown Court in England and Wales-Practitioners' Perspectives*'.<sup>33</sup>

There is therefore a paucity of current empirical literature on unrepresented accused, particularly in the Australian context. Of course, many of the impacts of SRLs may translate to the criminal context. For example, the perception that the rise in SRLs is due to legal aid cuts and increased legal costs, that SRLs typically self-represent because they cannot afford legal representation, and that SRLs are disadvantaged in understanding rules and procedures, the law, and representing themselves.<sup>34</sup> The following summary of some of the challenges presented by SRLs would likely resonate with many in the criminal jurisdiction:

- 
- 23 Richardson, Sourdin, and Wallace (n 15); Deputy Chief Justice Faulks, Family Court of Australia, 'Self-Represented Litigants: Tackling the Challenge', Managing People in Court Conference, National Judicial College of Australia and the Australia National University, February 2013, 3-5; Paul Sheiner, *Litigants in Person Management Plans: Issues for Courts and Tribunals*, (Australasian Institute of Judicial Administration, 2001); John Dewar, Barry W Smith and Cate Banks, *Litigants in Person in the Family Court of Australia*, Research Report No 20 (2000).
- 24 Tandrell Allender, Sonia Gatti, Jayne McCubbin, and Diane Mailer, *Unrepresented Litigants at What Cost? A Report on the Implications of Unrepresented Litigants in the Magistrates' Court, Victoria* (West Heidelberg Community Legal Service, 2002).
- 25 Victorian Department of Justice and Regulation, (n 2) Ch 8.
- 26 See for example, Julie Macfarlane, Katrina Trask and Erin Chesney, *The Use of Summary Judgment Procedures Against Self-Represented Litigants: Efficient Case Management or Denial of Access to Justice*, Final Report (National Self-Represented Litigants Project, 2015); Julie Macfarlane, Gurleen Gill and Piper Riley Thompson, *Tracking the Continuing Trends of the Self-represented Litigants Phenomenon, Data from the National Self-Represented Litigants Project 2015-2016* (National Self-Represented Litigants Project, 2016).
- 27 Smith, Banbury and Ong (n 15); New Zealand Law Commission (n 18).
- 28 See for example, Liz Trinder, Rosemary Hunter, Emma Hitchings, Joanna Miles, Richard Moorhead, Leanne Smith, Mark Sefton, Victoria Hinchly, Kay Bader and Julia Pearce, *Litigants in Person in Private Family Law Cases* (Ministry of Justice, United Kingdom, 2014); Richard Moorhead and Mark Sefton, *Litigants in Person: Unrepresented litigants in first instance Proceedings*, (Department of Constitutional Affairs UK, 2005).
- 29 Department of Justice, Canada, (n 21). Note, 'provincial courts' are the Canadian equivalent of Magistrates' Courts: ('the Canada Study').
- 30 New Zealand Law Commission (n 18) 85.
- 31 Smith, Banbury and Ong (n 15) Chapter 13 ('the New Zealand Study').
- 32 Karen Souza and Vicky Kemp, *Study of Defendants in Magistrate's Court* (Legal Services Commission, 2009.) ('the United Kingdom Study'). Also see, Vicky Kemp, *Transforming Legal Aid: Access to Criminal Defence Services* (Legal Services Research Centre, 2010) and Law Society of England and Wales, *Access Denied? Legal Aid Sentencing and Punishment of Offenders Act 2012 – Four Years On: A Law Society Review* (Law Society of England and Wales, 2017).
- 33 Joe Thomson and Jane Becker, *Unrepresented Defendants: Perceived Effects on the Crown Court in England and Wales-Practitioners' Perspectives*, Ministry of Justice Analytical Series (Ministry of Justice, 2019) ('the Ministry of Justice Study').
- 34 Richardson, Grant and Boughy (n 14) 7.

'the need for judges and tribunal members to remain impartial, ensuring proceedings are conducted fairly, protecting the rights of other parties and resolving matters efficiently. Where courts and tribunals directly assist SRLs, they need to be careful to maintain the boundary between the provision of legal information and legal advice. SRLs are often perceived as a problematic presence in courts and tribunals, creating delays and consuming more time and resources than represented litigants.'<sup>35</sup>

While there may be some overlap in the challenges presented by lack of representation, given the vastly different contexts it cannot be assumed that they apply - or apply in the same way - in criminal proceedings. The first and most obvious difference is the nature of the adversarial contest, which is at its most imbalanced in the criminal jurisdiction. '[O]ur criminal justice system is built on the premise that Crown and defense (sic) function as equals, with equal legal expertise. It is not built to operate with major gaps in either access to representation or legal expertise, and does not function efficiently or well with such gaps or imbalances.'<sup>36</sup> As an obvious distinction, 'most tribunals are unencumbered by evidentiary rules and formal court processes and tend to adopt less formal and more flexible processes.'<sup>37</sup> Even in adversarial civil proceedings, the rules of evidence and procedure, and the obligation on judges to ensure fairness, operate quite differently to criminal matters.

Secondly, the different consequences that may arise in criminal proceedings. At its most extreme there is the possibility of imprisonment, but even less serious offences carry the risk of conviction that may have significant ramifications for an accused.<sup>38</sup>

Thirdly, there are likely to be differences in the types of matters that are unrepresented in the civil and criminal jurisdictions, and the nature of unrepresented litigants in both. For example, legal aid funding is more likely to be provided for criminal matters, and concern has been expressed that this is at the expense of representation in civil matters.<sup>39</sup> Parties in criminal matters have no choice but to respond, and so those who are forced to represent themselves are likely to be a very different cohort to those who undertake civil proceedings without representation. The nature of criminal offending in general is likely to produce very different demographics between the two jurisdictions.

A review of the Australian and international literature on unrepresented accused reveals four common areas of concern:

1. the nature and scale of the problem;
2. the impact of unrepresented accused on courts and court processes;
3. the impact of lack of representation on the accused themselves; and
4. the impact of unrepresented accused on judicial officers and court staff.

Each is now discussed in more detail. While the literature on SRLs is informative and will be drawn upon where appropriate, this summary focuses upon those studies and reports that are specifically concerned with unrepresented accused.

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<sup>35</sup> Ibid 4.

<sup>36</sup> Department of Justice, Canada (n 21) 12.

<sup>37</sup> Richardson, Grant and Boughey (n 14) 6.

<sup>38</sup> On the discussion of criminal records and employment see, Bronwyn Naylor, 'Do Not Pass Go: The Impact of Criminal Records Checks on Employment in Australia', (2005) 30(4) *Alternative Law Journal* 174, 174-179.

<sup>39</sup> Productivity Commission, Australian Government, *Access to Justice Arrangements*, Productivity Commission Inquiry Report, Vol 1 (2014) Chapter 19.

## The Nature and Scale of the Problem

### How many accused are unrepresented?

Some reports suggest that, in both the courts and the legal profession, there is a general perception that the number of people appearing without representation is increasing.<sup>40</sup> Other studies have found no clear consensus as to whether rates of self-representation are increasing,<sup>41</sup> or a belief that they are increasing, but that the increase is small.<sup>42</sup>

Given the importance of the issue, it is striking that accurate statistics concerning unrepresented accused in criminal courts remain elusive. There are at least two reasons for this. First, as this literature review indicates, the focus of researchers and policymakers has primarily been on SRLs in civil matters rather than on unrepresented accused in criminal matters. Secondly, 'despite widespread perceptions of an increase in numbers of unrepresented persons appearing before them in recent decades, most courts do not collect data about this, or do so only minimally or sporadically.'<sup>43</sup> Therefore, even if the question is asked, the data are not readily available and must be ascertained in other ways.

In some studies, the problem is exacerbated by a conflation of criminal and civil matters. For example, the Productivity Commission's 2014 report on *Access to Justice Arrangements* states that while data are limited, it appears that most people self-represent involuntarily because they cannot afford a lawyer or cannot access legal aid.<sup>44</sup> However, a significant minority choose to self-represent.<sup>45</sup> This is cited by the *Access to Justice Review*, which uses the term 'self-represented litigant' to apply to both civil and criminal matters,<sup>46</sup> although the data relied upon by the Productivity Commission was almost exclusively concerned with civil and administrative matters.<sup>47</sup>

Similarly, in reporting the results of its Survey of Self-represented Litigants, the *Access to Justice Review* did not differentiate criminal from civil matters. Therefore, when reporting that 'just over half of all the respondents had represented themselves in either VCAT or the Magistrates' Court on at least one occasion',<sup>48</sup> it is unclear how many of these were criminal matters in the Magistrates' Court, given that the Magistrates' Court could have involved civil or criminal matters.

Such information as is available presents a mixed picture. According to the *Access to Justice Review*, the then Chief Magistrate estimated that up to 50% of all accused in criminal matters were unrepresented.<sup>49</sup> This is broadly consistent with the New South Wales Bureau of Crime Statistics and Research Local Court statistics. In 2014, which appears to be the last year this specific statistic was provided, just under 40% of finalised appearances in the Local Court were without representation.<sup>50</sup> In 2013, the figure was 36.4%.<sup>51</sup> This is an apparent decrease from earlier periods. For example, in each of the years 2000-2004 approximately 50% of matters heard in the Local Court were unrepresented.<sup>52</sup>

The United Kingdom Study of two magistrates' courts found that a majority of defendants surveyed were unrepresented (54.6% in Court One and 66% in Court Two).<sup>53</sup> Souza and Kemp observed 201 cases; however, these included a number of summary offences which were unlikely to pass the 'interests of justice' test for legal aid. When these cases were excluded, there were 136 relevant cases remaining, of which 40% concerned an unrepresented defendant.

40 Victorian Department of Justice and Regulation (n 2) 473.

41 Smith, Banbury and Ong (n 15) 11.

42 Thomson and Becker (n 33) 7.

43 Anne Wallace, 'Australia's Lower-Level Criminal Courts: Tackling 21<sup>st</sup> Century Problems in a 19<sup>th</sup> Century Paradigm', in *New Directions for Law in Australia* (ANU Press, 2017) 202. Also see, Richardson, Grant and Boughey (n 14) 8; Smith, Banbury and Ong (n 15) 10; Victorian Department of Justice and Regulation, *Access to Justice Review* (Vol 1 Report and Recommendations, 2016) 6.

44 Productivity Commission (n 39) 490-493.

45 *ibid* 492.

46 Victorian Department of Justice and Regulation (n 2) Chapter 8.

47 Productivity Commission (n 39) 492-494 and Chapter 19 contains no reference to criminal matters. The 'Survey of Court Users' at Appendix C was concerned primarily with civil matters. The 'Data on Self-represented Litigants' at Appendix F notes that state and territory data are incomplete, and the only reference to criminal matters is to note that the Supreme Court of Victoria does not differentiate between civil and criminal matters in terms of contacts made to its SRL Coordinator: Productivity Commission, Australian Government, *Access to Justice Arrangements*, Productivity Commission Inquiry Report, Vol 2 (2014) 1003.

48 Victorian Department of Justice and Regulation (n 2) 474.

49 *Ibid* 472.

50 New South Wales Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics - 2014*, (NSW Bureau of Crime Statistics and Research, 2015) 3.

51 *Ibid*.

52 Chris Craigie SC, 'Unrepresented Litigants: The Criminal Justice Perspective', *The Public Defenders*, (2005) <[https://www.publicdefenders.nsw.gov.au/Pages/public\\_defenders\\_research/Papers%20by%20Public%20Defenders/public\\_defenders\\_unrepresented\\_litigants.aspx](https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/Papers%20by%20Public%20Defenders/public_defenders_unrepresented_litigants.aspx)>.

53 Souza and Kemp (n 32).

In contrast, much lower percentages were found in the New Zealand Study, with variations in the percentage of SRLs ranging from 1% to 7% of cases.<sup>54</sup> An earlier 2004 evaluation of status hearings in New Zealand found the percentage of accused unrepresented in five courts varied from 2% to 18%, with a range of 11% overall.<sup>55</sup>

It is also important to recognise that the level of representation may vary according to the nature of the matter. According to key informants in the New Zealand Study, SRLs were generally appearing in relation to minor charges such as driving related offences, assault, disorderly behaviour, and wilful/unlawful damage.<sup>56</sup> That is, matters for which legal aid is not generally available.<sup>57</sup> Also relevant is the stage of proceedings, with unrepresented accused more likely at first appearance compared to at contested hearings.<sup>58</sup> For example, in the Canada Study the percentage of unrepresented accused at first appearance ranged from a low of 5% to a high of 61%.<sup>59</sup> At final appearance there was a low of 6% to a high of 46%, while the percentage of unrepresented accused for at least one appearance ranged from 10% to 63%.<sup>60</sup> Similarly, analysis of one specific site in New Zealand showed 74% unrepresented at the initial list stage compared to 26% at status hearing.<sup>61</sup>

The percentage of unrepresented accused is generally lower in the superior courts where legal aid is much more likely to be granted. For example, interviewees in the Ministry of Justice Study considered unrepresented defendants to be the exception at trial, more common but still rare at pre-trial hearings, and more frequent at breach hearings.<sup>62</sup> Data from the Crown Courts in England and Wales indicated relatively stable levels of representation in those courts, from 5% unrepresented in 2010 to 7% in 2015.<sup>63</sup>

Although the data vary considerably as to levels of representation, the literature does suggest that significant numbers of accused are likely to be unrepresented, particularly in the early stages of proceedings.<sup>64</sup>

### Demographics

The personal characteristics of accused are likely to have a significant impact on their ability to represent themselves, and to engage with any assistance that is provided. There is, however, little demographic data on unrepresented accused beyond general statements as to the nature of criminal defendants in general: '[m]any criminal defendants are poor, have limited education, lead relatively disordered lives, and function at low reading levels. At some sites, many were from racial or cultural minorities; some were immigrants facing language and cultural barriers. Some sites also have significant numbers of mentally disordered accused.'<sup>65</sup>

The New Zealand Study provided a limited demographic comparison between SRLs and represented litigants in both the family and criminal jurisdiction and found that both were similar in age (average 31/29), gender (male 82%/80%) and of New Zealand European (38%/36%) or Maori (32%/35%) backgrounds.<sup>66</sup> Few litigants with mental health issues were thought to be self-represented.<sup>67</sup> Attempts to gain more detailed information via individual interviews were discontinued due to the challenges in interviewing self-represented criminal litigants.<sup>68</sup>

### Why are accused unrepresented?

There is limited information on the reasons why accused are unrepresented in criminal matters. Drawing on the literature in relation to SRLs suggests that the primary reason is a lack of financial means.<sup>69</sup> This was the case in the New Zealand Study which found that the main reason litigants 'elected' to self-represent was that they were ineligible for legal aid funding and unable to afford legal representation.<sup>70</sup> This was particularly the case in respect of minor charges that are ineligible for legal aid.<sup>71</sup>

54 Smith, Banbury and Ong (n 15) 11.

55 Wendy Searle, Tania Slater, Trish Knaggs, Janet November and Christopher Clark, *Status Hearings Evaluation: A New Zealand Study of Pre-Trial Hearings in Criminal Cases* (New Zealand Law Commission, 2004) 26.

56 Smith, Banbury and Ong (n 15) 88.

57 *Ibid.*

58 *Ibid* 87.

59 Department of Justice (n 21) 13.

60 *Ibid.*

61 Smith, Banbury and Ong (n 15) 87.

62 Thomson and Becker (n 33) 5.

63 *Ibid* 3.

64 Department of Justice (n 21) 14.

65 *Ibid* 9.

66 Smith, Banbury and Ong (n 15) 90.

67 *Ibid* 103.

68 *Ibid* 10.

69 *Ibid* 110.

70 *Ibid* 94.

71 *Ibid* 11.

This is also likely to be the case in Victoria. 'The number of matters being listed at the Magistrates' Court has not been matched by increases to legal assistance funding. The resulting narrowing of eligibility for legal assistance to manage services within the available budget is one factor that appears to have led to greater numbers of self-represented litigants at the Magistrates' Court.'<sup>72</sup>

In some cases, there may be a perception that the matter is straightforward and does not require representation. For example, in the United Kingdom Study the most common reason for not having representation was that the defendants were of the belief that they 'did not need one'.<sup>73</sup> In criminal cases, this may be influenced by standardised sentences.<sup>74</sup> Some suggest that the choice to self-represent may in part be explained by greater access to information and the rise of a 'self-help' culture, meaning people are more likely to believe they are equipped to represent themselves.<sup>75</sup> Of particular concern, some accused may choose to self-represent because of a desire to 'get it over with'.<sup>76</sup>

### Impact on the Courts and Court Processes

The focus here is on the impact that unrepresented accused have on the efficient running of the criminal courts. An often-cited challenge is that 'relatively straightforward trials typically turn into lengthy and complex proceedings'.<sup>77</sup> This observation has been echoed in Victoria by participants in criminal trials.<sup>78</sup> It is generally assumed that judicial officers may spend more court time with unrepresented accused due to the duty to ensure a fair trial, and the need to provide information without providing advice. In one study of magistrates' work, 51% of magistrates were of the view that their time was often taken up by explaining things to unrepresented litigants.<sup>79</sup> There is also concern that unrepresented matters will be 'slower to progress through the system because of more unnecessary adjournments and/or more cases going through to a defended hearing stage than those with representation'.<sup>80</sup>

However, such quantitative data as is available suggests that matters involving unrepresented accused may not be more time consuming, at least in non-trial courts.<sup>81</sup> For example, the Canada Study found that in five of the courts, the times per appearance were similar, in two they were shorter, and in only one, was it longer.<sup>82</sup> The times taken in these matters were very brief, with a quarter of appearances in the non-trial courts typically taking one or two minutes or less, with the average median time per appearance across the eight sites measured being 1.9 minutes.<sup>83</sup>

The Canada Study also addressed the concern that unrepresented accused place additional strain on resources by requiring more court appearances before resolution. Contrary to expectations, unrepresented accused typically made fewer appearances in seven sites.<sup>84</sup> The average median number of appearances was 2.6 for unrepresented accused compared to 6.4 for private counsel.<sup>85</sup> Similarly, the data suggest that cases involving unrepresented accused did not require a longer elapsed time to resolve when compared to private counsel.<sup>86</sup> The average median time in weeks from first to last appearance was 7.1 for unrepresented accused and 15.3 for private counsel.

Data from the Crown Courts in England and Wales suggests that lack of representation may affect the number of hearings. For example, in 2015 27% of represented defendants had two or fewer hearings, compared with 17% of unrepresented defendants.<sup>87</sup>

While the focus of studies is often on the time taken in court, the challenges of unrepresented accused can have a significant impact on court processes and court staff. The experience of unrepresented accused is heavily influenced by the way in which the court processes are managed. Equally, the operation of the courts

72 Victorian Department of Justice and Regulation (n 2) 473.

73 Souza and Kemp (n 32). Also see, Kemp (n 32) 80

74 Smith, Banbury and Ong (n 15) 11.

75 Tania Sourdin and Nerida Wallace, 'The Dilemmas Posed by Self-Represented Litigants: The Dark Side' (2014) 24(1) *Journal of Judicial Administration* 61, 68.

76 See, for example, Smith, Banbury and Ong (n 15) 11; 94. Also see Department of Justice, Canada (n 21) 23.

77 Ministry of the Attorney-General, Ontario, *Report of the Review of the Large and Complex Criminal Case Procedure*, Chapter 7 (Ministry of the Attorney General, Ontario, 2015). Also see David Berg, 'An Inconvenient Right: An Overview of the Self-Represented Accused's Autonomy' (2015) 62 *Criminal Law Quarterly* 503, 509.

78 Law Institute of Victoria, *Submission to the Chief Magistrate on 'Direct Access Brief Scheme'*, (Magistrates' Court of Victoria, 2014) 1-2.

79 Kathy Mack, Sharyn Roach Anleu and Anne Wallace, 'Everyday work in the Magistrate's courts: Time and tasks' (2011) 21(1) *Journal of Judicial Administration* 34, 44.

80 Smith, Banbury and Ong (n 15) 103; Department of Justice, Canada (n 21) 35; Thomson and Becker (n 33) 15-16.

81 Department of Justice, Canada (n 21) 33. Kathy Mack, Anne Wallace, and Sharyn Roach Anleu, *Judicial Workload: Time, Tasks and Work Organisation* (The Australasian Institute of Judicial Administration, 2012) Chapter 4.

82 Department of Justice, Canada (n 21) 34.

83 Ibid 34.

84 Ibid 35.

85 Ibid 36.

86 Ibid.

87 Thomson and Becker (n 33) 3.

is influenced by unrepresented accused.<sup>88</sup> Relevant factors include scheduling of cases, whether there are backlogs, practices in relation to standing down/adjourning matters, and accessibility of legal or other assistance at court.<sup>89</sup> For example, matters involving unrepresented accused are often adjourned so that further advice or assistance can be sought. The time imposition is therefore transferred from the courtroom to court staff and/or duty lawyers who must try to assist as best they can.<sup>90</sup>

### Impact on the Unrepresented Accused

*'With the exception of the criminally sophisticated, most accused have only the faintest understanding of what is happening around them in court.'*<sup>91</sup>

One of the major concerns in relation to unrepresented accused in criminal cases is that they will not be able to participate in the process effectively and may not have their rights adequately protected. In the Canada Study, most of the key informants considered that unrepresented (and under-represented) accused suffer negative impacts.<sup>92</sup>

### Early Intervention

The provision of legal assistance typically focuses on the trial/hearing, and in particular the seriousness of the matter and the likelihood of imprisonment. However, these are relatively rare, and some studies suggest it is crucial to focus on representation at the early stage of proceedings.<sup>93</sup> These are critical stages in terms of how a matter proceeds; for example, whether diversion is available, or whether certain matters may be withdrawn, and whether an early plea of guilty should be made.<sup>94</sup> This is particularly the case as unrepresented accused are typically unable to take part in negotiations and plea bargaining.<sup>95</sup>

### To Plead or Not to Plead?

Particularly challenging for unrepresented accused is the decision whether to plead guilty or not guilty; a decision which requires them to understand the ramifications of their decision, and where the judge is faced with providing information but not advice.<sup>96</sup> The Canada Study data were varied as to whether unrepresented accused were more likely to plead guilty, with more guilty pleas in some courts compared to others.<sup>97</sup> However, there was some evidence that unrepresented accused were more likely to plead guilty earlier than represented accused, typically at first or second appearance.<sup>98</sup> More than half of represented accused did not enter pleas until after their fifth or later appearance.<sup>99</sup> In the United Kingdom Study, Souza and Kemp found that of those who did not have representation, 86% pleaded guilty compared to 49% of represented defendants.

An unrepresented accused may be precluded from certain procedures that would otherwise benefit them. For example, in Victoria, an unrepresented accused may not be able to participate in plea bargaining.<sup>100</sup> This was also the case in the Canada Study, where Crown Attorneys would not talk to unrepresented accused or negotiate a plea unless unavoidable.<sup>101</sup> This raises concerns that unrepresented accused may lose the benefit of dropped or lesser charges, and 'are not aware of the many legal options available to them, nor of the procedural and strategic mistakes counsel would likely prevent them from making.'<sup>102</sup> The New Zealand Study found that 'many self-represented litigants received a less favourable outcome than they would have received if they had a lawyer because they were unaware of what information to express in court...and their lack of knowledge on plea bargaining.'<sup>103</sup>

88 Department of Justice, Canada (n 21) 10.

89 Ibid.

90 Smith, Banbury and Ong (n 15) 15.

91 Department of Justice, Canada (n 21) 9.

92 Ibid 21.

93 Ibid 10-11.

94 Ibid 10-11, 22.

95 Asher Flynn and Arie Freiberg, *Plea Negotiations* (Report) (Criminology Research Advisory Council, 2018) 131-138.

96 Department of Justice, Canada (n 21) 23.

97 Ibid.

98 Ibid 24.

99 Ibid.

100 Flynn and Freiberg (n 95) 131-138; Richard Fox, *Victorian Criminal Procedure* (Monash University Law Book Co-Operative Limited, 2015) 81.

101 Department of Justice, Canada (n 21) 32. Also see Craig A Brannagan, 'Legal-Ethical Responsibilities of Crown Counsel and Their Heightened Role in the Criminal Prosecution of Unrepresented Accused' (2019) 10 *Crown's Newsletter* 3; Thomson and Becker (n 33) 11; Ben Kempinen, 'The Ethics of Prosecutor Contact with the Unrepresented Defendant' (2006) 19(4) *The Georgetown Journal of Legal Ethics* 1147.

102 Department of Justice, Canada (n 21) 22.

103 Smith, Banbury and Ong (n 15) 103.

For example, an unrepresented accused may be more likely to plead guilty earlier 'to get it over with',<sup>104</sup> without necessarily appreciating that this may result in a criminal record, which may impact on their future, including employment,<sup>105</sup> study, travel, volunteering and even familial relationships and responsibilities. On the other hand, an unrepresented accused may contest a matter that they would have been advised to plead to, and may receive tougher sentences because of their lack of understanding of mitigating factors.<sup>106</sup>

### Ineffective Advocacy

Where an accused is in a contested hearing, or even making a plea, their lack of understanding of the process may mean that they do not disclose relevant information, or focus too much on irrelevant material.<sup>107</sup> Questions, whether in examination-in-chief or cross-examination, are not framed properly. Rambling, disjointed or convoluted questions are the norm.<sup>108</sup> Some judges in England and Wales observed that unrepresented defendants would either not participate enough, or would 'over participate', for example by adducing irrelevant evidence.<sup>109</sup> In addition, an unrepresented accused is commonly unable to properly comply with evidentiary rules.<sup>110</sup>

### (Under)representation

Some studies have noted that although the focus is typically on whether or not an accused has representation, this does not address the question of whether they are adequately represented.<sup>111</sup> The Canada Study, for example, found that one research site had very high levels of representation, but key informants characterised the problem as one of 'under-representation'.<sup>112</sup> Relevant factors include the resources available, workload, as well as training and experience.<sup>113</sup> This may give rise to concerns that legal aid and duty lawyers do not have sufficient time to prepare, and this in turn could translate to clients facing delays in access to a legal aid lawyer and a reduced level of service.<sup>114</sup> Lack of assistance may also be passed on to court workers, social services, or other forms of specialised assistance, which may present its own stresses both on the system and the individual personnel involved.<sup>115</sup>

104 Department of Justice, Canada (n 21) 24.

105 Bronwyn Naylor, 'Do Not Pass Go: The Impact of Criminal Records Checks on Employment in Australia', (2005) 30(4) *Alternative Law Journal* 174; Bronwyn Naylor, Moira Paterson and Marilyn Pittard 'In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks' (2008) 32(1) *Melbourne University Law Review* 171; Georgina Heydon and Bronwyn Naylor, 'Criminal Record Checking and Employment: The Importance of Policy and Proximity' (2018) 51(3) *Australian and New Zealand Journal of Criminology* 372.

106 Cf *Sentencing Act 1991* (Vic), s 6AAA; Penelope Gibbs, *Justice denied? The experience of unrepresented defendants in the criminal courts* (Report) (Transform Justice, 2016). For an historical overview, see Alana Piper and Mark Finnane, 'Defending the Accused: The Impact of Legal Representation on Criminal Trial Outcomes in Victoria, Australia 1861-1961' (2017) 38(1) *The Journal of Legal History* 27.

107 Janet Martin, "A balanced performance" on Sentence: Some Comments on the Modern Role of Defence Counsel in the Sentencing Process' (1991) 15 *Criminal Law Journal* 261, 261-263.

108 The Honorable Madam Justice M Furst, 'The Self-Represented Accused: The Trial Judge's Perspective' (Speech, Empire Club) 8 March 2007, 2.

109 Thomson and Becker (n 33) 7.

110 Jeff Giddings, John Dewar and Stephen Parker, 'Being Expected to do More with Less: Criminal Law Legal Aid in Queensland' (1999) 23 *Criminal Law Journal* 69; Mack, Roach Anleu and Wallace (n 79) 34; Dean Mildren, 'Don't Give Me Any LIP - The Problem of the Unrepresented Litigant in Criminal Trials' (1999) 19 *Australian Bar Review* 30.

111 Department of Justice, Canada (n 21) 9.

112 *Ibid* 9; 18.

113 *Ibid* 9.

114 *Ibid* 31.

115 *Ibid* 11.

### Inequality of Outcomes

There is some evidence that unrepresented accused are no more likely to be convicted than those with representation.<sup>116</sup> However, care must be taken in implying causation from these data. For example, in the Canada Study it was pointed out that those who are diverted are likely to be unrepresented. If successfully completed, there will be no conviction. This would result in a lower conviction rate for unrepresented accused, while having no impact on the rates for represented accused.<sup>117</sup> Therefore, we cannot say what the conviction rate would be for unrepresented accused in each site who were not diverted. However, it is safe to say that the rate for non-diverted, un-represented accused would be higher than the percentages shown...'.<sup>118</sup>

The risk of imprisonment for unrepresented accused can be very real. For example, the Canada Study found significant proportions of unrepresented accused received custodial sentences, less than 2% in two sites, over 10% in the other seven, with over 15% in three of those.<sup>119</sup> However, the data also suggest that unrepresented accused were not more likely to go to prison than represented accused.<sup>120</sup> These statistics are particularly pertinent given that legal aid is more likely to be provided based on the likelihood of imprisonment. Although this is difficult to predict, 'it is relevant that custodial sentences are received by at least one in ten self-represented accused in seven of the courts considered.'<sup>121</sup>

While the focus is often on custodial sentences, other sentences may have socio-economic impacts for the accused that they might not have appreciated, such as impacts on employment and travel.<sup>122</sup> For example, it might be suggested that lack of representation in driving matters may be of little concern.<sup>123</sup> However, loss of licence may have very serious consequences for a person's employment, and/or their ability to discharge family or other responsibilities. Although causation is difficult to establish, the Canada Study makes clear that given the impact of conviction both socially and legally in terms of impact on future offences, 'the data can definitely be used to show that many unrepresented accused will experience serious negative impacts as a result of the court process.'<sup>124</sup>

Studies demonstrate that, in general, judges do their best to ensure fairness in the circumstances by adapting their approach,<sup>125</sup> trying to balance the awkward position of assisting unrepresented accused as best they can, but without providing advice. Some judges indicated that they often 'bend over backwards' to protect the accused's rights, risking giving the impression to victims and police that they are 'on the defendant's side'.<sup>126</sup> This is a common concern raised by judges, that they have to explain the process and ensure they are understood, and that this takes time and prolongs proceedings.<sup>127</sup> Concerns are also expressed that unrepresented accused may be more vulnerable in terms of protection of rights during proceedings.<sup>128</sup>

Despite these challenges, key informants in the New Zealand Study considered that outcomes were fair, but also that outcomes may have been more favourable if they had representation.<sup>129</sup> Similarly, although the data were mixed, a majority of Crown Court judges interviewed considered that the same outcomes would be achieved for unrepresented defendants, even if it might take longer to achieve.<sup>130</sup> The United Kingdom Study found that 43% of unrepresented defendants were convicted and sentenced at hearing, compared to 18% of represented defendants.<sup>131</sup> Interestingly, the unrepresented defendants perceived their sentence as relatively fairer than those who were represented.<sup>132</sup>

116 Ibid 28.

117 Ibid.

118 Ibid.

119 Ibid 29.

120 Ibid.

121 Ibid 30.

122 Ibid 22.

123 Craigie (n 52).

124 Department of Justice, Canada (n 21) 28.

125 Smith, Banbury and Ong (n 15) 103.

126 Department of Justice, Canada (n 21) 32.

127 Thomson and Becker (n 33) 10.

128 Searle, Slater, Knaggs, November and Clark (n 55) 104.

129 Smith, Banbury and Ong (n 15) 12.

130 Thomson and Becker (n 33) 10.

131 Also see, Kemp (n 32) 80.

132 See Souza and Kemp (n 32); Kemp (n 32) 80.

## Impact on Judicial Officers and Court Staff

The nature of the adversarial system within the criminal jurisdiction places particular obligations on the court and trial judge.<sup>133</sup> For example, a trial judge has a particular onus to provide an unrepresented accused with enough information to ensure a fair trial.<sup>134</sup> The tension that this obligation creates is that the provision of information ought to be enough 'without effectively *advising* ... [the unrepresented accused]...of what course should be followed, or unduly interfering with the Crown's case as if the judge were the accused's counsel.'<sup>135</sup> Since there are no clear rules governing what a trial judge must do to ensure a fair trial, 'elements of reason and common sense ...play a role in determining the steps that should be taken in a particular case to prevent the possibility that the trial will be unfair.'<sup>136</sup> Judges must show particular care in accepting guilty pleas from unrepresented accused,<sup>137</sup> and a number of Crown Court judges in England and Wales expressed concern that unrepresented defendants struggled to understand the concept of a plea, or sentencing discounts, and the judge may come across as telling the person to plead guilty.<sup>138</sup>

Unrepresented accused can also have significant impacts on court staff and associated professionals. The Canada Study, for example, found that key informants were concerned that legal aid lawyers and duty lawyers were 'run off their feet'.<sup>139</sup> There are also pressures on court staff to answer questions from unrepresented accused. Of particular concern are questions from accused who are seeking legal advice, or have not understood bail or probation conditions which they cannot comply with and/or may impact on their employment or carer responsibilities.<sup>140</sup>

Finally, there is some concern that in addition to causing delays, the need to assist but not advise unrepresented accused may cause frustration and stress for judicial officers and court staff.<sup>141</sup> However, according to the New Zealand Study, most key informants in the criminal courts felt that dealing with SRLs 'did not have a huge personal impact on them'.<sup>142</sup> This was thought to be in part due to the volume and speed of cases in the District Court, meaning that key informants were less likely to deal with repeated requests from the same litigant, and have fewer SRLs overall than the Family Court.<sup>143</sup> 'The perception from most key informants in the criminal summary court is that even though there are effects on their time and effort, it is not such a problem for them, compared to the more noticeable burden it has on family key informants.'<sup>144</sup>

133 See for example, J. C. Miller, 'Duress and homicide: The voir dire and the unrepresented accused guidelines for a trial judge' (1982) 6 *Criminal Law Journal* 44; Joan McEwen and Ivan Henry, 'Self-represented accused and the trial judge's duty to assist' (2012) 70(4) *The Advocate* 537.

134 *Dietrich* (emphasis in original).

135 *R v Kerbatieh* [2005] VSCA 194 at [52] (Chernov and Nettle JJA and Byrne AJA). Also see, Department of Justice, Canada, (n 21) 32.

136 *R v White and Piggin* (2003) 7 VR 442 at 453 (Chernov JA).

137 Department of Justice, Canada, (n 21) 32.

138 Thomson and Becker (n 33) 10.

139 Department of Justice, Canada, (n 21) 31.

140 *Ibid* 32.

141 Smith, Banbury and Ong (n 15) 15.

142 *Ibid* 12; 103.

143 *Ibid*.

144 *Ibid* 113.

## Part 4: Legal Frameworks

Legal representation in criminal matters is regarded as being of fundamental importance in both international and domestic law. In *Dietrich*, a majority of the High Court of Australia held that where an indigent accused is charged with a serious offence and, through no fault of their own, cannot obtain legal representation, 'in the absence of exceptional circumstances the trial should be adjourned, postponed or stayed until legal representation is available.'<sup>145</sup> The decision is based on the trial judge's duty to ensure a fair trial, rather than a common law 'right' to legal representation. If it is determined that, given the nature of the charges brought against the accused, lack of legal representation would be likely to produce an unfair trial, then the court may stay the proceedings either temporarily, until representation is provided, or permanently if not.<sup>146</sup>

A limited right to legal representation is recognised under international law. Article 14(d) of the *International Covenant on Civil and Political Rights* provides that a person has a right to 'be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it'.<sup>147</sup> This is reflected in sections 25(d)-(f) of the Victorian *Charter of Human Rights and Responsibilities Act 2006* which provides that an accused has a right to defend themselves personally or through legal assistance, and to 'have legal aid provided if the interests of justice require it, without any costs payable by him or her if he or she meets the eligibility criteria'.<sup>148</sup>

However, none of these sources establish a right to representation at public expense. In Victoria, the decision in *Dietrich* is given effect to by section 197 of the *Criminal Procedure Act 2009* (Vic). This provision authorises a court to order VLA to provide legal representation for an accused if it is satisfied that the accused will be otherwise unable to receive a fair trial and cannot afford the full cost of obtaining private legal representation in the trial.<sup>149</sup> However, if the accused has engaged in vexatious or unreasonable conduct that has contributed to the accused's inability to afford the full cost of obtaining private legal representation, the court may refuse to make an order.<sup>150</sup> The legal burden of proof is on the accused to show that they are unable to afford the full cost of obtaining private legal representation.<sup>151</sup>

However, section 197 is limited to trials in the County or Supreme Courts, and does not apply to summary matters in the Magistrates' Court.<sup>152</sup> While there is a common law power to stay or adjourn proceedings, this only applies where it is not possible to ensure a *fair* hearing without representation.<sup>153</sup> Section 33 of the *Criminal Procedure Act 2009* (Vic), on the other hand, provides that where an accused is charged with an offence punishable by imprisonment, and is unrepresented on the return date, the court must ask the accused whether they have sought legal advice. If satisfied that the accused has not had a reasonable opportunity to obtain legal advice, the magistrate may grant an adjournment if requested by the accused. They must also inform the accused that they have the right, if eligible, to legal aid.

<sup>145</sup> *Dietrich*, 315 (Mason CJ and McHugh J).

<sup>146</sup> *Dietrich* 315 (Mason CJ and McHugh J). See generally, Flynn, Hodgson, McCulloch and Naylor (n 5) 209-211; Gideon Boas, 'Dietrich, the High Court and unfair trials legislation: a constitutional guarantee?' (1993) 19(2) *Monash University Law Review* 256; Simon Lipp, 'Principles of Dietrich: the right to a fair trial' (2000) 22(4) *Law Society of South Australia* 23; Justice K P Duggan, 'Reform of criminal law with fair trial as the guiding star' (1995) 19 *Criminal Law Journal* 258.

<sup>147</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol 999.

<sup>148</sup> *Charter of Human Rights and Responsibilities 2006* (Vic), ss 25(d)-(f) (emphasis added).

<sup>149</sup> *Criminal Procedure Act 2009* (Vic), s 197(3).

<sup>150</sup> *Criminal Procedure Act 2009* (Vic), s 197(5).

<sup>151</sup> *Criminal Procedure Act 2009* (Vic), s 197(5)(b).

<sup>152</sup> *Slaveski v Smith & Anor* (2012) 34 VR 206 at [43].

<sup>153</sup> *Ibid.*

Although there is no right to state funded legal assistance, there is paradoxically a right to self-represent and the court cannot compel an accused to accept legal representation.<sup>154</sup> Section 78 of the *Judiciary Act 1903* (Cth) provides that in 'every Court exercising federal jurisdiction the parties may appear personally or by such barristers or solicitors as by this Act or the laws and rules regulating the practice of those Courts respectively are permitted to appear therein.'

Despite acknowledging that an accused has a right to self-represent, it has been held that a self-represented accused lacks the qualities of professional skill and objective judgment that legal representatives bring to a case.<sup>155</sup> While a self-represented accused is not entitled to any special treatment, the court has to ensure that the principles of a fair trial are upheld. The extent of court assistance will be individualised, and courts have rejected adopting strict guidelines that list the issues that must be addressed when dealing with a self-represented accused. In some cases, the obligation to do so can be onerous as the court may have to actively counteract the accused's disadvantage in conducting proceedings without legal representation and attempt to provide a semblance of equality between the parties.<sup>156</sup>

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154 *Collins (aka Hass) v R* (1975) 133 CLR 120; *R v Zorad* (1990) NSWLR 91 at [95]; *Sacco v The Queen* (2018) VSCA 353 at [25].

155 *MacPherson v R* (1981) 147 CLR 512; *R v Zorad* (1990) NSWLR 91; *Dietrich*.

156 *Ibid.*

## Part 5: Results and Discussion

In this section, the results are presented from both the observation study and the qualitative interviews. In relation to observed matters, a number of case studies based on interactions in court are included.<sup>157</sup> These were written down as close to verbatim as possible, and some impressionistic comments are included to convey the tone of the interaction. Quotations in italics are those made by magistrates in interviews conducted for the purpose of this study.

### Number of Unrepresented Accused

As noted above, a total of 24 full-day sessions involving 19 separate magistrates were observed in the selected courtrooms between August and October 2019. This involved a cumulative total of 757 criminal law matters observed and codified. Consistent with some estimates discussed above,<sup>158</sup> in almost half of the matters (47%, n=358), the accused was not legally represented, while 53% (n=399) had legal representation. In 14% (n=106) of the total, the accused was not present. Of course, the overwhelming majority of these were not represented, although just over 8% (n=9) were represented in their absence.

Of those matters where the accused was represented, in 51% (n=202) of cases it was not possible, from observation, to determine the nature of the representation (e.g. duty lawyer, solicitor, barrister). Of those that could be determined (n=197), 80% (n=157) were represented by a solicitor,<sup>159</sup> 19% (n=37) by a duty lawyer, with the remaining 1% represented by a barrister (n=2) or Justice Connect (n=1).

Interviews with magistrates confirmed that unrepresented accused were encountered frequently. Of those magistrates interviewed, eight provided their estimated percentages of unrepresented accused, which ranged from 20% to 50% depending on the matter. There was no discernible pattern according to location, with three magistrates from Melbourne, four suburban, and one regional. Those matters where an accused was most likely to be unrepresented included traffic offences, local council prosecutions, summary mentions, family violence matters, low level drug offences, and some bail applications. One magistrate estimated that in traffic matters the percentage could be as high as 80 to 85%.

Four magistrates suggested that the percentage of unrepresented accused may have increased since COVID-19, in some cases to greater than 50%. As one magistrate observed, *'in the summary jurisdiction ... people used to be able to turn up to court, see a duty lawyer, or at least get some representation that way, but these days because a lot of [the matters are] being dealt with online, that connection is a little bit more difficult.'* Another observed that it was difficult to accurately estimate the number of unrepresented accused as *'post COVID-19, the only people who are really turning up...are ones who don't have lawyers which can distort the list. People who have lawyers are generally not appearing...'*

157 The abbreviations refer to interactions between, for example, Magistrate-Accused (MA), Accused-Magistrate (AM) etc. The full legend is found in the Coding Sheet at Appendix A.

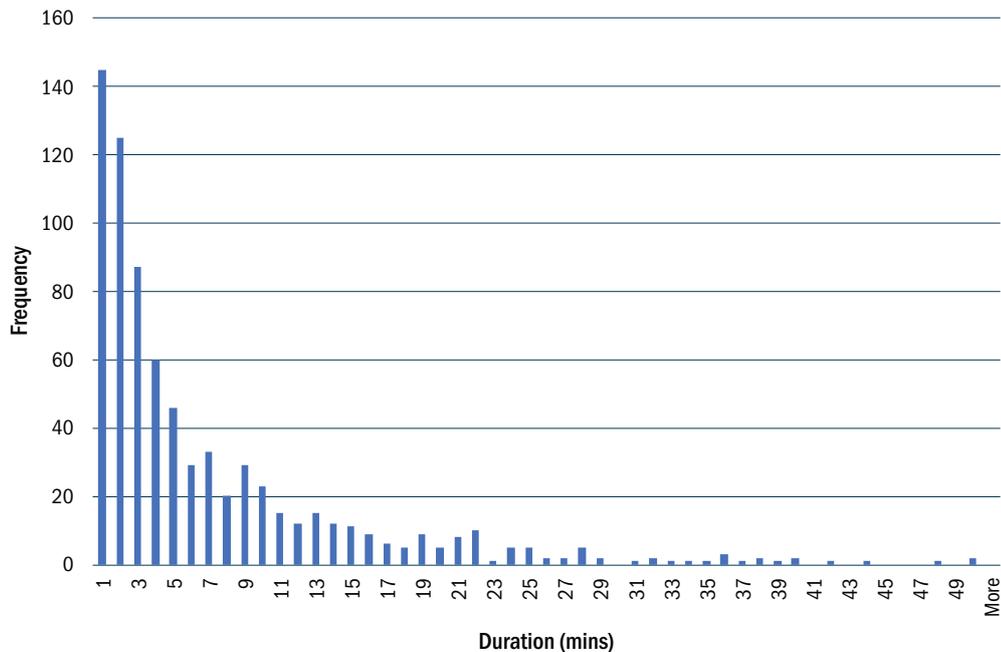
158 See Part 3: Literature Review.

159 It was not possible to determine, from observation, whether the solicitor was paid for privately or by VLA.

## Duration

All matters were timed from the moment the matter was called until concluded by the magistrate. Duration was recorded in one-minute increments. The average time taken across all matters was 7.2 minutes (range = 1 minute - 96 minutes).<sup>160</sup> The distribution was heavily skewed, as illustrated in Figure 1.<sup>161</sup> This is reflected in the fact that the median time taken for all matters was four minutes, meaning that 50% of all matters observed took four minutes or less.<sup>162</sup> Seventy five percent of all matters took nine minutes or less.

**Figure 1**



Based on the literature, it was hypothesised that matters involving unrepresented accused would, on average, take significantly longer than where the accused had representation.<sup>163</sup> Contrary to expectations, the average time taken in represented matters (8.6 mins) was significantly longer than for unrepresented matters (5.6 mins).<sup>164</sup> This finding was contrary to the views expressed by the overwhelming majority of magistrates interviewed, who indicated that, in general, matters concerning unrepresented accused did take significantly more time than with representation. Others acknowledged that while some matters involving an unrepresented accused could take longer, the relatively less complex nature of unrepresented matters meant that this was not generally the case.

Of those that considered matters involving unrepresented accused to take longer, this was largely due to the need to explain procedural and other matters. This can be particularly challenging where the accused asks what they should do, with magistrates having to strike a balance between providing information and providing advice. For example, one magistrate referred to a family violence matter with an attached criminal matter. The magistrate explained that because the accused didn't have representation, they would adjourn the matter to the next mention date. However, the accused was unsure of what that meant, and sought further clarification. This required the magistrate to take the accused through the process, step by step, ultimately recommending that the accused obtain legal representation. This process can take a significant amount of time, and such explanations are further complicated where an accused may have an intellectual disability, mental health issues, or require an interpreter.

<sup>160</sup> The 96-minute matter was an outlier, and involved a bail application involving numerous property offences. The next longest matter was 50 minutes.

<sup>161</sup> For ease of illustration, the 96-minute matter has been removed from this data.

<sup>162</sup> These findings were consistent with an earlier study conducted by Mack, Wallace, and Roach Anleu (n 81) 64-65.

<sup>163</sup> See Part 3: Literature Review.

<sup>164</sup> 95% CI [1.7831, 4.1717].

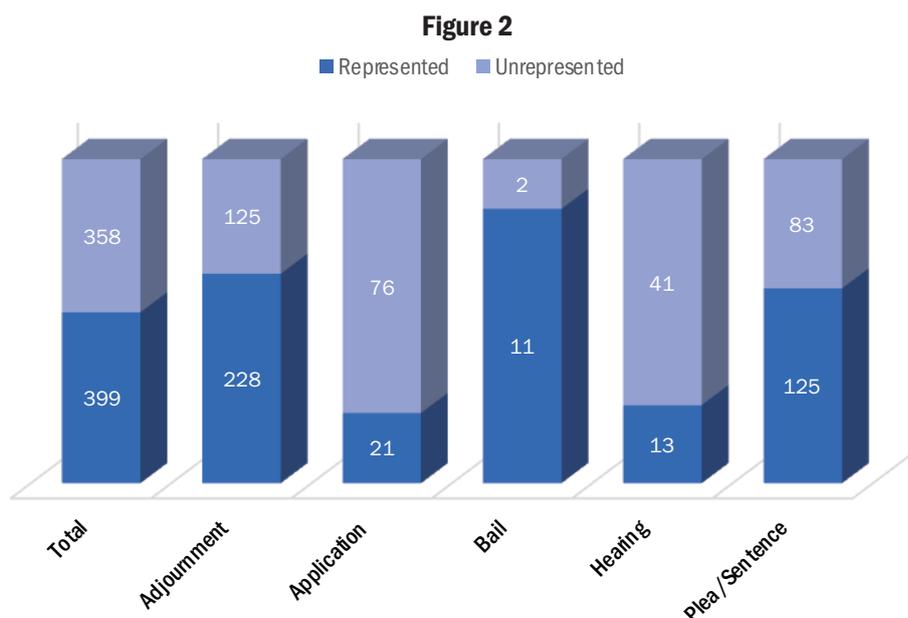
The length of time taken may also depend on the type of proceedings, with contested hearings being particularly challenging. Where an accused has representation, many issues will be decided more quickly: such as whether there is a defence, will the accused plead guilty, can it be heard immediately, is more information required, and the like. *'[W]ith an unrepresented accused, they often just don't know what it is they require.'*

In some cases, this could double the time taken, not because they are complicated legally, but because of the approach taken by the accused. One magistrate gave an example of a stalking matter where the unrepresented accused wanted to contest the charges even though they had no realistic defence. *'That's their right ... but you have certain obligations as a judicial officer in terms of ensuring that they have a fair hearing, which could be quite challenging sometimes in managing those cases. [W]ith a legal representative it would be a more focused exercise.'*

Some magistrates noted that represented matters could take longer because they are typically more complicated. Other magistrates identified that 'loquacious' legal representatives may 'waffle on a bit'; but that nonetheless, matters with unrepresented accused required magistrates to explain more, which contributes to the time that each hearing takes.

### Matters by Category

Given the large range of matters observed, in order to facilitate analysis, the matters were sub-divided into six categories: Adjournment, Applications, Bail, Hearing, Plea/Sentence and Non-Appearance. As shown in Figure 2, the levels of representation varied according to category. These are discussed in more detail below.



## Adjournment

Given that the observations were conducted in mention courts, it is not surprising that adjournments were the single largest category. These were challenging matters to categorise as there is clearly some overlap with other categories. For example, a sentencing hearing may be adjourned in order for the accused to be assessed in terms of their suitability for a Community Correction Order ('CCO'). However, this category reflects matters that were primarily concerned with an adjournment or were stood down. Although it was not possible to deduce from observation the reason for the adjournment in all cases, some of the common reasons included:

- the accused being absent;
- the accused needing to seek legal advice;
- assessment for diversion/CCO/Court Integrated Services Program ('CISP');
- consolidation of matters;
- adjourned for contest (mention, hearing or committal);
- financial hardship;
- need for further information;
- for further mention;
- in order to secure an interpreter;
- change of venue (e.g. Children's Court, Koori Court);
- for sentence;
- due to insufficient capacity in the court; and
- part-heard.

In total, 47% (n=353) of all matters observed fell within this category. The average time taken for an adjournment was 3.6 minutes, with a range of 1-36 minutes. The accused was represented in 65% of these matters (n=228) with an average time taken of 3.5 minutes. In the remaining 35% of cases (n=125) where the accused was not represented, the average time taken was 3.7 minutes. In 9% of cases (n=31) the accused was not present; although 6 of these were represented.

It can therefore be seen that there was no statistical difference between the time taken with or without representation.<sup>165</sup> However, closer analysis of the observational data reveals some of the challenges associated with unrepresented accused. For example, in 22% of these cases the matter was adjourned so that the accused could obtain legal advice, or secure funding in order to obtain/retain advice. These matters were also at the upper end in terms of time taken, with an average of 4.7 mins.

Observational data also suggests that these matters commonly involved significant involvement by the magistrate, with numerous adjournments and promises of seeking legal advice. In a number of matters that were observed, the matter was stood down/adjourned more than once, and the magistrate had to repeatedly explain that they could not advise the accused as to whether he or she should plead guilty. The point is vividly illustrated by one case study in which the unrepresented accused was seeking an adjournment because their witness had not attended court. The magistrate inquired whether the accused would like to obtain legal representation:

MA: Do you have a lawyer?

AM: No.

MA: Do you want one?

AM: No, I don't need one. I want to explain the matter myself.

MA: Are you sure you don't want to see legal aid?

AM: No, I want to explain it myself. In my defence, I was helping a friend ... but I didn't know that it wasn't his stuff. He was going to come and say this – but he has been convicted.

MA: Is that going to be realistic to expect him to come to Court?

AM: No, so what will happen is that someone who is not a lawyer but who is really good at explaining – they are going to come to Court and speak for me.

MA: But that is what a lawyer does.

AM: Not all the time. I've had a lawyer before.

PM: The accused has been charged with further charges today, and has extensive priors, so he should be getting a lawyer.

MA: The prosecution has indicated that he will consent to an adjournment IF you get a lawyer.

AM: Okay I will get a lawyer...

MP: We might need to briefly stand this down to organise all the further charges for the adjournment ...

165 Confirmed by confidence interval 95% CI [-1.0398, 0.80677].

Approximately 40 minutes later the matter returned before the magistrate. During this time, the charges were consolidated. The matter was adjourned with a commitment expressed by the accused that he would obtain legal representation.<sup>166</sup>

The following case study involved an application for forfeiture that was repeatedly adjourned for the purpose of the accused seeking legal representation:

MA: Good morning, are you representing yourself today?

AM: Nahh, I'm going to adjourn it.

MA: You have no lawyer here today?

AM: Yeah.

MA: Why do you want to adjourn it?

AM: I need to get a lawyer.

MA: You have already had six adjournments now. And on three of those occasions you did have a lawyer, but it was still adjourned?

AM: I am having difficulty with my lawyers, I don't have the money to pay them.

MA: This is a problem. Will you have the money to pay them next time? Do you work? (The accused nods.) I will only adjourn it for a couple of weeks, so if you don't have the money in a couple of weeks we better hear it now.

AM: Okay let's hear it now.

MA: Are you sure?

AM: Yes.<sup>167</sup>

In another example, the matter should have been a brief adjournment to contest mention but instead became prolonged because the unrepresented accused did not understand relevant documents. After numerous adjournments, the accused returned to court to state that '[s]o it turns out I didn't understand, we were actually referring to the same email...' and proceeded to agree with the Magistrate's earlier findings. The matter was adjourned again, and the accused was strongly advised by the Magistrate to obtain legal representation for the contest mention and hearing.<sup>168</sup>

A number of accused had retained lawyers but required an adjournment in order to pay them. One accused seemed genuinely baffled on being informed by the Magistrate that, according to the letter on file, the lawyers were no longer acting as they had not been paid.<sup>169</sup>

## Applications

The second category involved a range of procedural and other applications. Thirteen percent of matters (n=97) fell into this category. Matters observed included applications relating to:

- time to pay;
- release of impounded cars;
- abandoning an appeal;
- withdrawing charges;
- having vehicle interlock removed;
- videolink;
- materials being provided;
- judicial review;
- forfeiture of property;
- rehearing;
- variation/suspension of CCO; and
- driving licences (e.g. reinstatement).

The average time taken for these matters was 6.4 minutes, ranging from 1 to 37 minutes. Only 22% (n=21) had representation, taking an average of 5.7 minutes. Seventy eight percent (n=76) of accused were unrepresented, taking an average time of 6.6 minutes. Although the unrepresented matters appeared, on average, to take longer, it is not possible from the data obtained to infer that this is a meaningful difference between the two groups.<sup>170</sup>

<sup>166</sup> Case Study Matter 17.18 (on file with the authors).

<sup>167</sup> Case Study 17.14 (on file with the authors).

<sup>168</sup> Case Study 11.3 (on file with the authors).

<sup>169</sup> Case Study 19.6 (on file with the authors).

<sup>170</sup> 95% CI [-4.5424, 2.7078].

Although relatively simple, some applications can prove challenging. In one example where the accused was applying to have his car released from impoundment, the accused was unable to demonstrate the necessary circumstances and the application was refused. The accused became angry, smashing a door, throwing a chair and yelling at the Magistrate. The accused was escorted from the building by Protective Services Officers. Another application for release of a car took 22 minutes, with the Magistrate explaining the process to the accused before the hearing began. In another example, an application to subpoena the police informant in a traffic matter took 29 minutes due to the aggressive behaviour of the accused who struggled to understand the process:

MA: I have four matters, two in relation to vehicle impoundment and two infringements to extend time.

AM: I have about 30 matters!

MA: What is your application? To extend time on an infringement notice?

AM: Which infringements are they?

MA: Well, which ones are you seeking to extend?

AM: Look I had no fixed address, I did not receive any of the letters, other people used my car without my knowledge, like my mum etc

MA: Well, I can give you an extension for those.

AM: No, I want them wiped! It wasn't even me!

MA: So, I will give you 28 days.

AM: But I won't be able to pay in 28 days! I've finally got them all to Court and I want them wiped!

MA: I only have two here.

AM: How do you know what you're talking about if you don't even know which fines we are looking at today! Look, they drove my unregistered car, some are from \_\_\_\_\_. And it will affect my licence, it will affect my business.

MA: You said you were unemployed?

AM: No, I didn't.

MA: What are you doing? Are you working at the moment?

AM: I am trying to realign myself after getting a brain injury.

MA: I can only extend the time to pay and in that time, you can nominate another driver.

AM: I nominate you!

MA: (ignores)

AM: What about the impoundment of my car?!

MA: I'm coming to that. Now there is an application here to have the costs waived.

AM: Whose application?!

PM: There is a hardship application. I do not have the paperwork, but I do have that it was due to driving while disqualified and then it was impounded for 30 days on \_\_\_\_\_.

MP: And now it's available for release. But the applicant couldn't pay costs?

AM: I was in hospital.

MA: So, this is your application to waive costs of impoundment.

AM: I am currently experiencing financial difficulty, I am on Centrelink, and I now have a brain injury because of the police! And they were asking for medical documents from the police.

MA: Do you own the vehicle?

AM: Yes....

MA: Do you understand what you need to prove for your application to waive costs?

AM: Do you understand that it's not my fault that they sent it to the wrong address!

MA: I thought you said you had no address?

AM: I have no fixed address, I have lots of addresses!!

MA: Look I am not going to have an argument with you.

AM: I am not finished!

MA: Leave the witness box. We are standing the matter down, the police are getting your documents because we do not understand what you're seeking today. We are trying to sort this out for you.

AM: It was all heard yesterday! And they did this too!

MA: Leave the witness box. You can sit in Court or outside.

AM: It was adjourned yesterday too! How about you just contact me when you are ready! (swearing and storms out of Court).<sup>171</sup>

171 Case Study 13.4 (on file with authors).

In other cases, it was clear that the accused was having trouble understanding the process, due to language or cognitive difficulties. This would extend the time taken but also complicate the process, with matters being stood down, prosecutors trying to explain to the accused what is needed, and in many cases leading to an adjournment.

Further, matters concerning unrepresented accused may not necessarily be complex for legal reasons but can be challenging because of the need for management. This is consistent with observations in interviews with magistrates, with some commenting that matters concerning unrepresented accused *'are often not more complicated at law, but more difficult to manage and adjudicate'*. They also illustrate the tension magistrates face in striking *'the balance between assisting somebody with process and procedure and the law but not running their case.'*

## Bail

In interviews, a number of magistrates identified bail hearings as being particularly challenging to conduct with unrepresented accused. This is in part due to the increasingly onerous requirements of bail legislation, requiring a person seeking bail to satisfy the court that there are exceptional circumstances (for Schedule 1 offences) or compelling reasons (for Schedule 2 offences) justifying release.<sup>172</sup> The potential consequences for the accused of being remanded in custody are, of course, extremely serious.

Given the nature of the mention courts observed, a large number of bail hearings was not to be expected. Nonetheless, over the observation period there were 13 matters involving bail (2% of the total). The offences charged included property offences, drug trafficking, intentionally causing serious injury and robbery. The time taken to deal with these matters ranged from 1 minute (adjournment to another court) to the longest matter observed in the study at 96 minutes. Overall, the average time taken for bail matters was 24.5 minutes. Lack of representation was not an issue in the overwhelming majority of cases observed, with 85% of accused (n=11) being represented. Matters with representation took an average of 25.5 minutes. The two matters without representation took an average of 18.5 minutes.<sup>173</sup> In one of these, the matter was adjourned as the accused was not brought up from the cells below the courts due to illness. The other matter involved a breach of a Family Violence Intervention Order ('FVIO'), took 32 minutes and is the subject of the following case study:

PM: She has to show exceptional circumstances.

MA: Do you understand that ma'm? It is something like, for example, you have to go to the doctor tomorrow, or you will die.

AM: Well I was cold. That is why I went into the house.

MA: Yes. But what about your 39 prior convictions?

AM: It's so hard to talk about them all.

MA: Expand if you can.

AM: Some of the situations did not happen like the way they said.

MA: What's your family like?

AM: My father is loving. I come from a good home. He does not know who I am now.

MA: What about your mother?

AM: I haven't had the opportunity to meet my mother. But my stepmother is caring towards my father. So, I love her for that.

MA: What are the exceptional circumstances here?

AM: I just want to be given a chance.

MA: You should try and think of something - I know it's hard to think, but you are not represented and so you just try and think.

(Accused appeared confused and silent. Her first time in prison, she had been in for about 24 hours).

MA: Is there anymore you want to say?

(Accused shakes head).

MA: Bail has to be denied, but you can make another application when you have the benefit of a lawyer. Are you aware of that ma'm?

(Silence from accused)

MA: Are you concerned about your welfare in custody ma'm?

(Still no response).

MA: Okay your matter will be heard on [date]....<sup>174</sup>

172 *Bail Act 1977* (Vic), ss 3D(3)-(4).

173 The number of matters observed in this category was too small to perform any meaningful statistical analysis.

174 Case Study 7.26 (on file with authors).

Given the limited sample size, there is little that can be inferred from the statistical information. However, interviews with magistrates provided more detail about the challenges they experience with unrepresented accused seeking bail. One magistrate noted that accused are particularly likely to be unrepresented when recently remanded, or where they have been advised that their bail application is not going to succeed, but they apply for bail anyway:

*People who are arrested and then immediately after they are remanded apply for bail, are less likely to have been organised enough to get their regular lawyer if they are recidivist, or to receive advice from Legal Aid and be represented based on that advice. When people come into [the Bail and Remand Court], they are usually arrested off the street or at home. So, the levels of intoxication through alcohol or drugs are high. They can be highly agitated if they're arrested on warrants. And their ability, I think, to understand and follow legal advice is really diminished.*

Another magistrate emphasised the need to spend time explaining the process to the accused, given the seriousness of the consequences. This magistrate estimated that approximately 50% of bail applications would be unrepresented and would take a minimum of 30 minutes because of the need to explain the complex requirements of bail.

Two magistrates identified particular challenges for unrepresented accused on remand during COVID-19, where there were reasons to believe the accused may have been exposed to the illness. In the first example, such prisoners would be isolated and often the police would 'just hold a telephone up to the cell rather than give them the equipment they needed to speak to the court and to their lawyers.' This would result in very poor sound quality, and was stressful for both the prisoner, and the magistrate as they 'have a responsibility to ensure that the accused understands the proceedings, that they're being heard and not just metaphorically, but physically that they're being heard. And often I couldn't hear them.' The second example related to women who are taken into custody, 'put into lockdown for 14 days [without]...access to any lawyers or phones or anything. So at least the men who were taken into custody can have access to video facilities and phones to get legal advice, the women have nothing for 14 days.' According to one magistrate, these women are a 'group of unrepresented people who are actually denied procedural fairness through determinations of people other than magistrates.'

## Hearings

As noted above, this study did not focus on contested hearings. Nonetheless, a number of matters arose during the observation period that we have categorised as 'hearings'. 'Hearing' is used here to describe any matter concerned with a substantive offence or allegation. Fifty-four matters fell within this category, (7.1% of the total).

The average time taken for a hearing was 5.2 minutes (range = 1-25 minutes). 24% of accused in this cohort were represented (n=13), taking on average 7.4 minutes. The remaining 76% without representation (n=41) took an average of 4.5 minutes. However, of those where there was no representation, 44% (n=18) did not appear.<sup>175</sup>

These matters were further broken down as follows:

**Hearing** (20.4%; n=11): These were matters where the magistrate was required to make a finding of guilty/not-guilty. In 73% of these cases, the accused was not in fact present and the matter was adjourned, struck out or heard *ex parte*. Of the remaining three cases, two were without representation. One concerned theft and resisting arrest and was adjourned for a summary case conference because of inconsistencies in the plea, and the other was a driving offence that was proven and dismissed.

**Judicial monitoring** (25.9%; n=14): These matters involved the magistrate supervising whether conditions have been complied with; for example, adjourned undertakings, CCO or CISP. In 13 of the 14 cases the accused was not represented (the accused was not present in three of those matters). While the majority of matters observed appeared to be straightforward, there was an example of an accused who was clearly having difficulty complying with his CCO. The Magistrate, who indicated they had not initially been involved in the order and so was not familiar with the case, was clearly concerned about the potential for breach and more serious consequences. No order was made and the accused was advised to speak to his corrections officer and to seek a variation of the order. The challenge for an accused already impacted by a number of factors in navigating this process is an issue of concern.

<sup>175</sup> The number of matters observed was too small to perform any meaningful statistical analysis.

Breach of condition (20.4%; n=11): These were matters that came before the court because the accused was alleged to be in breach of a condition attached to diversion, adjourned undertaking, FVIO, or CCO. The accused was present in nine of these matters. One matter where the accused was not present proceeded *ex parte*, while the other was adjourned. In the remaining matters, the accused was represented in four. Of those where the accused was not represented, one was struck out as being in error, one was adjourned and consolidated with other matters, and in three diversion cases, the accused was given an opportunity to pay the monetary amount and then the matter would be dismissed.

Application for diversion (11.1%; n=6): These were matters where an application was made for the matter to be diverted. In only one matter was the accused not present, and that was a corporate defendant. Of the remaining five, the accused was unrepresented in three. One was adjourned and in two the diversion was granted.

Application for FVIO (16.7%; n=9): The accused was present in three of the nine cases, and in two of these was represented. The order was made in all three cases. Of the remaining six cases where the accused was not present, the accused was represented in one. In three matters the order was made, while the remaining three were adjourned.

Mention (5.5%; n=3): There were three mention hearings. The accused was present in all three, with one of these being represented. Of the two that were unrepresented, both were driving offences. One was adjourned for a contested hearing, while the other resulted in a plea of guilty following assistance from the Magistrate. The charges were proven and dismissed.

### **Plea/Sentence**

*'I do worry that we let people enter into pleas...when they don't understand the ramifications.'*

Sentencing hearings are particularly challenging for unrepresented accused. Without representation, an accused may not fully appreciate the considerations that are most relevant to the magistrate in terms of sentencing objectives, and may not present his or her personal circumstances most effectively. Even in apparently minor matters, such as driving offences, an unrepresented accused may not understand the ramifications of their plea, or their opportunities to avoid a conviction, for example, by way of diversion.

This category included all matters where a plea was heard and/or sentence imposed. It included sentence indications, part-heard matters, and matters that were commenced but then adjourned. It did not include matters where the case was simply adjourned for a plea, or to consolidate charges. Overall, there were 208 (27.5%) matters that fell within this category, representing a diverse range of offending. To facilitate analysis, the offences were grouped according to the following categories:

- assault and related offences such as affray, stalking, assault police;
- breach of condition including FVIO, adjourned undertakings, CCO, parole, etc;
- driving and traffic offences, including drink driving;
- drug offences;
- property offences; and
- 'other' offences. These included possession/importation of prohibited weapons, dangerous dog offences, failure to provide password, begging, false report to police, failure to have a building permit, public drunkenness, and fare evasion.

The following figures provide a snapshot of the range and volume of offences considered. As a number of accused were charged with multiple offences, the following figures are based on the primary offence.

Type of Offence	Overall		Represented		Unrepresented	
	n	%	n	%	n	%
Assault	22	10.6	19	86%	3	14%
Breach of condition	8	3.8	6	75%	2	25%
Driving	109	52.4	46	42%	63	58%
Drug	24	11.5	19	79%	5	21%
Property	19	9.1	16	84%	3	16%
Other	13	6.3	10	77%	3	23%
Not recorded	13	6.3	9	69%	4	31%
<b>Total</b>	<b>208</b>	<b>100%</b>	<b>125</b>	<b>60%</b>	<b>83</b>	<b>40%</b>

It can be seen that driving offences represented the single largest category, being just over half of all matters observed. In many of these, legal representation may be unwarranted as the consequences are either mandatory and/or there is limited discretion. As one magistrate observed in relation to drink driving offences for first time offenders: *'[d]oesn't matter whether they are represented or not...[that's] not going to take more time. The ones that concern me are the ones where there may be a spectrum of results or there might be severe ramifications because they are unrepresented.'* One magistrate identified these severe ramifications in the example of an unrepresented accused who pled guilty of speeding at 25km/h over the limit, resulting in a mandatory loss of licence for three months. The reason for her speeding was that the childcare which her child attended had a COVID-19 scare and she was on the way to pick her child up. However, as the magistrate noted, her loss of licence had to be seen in the context of her being a victim of family violence, no family support and in her case would translate to a potential loss of her job.

The remaining matters were fairly evenly distributed across the categories. The matters observed ranged in seriousness from those which resulted in an unconditional dismissal, to offences that were sufficiently serious to warrant imprisonment or a CCO. For example, during the observed period there were seven matters where the accused was sentenced to imprisonment, 6 month's imprisonment being the longest period. In all cases resulting in imprisonment or a CCO, the accused was represented.

Matters involving unrepresented accused still had the potential for significant consequences, noting that even the entering of a conviction may have serious ramifications for employment, travel, and other matters. For example, in one of the matters, a psychology student who had a conviction recorded would need to disclose that fact should they seek registration with the psychology board.<sup>176</sup>

A fine was the most common penalty imposed, and these could be in excess of \$1000, with the largest fine imposed being \$5,000. Given the number of traffic offences heard, licence suspension and driving disqualification were obviously other significant penalties imposed, often being mandatory. The longest period of disqualification imposed was four years.

Although no unrepresented accused in the matters observed was subject to a CCO or imprisonment, a closer look at the matters revealed that this was a realistic possibility in a number of cases. For example, a number of matters were adjourned so that the unrepresented accused could be assessed for a CCO.

There were several matters where the unrepresented accused was unsure whether to plead guilty or not, and the matter was stood down/adjourned so that he or she could seek advice. This was particularly the case where the

<sup>176</sup> Even a non-conviction appears on a criminal record, a fact of which many people are unaware, and they may plead guilty on the basis that they won't have a conviction recorded: Heydon and Naylor (n 105) 372-394.

accused may have been unaware of how serious the matters were, because of the seriousness of the offending and/or prior offending history, and the magistrate urged them to seek advice. In some cases, the magistrate indicated that the offending was of sufficient seriousness that further offending would likely result in a term of imprisonment. In other cases the accused would be urged to get advice, but would prefer to just 'get it over and done with'. At the other end of the spectrum, an unrepresented accused was charged with public drunkenness and had already been in custody for two days. The accused pleaded guilty and the matter was unconditionally dismissed.

Of the 208 matters observed under this category, 60% (n=125) were represented, while 40% (n=83) were not.<sup>177</sup> Overall, the average time taken for these matters was 14 minutes, ranging from 1 to 48 minutes. However, there was a stark difference in the average time taken with representation (17 minutes) compared to an average of 9.5 minutes without. This suggests a difference on average of almost 8 minutes between represented and unrepresented pleas.<sup>178</sup>

There are a number of possible explanations for this difference. First, as noted above, driving offences were the most numerous single category (n=109). Of these, 42% (n=46) had representation, while a majority (58%, n=63) did not. This is likely to skew the nature of the sample with the majority of unrepresented matters being driving matters which are typically less complex than other matters. Nonetheless, these proceedings followed a similar pattern with the average time taken for driving matters with representation being 13.2 minutes compared to an average of 9.7 minutes without representation.<sup>179</sup> This is consistent with the view of at least one magistrate, who indicated that in traffic offence matters, unrepresented matters can take approximately 3 minutes whereas the same matters with accused who are legally represented can take 5 minutes or more.

Secondly, the fact of representation may distort the nature of the sample. That is, more serious matters are more likely to have representation and to take more time because of their seriousness. However, interviews with magistrates would suggest that unrepresented matters require more time for explanation and to elicit answers from the accused. In a number of observed cases the magistrate had to take time to explain the process to the accused, to check if they understood the prosecution summary, and/or asking the accused a lot of questions in order to ensure they have a full picture of the accused's circumstances. Time could also be taken up with irrelevant information, as in one case where the magistrate took time to read material provided by the unrepresented accused only to determine that it was not relevant.

Thirdly, the difference may also be explained on the basis that lawyers are more able to identify relevant considerations for the magistrate, and to more fully articulate their client's circumstances. Where an accused is unrepresented, it may be that more time is taken up explaining matters than in actually discussing matters relevant to sentence.

It was clear that even with explanation, some accused struggled to understand the process. For example, a number of unrepresented accused in driving cases did not seem to understand that these were matters of strict/absolute liability, and/or that the magistrate had no discretion. They would therefore take up time arguing matters that were, in effect, irrelevant. For example, in one driving matter, the accused admitted the offence but argued it was not his fault. While the magistrate imposed no greater fine than if he had accepted the fine, the accused continued to argue even after the next matter had commenced. One accused thought he was facing one charge, when he was in fact facing four.

Another unrepresented accused challenged an infringement notice in court. However, the accused pleaded guilty and did not really make any statement in his defence. Although the process had been explained, it was not clear that he understood. The magistrate indicated that although it should never have been brought to court, the penalty imposed would be the same as if it had not been challenged.

Given the diverse backgrounds of the accused, language was an issue in a number of cases. In one of the observed matters for example, the magistrate had to stand it down because it was apparent the accused, who had an interpreter, had not read the summary and did not understand the charges. In another case, the use of the interpreter was effective in obtaining relevant information, but the interpreter was challenged by the task of how to convey the seriousness of the offending which the magistrate was trying to make clear to the accused.

177 In two of these cases, the accused was not present.

178 95% CI [5.5262, 9.5577].

179 The number of matters observed was too small to perform any meaningful statistical analysis.

The stress and emotion of court can also present challenges when there is no intermediary. For example, in one of the case studies, the accused exhibited signs of stress that prevented her from being able to represent herself to the best of her abilities. After the prosecution summary, the magistrate tried to elicit from the unrepresented accused her responses:

MA: Does that sound right in relation to what happened on that day?

AM: Yes.

(Then hands up priors)

MA: What have you got to say?

AM: I don't have a great driving record. My siblings will often steal my car and some of the priors are my siblings. You can see one of them was struck out – we had to go to Court, it was my sister.

MA: Yes, I see that.

AM: I'm sorry (tearing up, nervous and bewildered looking)

MA: Take your time, I know it's nerve-wracking to be here.

AM: I am really struggling to keep track. I just lost my dad. (Starts crying)

MA: Is there anything you can do to change your behaviour for the future?

AM: I am really finding it hard to speak in Court. Can I please give you my references?

PA: Have you done a summary case conference?

AP: I don't know, what does that mean?

PA: Have you spoken to the prosecutor?

AP: No.

PM: I am concerned your Honour that the suspension may not have been valid. If she was not driving when the demerit points were incurred, then there is no valid suspension.

(Quick discussion between Magistrate and Prosecutor about this possibility.)

MA: Do you understand? So if the fines that caused the suspension have been revoked, then in fairness we need to check this.

AM: No, I think it would still be suspended.

MA: So, the fines were revoked at [location]?

AM: The other fines were mine, that one wasn't, but even without it I think that my licence was still suspended.

MA: But are you sure that all the fines leading to the suspension were yours?

AM: Well it was my ex-husband who was driving at the time, but I cannot contact him so there is nothing I can do.

MA: I don't want to find you guilty of something that you are not guilty of – it sounds like there might possibly be a mistake.

(Further investigations made by police, confirms that the licence was still suspended.)

MA: Okay well sounds like your licence was still suspended if you didn't nominate your ex-husband.

MA: I have read your material and I understand this is a difficult time for you. You need to keep better control of who uses your car, so you don't end up back here. As you have already paid all the fines and the costs of impoundment, which is already a heavy penalty, I will take into account your guilty plea and find your matter proven, but dismiss it otherwise. So, there is no further penalty today.<sup>180</sup>

### Non-Appearence

In 103 cases (14%) the accused was not present, however in almost 10% of these cases (n=9) the accused was represented. The accused not being present obviously has an impact on hearings, with many being adjourned although a number proceeded *ex parte*. These are included within the above categories.

This category describes those cases where the accused was not present and a warrant or other process was sought to secure their attendance. There were 32 cases of this type (4% of the total) taking an average of 1.5 minutes (range = 1- 6 minutes). Only one accused was represented in these matters, we have therefore not prepared comparative statistics for this group.

<sup>180</sup> Case Study 14.14 (on file with authors).

### Seeking Representation

In interviews, a number of magistrates discussed the need to check whether the unrepresented accused had sought legal advice. This was particularly the case where it appeared that the accused did not understand the ramifications of, for example, their guilty plea. Of the 358 matters where the accused was unrepresented, in 97 cases (27%) the accused was not present. Of the remaining 261, in 20% (n=53) of cases the accused was asked whether he or she had sought legal representation. Fifty one percent (n=29) of these were adjournments, 43% (n=23) were pleas, and 2% (n=1) was a hearing.

In 23 of these, the accused gave some indication that they had sought legal advice though the nature of this interaction varied considerably, from letters provided by lawyers to having contacted lawyers but having difficulty paying. Of these, in 15 cases there was a further discussion about representation, with 10 of these being adjourned.

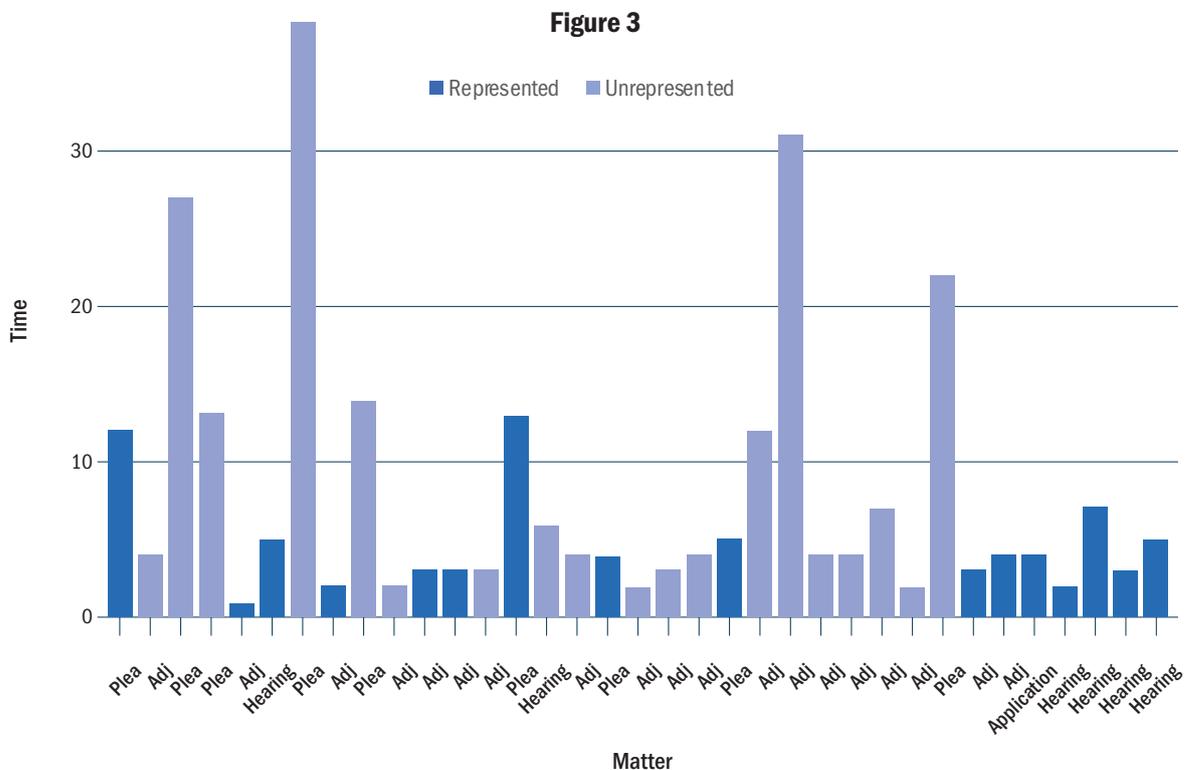
Of the 30 cases where the accused had not sought advice, in 20 there was further discussion about obtaining advice and 10 of these were adjourned.

Of the 80% of cases (n=209) where the accused was not asked whether he or she had sought legal advice, in 18 cases there was further discussion about legal representation of which 12 were adjourned.

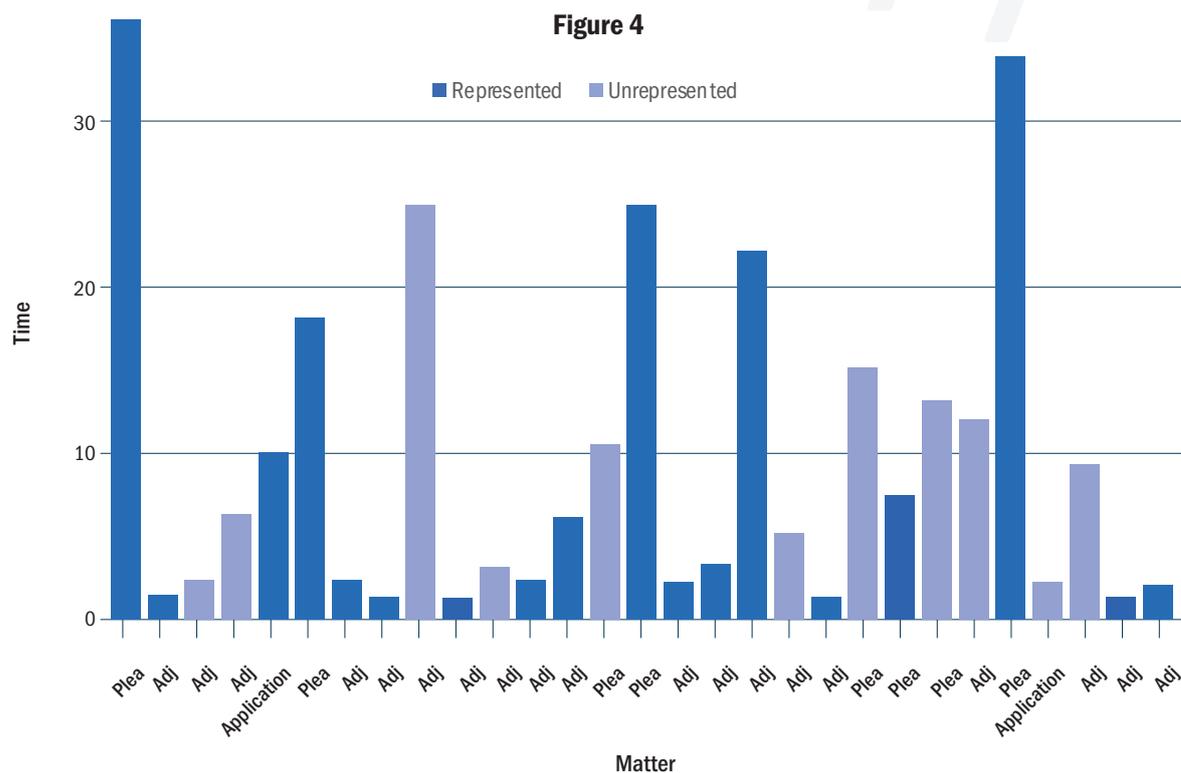
### Case Management

It can be seen from the observed data, that in the courts observed magistrates were having to deal with a range of matters, with both represented and unrepresented accused, and having to manage the flow of cases. As has been observed in an earlier study,<sup>181</sup> many of the difficulties that arise are outside the magistrate's control, and adjourning/standing down is an important aspect of case management. However, this has flow-on effects for other participants and the court system itself.

Set out below in Figures 3 and 4 are diagrammatic representations of two randomly selected full-day sessions to give a visual impression of what magistrates deal with in these courts.



181 See, Mack, Roach Anleu and Wallace (n 79) Chapter 4.



## Other Matters

There were a number of issues that arose in interviews with magistrates, and in the observation study, that are consistent with issues raised in the literature. We have organised this discussion under the same headings as the literature review:

- impact on the courts and court processes;
- impacts on the unrepresented accused; and
- impact on judicial officers and court staff.

### Impacts on the Courts and Court Processes

As in the literature, magistrates raised the challenges of managing proceedings with unrepresented accused. In particular, the need to explain procedures in detail to an accused person, particularly where the ramifications are serious, can *'take a lot longer, because I wouldn't have to do any of it, if they were legally represented.'* Some magistrates also pointed out that it is not just the time in court, but the time that may be required of duty lawyers and other support services at court.

Also identified by magistrates, and highlighted in the observation data, was the impact that case management can have on the way in which matters proceed and, in particular, the time taken. Multiple adjournments, particularly in order for the accused to get legal representation, can add considerably to the time taken to resolve the matter.

In some cases, the lack of representation is made up for by the assistance of other parties or lawyers present in the courtroom who take on the *de facto* role of assisting an accused. In one case study a lawyer present in court on another matter persuaded the accused to accept his offer to explain the matter to him outside the court.<sup>182</sup> In another example, a retired lawyer sought leave to appear for the accused. When this was refused, he nonetheless tried to whisper relevant matters to assist the accused during the proceeding.<sup>183</sup>

<sup>182</sup> Case Study 22.17 (on file with authors).

<sup>183</sup> Case Study 22.17 (on file with authors).

Police prosecutors may also play a role in assisting an accused person. Although there are obvious concerns when the accused is relying upon assistance from the prosecutor, they can play an important role where assistance is otherwise lacking. For example, in one case study, the matter was stood down because the accused had another matter in another court and the Magistrate wanted to consolidate them.<sup>184</sup> During the adjournment, the police prosecutor explained to the accused what was happening. In another example, the police intervened to provide assistance to the unrepresented accused, informing him of who to approach for advice prior to the summary case conference with the police informant.<sup>185</sup>

In addition, in this matter, the police interjected to remind the magistrate of processes that have to be complied with where there is an unrepresented accused. For example, ensuring the charge is read out and explained to an unrepresented accused under s 62 of the *Criminal Procedure Act 2009* (Vic). The Magistrate thanked the police informant, noting that they will 'endeavour to do that in the future.'<sup>186</sup> This highlights the importance of ongoing professional education in relation to matters concerning unrepresented accused.

Another magistrate described their interactions with a police prosecutor as an example of judicial leadership which they regarded as a key factor in shaping the way in which unrepresented accused are managed; *'it is our example that skews how other actors respond.'* In this case, the unrepresented accused was pleading not guilty to driving while suspended without having had any advice from a lawyer. The Magistrate explained the ramifications if the accused would elect to run a contested hearing, and provided an explanation about strict liability offences and the defence of honest and reasonable mistake of fact. The Magistrate referred the accused to VLA but due to the nature of the offence, legal aid was not available. The Magistrate inquired whether the prosecutor would be able to discuss the matter with the unrepresented accused. The prosecutor agreed and upon return indicated that the matter was resolved and applied to have it struck out; *'there is no utility in pursuing it.'* The Magistrate noted that this matter could easily have been adjourned again, necessitating more time off work for the accused, but instead resulted in a positive outcome.

### Impact on the Unrepresented Accused

While the literature often focuses on the frustrations caused by unrepresented accused, some magistrates observed the frustrations experienced by the accused. The accused is in a stressful environment, may not understand the process, and the delays in proceedings can contribute to agitation. *'That agitation translates into fast talking, failing to listen. It takes a long time to explain to somebody you will get your turn.... You will be given every chance at the end... and matters take a lot longer, because I wouldn't have to do any of it, if they were legally represented.'* There may also be matters where the accused is particularly emotional; for example, in family violence matters.

In addition, *'unrepresented accused are scared. They are defensive, they're obviously concerned about how their status is going to be and also because they're unfamiliar with the process as well. Nothing heightens anxiety like unfamiliarity.'* This highlights the importance of information being provided early, which can help ease anxiety.

In terms of outcomes, some magistrates commented that not every accused needs legal representation, that there are matters where a person could represent themselves and there would be no difference. However, problems can arise when an accused has been provided with or searched online for information that is not relevant to their matter, causing additional delays while the magistrate tries to address these irrelevant arguments. One magistrate referred to a traffic matter where the unrepresented accused was reading from a script and raised a range of legal arguments; from not recognising the court, to questions of contract law and estoppel. These were clearly irrelevant to the matter at hand and as a result, a matter which should have taken 15 minutes took two hours. This example illustrates the challenge for magistrates of having to steer matters while simultaneously providing the accused with an opportunity to be heard. It also highlights the importance of information being available to unrepresented accused that is tailored to common matters that arise before the court.

A recurring theme was concern that an unrepresented accused may plead guilty to matters without fully understanding the ramifications of their decision. Magistrates were at pains to encourage unrepresented accused to seek legal advice in such cases. One magistrate gave the example of an accused wanting to plead guilty to affray, a serious charge with the possibility of imprisonment. The magistrate commented on the importance of actively encouraging the accused to speak to VLA. Advice is also vital where there may be the possibility of negotiating with the prosecutor and having some of the charges withdrawn. In other cases, the

184 Case Study 14.1 (on file with authors).

185 Ibid.

186 Ibid.

accused might not be aware that diversion is a possibility. These are all matters that could be dealt with in advance with appropriate legal advice.

Magistrates identified the crucial role of legal advice and representation in the preparation of a sentencing plea. In cases where the accused had legal assistance, the plea was comprehensive and the magistrate was confident they had received as much information as possible: *'There might be forensic or psychological or psychiatric reports that need to be tendered... which if a person is representing themselves, may not have the capacity or appreciation that such information is important or that there is a need to do that.'*

An issue of concern that was also identified by magistrates in interviews was that of 'under-representation.' One magistrate indicated that in some cases they have to resist intervening *'to ensure that the accused person isn't prejudiced by having poor legal representation.'* This magistrate indicated that there may be a range of reasons that contribute to this poor legal representation. Other magistrates identified under-representation in the context of the poor or limited contact with an accused on remand being poor.

Finally, it should be noted that some accused appeared capable of representing themselves. Some had sought advice but did not consider they needed representation and were able to represent themselves effectively. Others would have liked representation but were unable to secure it. Nonetheless, they were clearly capable of understanding the questions and responding appropriately. Although such accused may not require legal representation, it is likely that they would be assisted by some guidance in how to prepare their matter, what information to include, and what to leave out.

### **Impact on Judicial Officers and Court Staff**

Some magistrates noted that their role is inherently complex, requiring them to be a *'psychologist and a social worker'* in order to consider what additional support services might be available for an accused. This can take additional time and must be balanced with the needs of other people on the list; prosecutors, legal representatives, and other accused who are waiting for their matter to be heard. One magistrate commented on the importance of moderating language, actively listening, and checking in to ensure that the accused genuinely understands. This too, increases the amount of time spent on a matter.

Several magistrates commented on the fact that dealing with unrepresented accused can be tiring and taxing on them personally. One magistrate indicated that:

*'you have to work very hard, intellectually and emotionally to manage them... the magistrates who make it look easy, it's like the duck floating on the water. You're thinking very quickly and have to be very careful about the words you use. You are thinking two steps ahead while eliciting information.... You're working really hard to pick up as much as you can in a really short period of time about someone to be able to triage them from the bench.'*

Further, during witness examination, magistrates commented on the need to rephrase questions in a way that makes sense and still reflects what the unrepresented accused intended to ask: *'[y]ou have to actually translate the question.'* Where an unrepresented accused is attempting to cross-examine a witness, magistrates may also have to intervene to ensure that the accused is provided with sufficient information about the rules of evidence, to ensure that they are able to participate effectively: *'[s]o that takes a lot of time and trying to get people to understand what part of the process they're in, what they're allowed to do at any given time in terms of the process can be very, very difficult.'* These issues in particular overlap with the need to ensure that everyone in the room is offered procedural fairness. Here, the magistrates have to ensure that they are not crossing the line and *'that balance is hard to strike'.*

Although unrepresented accused clearly can present challenges, one magistrate commented that those who are truly difficult to manage are relatively few in number, and the vast majority can be appropriately managed. Another indicated that there are benefits of dealing personally with unrepresented accused and the development of an ongoing relationship lends itself to a *'familiarity about them and their circumstances... that as a result, the client is better off.'*

## Reform

*'Most people want to come in when they're really desperate for help.'*

Although recommendations for reform are beyond the scope of this study, in interviews, magistrates were asked to comment on what steps they thought might be beneficial in assisting unrepresented accused.

A key theme that emerged from several interviews is that unrepresented accused are not provided with adequate self-help resources. This tends to result in magistrates having to provide legal information on the day, as well as eliciting relevant information from the accused. This emphasises the importance of adequate information being provided in advance, not only to inform the accused but to assist them to effectively prepare for their hearing.

Equally, the provision of information to an accused ahead of time can be particularly beneficial in relation to relatively simple matters such as driving offences. In such cases, magistrates can find themselves repeating the same information over and over. While an accused might have heard a previous explanation while waiting in court, this is not always the case and could be addressed if they had received preliminary information.

As noted in the literature, while providing information is a start, addressing the challenges of unrepresented accused requires a holistic response. Some magistrates commented on the importance of additional support services, in particular, interpreters. *'[H]aving interpreting services available at the start to help with those preliminary legal advice sessions or in interviews is incredibly important.'*

A number of magistrates commented positively on the value for unrepresented accused of sitting in court and observing matters before theirs. Some magistrates therefore suggested that it would be useful to replicate this by developing videos of different scenarios of what to do, and what not to do. This could be made available to the accused before their court date via the Magistrates Court's website.

Another suggested a 'blue sky' idea of a self-help centre located at the court, distinct from legal aid, and staffed by people trained to provide legal information and resources to assist people coming to court. Another idea was an app that would ask the questions that a magistrate could ask, and the person could fill in the answers and store or print them in preparation for their hearing.

One magistrate emphasised the importance of investing in assistance and services up front. So, for example, programs to address substance abuse or gambling addiction might help to address the underlying causes of the offending: *'if there's investment in this process and the services available, then you may not need the prisons.'* Similarly, another raised the potential for expanding therapeutic justice avenues that would address the criminogenic behaviour as an important area to focus on in terms of reform. This suggestion ties into the recognition by other magistrates that they are having to fulfil several roles; *'psychologist, social worker'*, in order to find appropriate assistance for an accused.

In addition to information for the accused, a common theme was the importance of ensuring better provision of information to magistrates prior to the start of matters. The more comprehensive the information provided ahead of time to the courts, the more likely the matter itself is going to be more focused and less expensive. In this context, one magistrate spoke about some of the advantages that have been brought about by the need to rapidly adapt to COVID-19. The ability to deal with some matters on the papers has been welcomed as it allows for magistrates to deal with simple matters without a court hearing. However, the detriment of this process has been that the information provided to the courts is not always adequate which requires courts spending additional time trying to acquire that information.

Along similar lines, another magistrate identified that there is currently no repository that contains relevant information about the accused in advance of the hearing. For example, special needs, English language proficiency, and the like. Such information, subject to appropriate controls, would be invaluable for both the magistrate and for the accused, because it would facilitate appropriate referrals being made.

In addition to information, some magistrates emphasised the importance of effective triaging of matters. An example of this is Victoria Legal Aid's proposed program - [Help Before Court](#), which one magistrate thought was an excellent idea; to try and get people assistance before first mention so that *'matters can progress as opposed to immediately adjourning it to get information and instructions'*.

Several magistrates commented on the importance of duty lawyers and the invaluable work that they do. Expansion of such services would greatly assist the courts in progressing matters.

In terms of judicial education and training specific to unrepresented accused, the majority of magistrates indicated that there are ample opportunities for participating in such training. However, all agreed that in addition to the theory, the opportunity for ongoing practical training is crucial; *'hands on experience is best'*.

Another suggestion was for magistrates to have greater power to make an order for legal representation in an appropriate case. As discussed above, at present, the only mechanism is to adjourn the matter in order to seek legal representation, it does not permit the court to order legal representation. Such a power, particularly in the case of persistently unrepresented accused, could stop a *'case going on for two weeks when it really should have gone on for no more than a day'*.

Finally, one magistrate commented on the need for new initiatives to be properly supported. *'It is all well and good to implement a service or a new protocol. But if you don't have everything in place - education, time, resourcing then it kind of makes it harder in a sense.'*

## Part 6: Conclusions and Future Research

*'Lack of representation is an expensive option.'*<sup>187</sup>

One of the most striking features of discussions around unrepresented accused in criminal matters, is the common belief that it is a problem that is increasing, while at the same time, there is a dearth of empirical data as to the extent and nature of the problem. This study aims to contribute to the limited literature in this area by providing a snapshot of the level and nature of unrepresented accused in the Magistrates' Court of Victoria, and to gain a more detailed understanding from magistrates of the challenges presented by unrepresented accused. It is, as far as we are aware, the first study of its kind in Australia, and one of only a few in the world.

Consistent with the limited literature available, and the estimates of magistrates who were interviewed for this study, we found a large percentage of unrepresented accused, approaching almost 50%. However, what the data also showed is the importance of examining in more detail the nature of the proceedings. For example, lack of representation was much more common in the initial stages of proceedings and in relatively minor matters, whereas an accused was more likely to be represented in more serious matters. Our observation study, which was limited to mention courts in the Melbourne Magistrates' Court, will therefore reflect different levels of representation compared to, for example, contested hearings. Similarly, when interviewed, magistrates were speaking about the full range of their experience, and therefore estimates of the prevalence of unrepresented accused understandably vary. Nonetheless, it is clear that magistrates encountered unrepresented accused frequently, and all considered that they presented some additional challenges compared to represented accused.

Contrary to expectations, we found that the observed matters involving unrepresented accused did not take more time than those with representation. Quite the opposite, matters involving represented accused took significantly longer on average, than with unrepresented accused. Consistent with findings in earlier studies, the majority of matters observed were very brief, with 50% taking 4 minutes or less.<sup>188</sup> Again, it was important to consider the nature of the proceedings. While there was in effect no difference in the average time taken for adjournments and applications, there was a significant difference in relation to pleas. In other categories there were insufficient data to draw a conclusion either way.

These findings were contrary to the experience of magistrates who overwhelmingly considered that matters involving unrepresented accused took longer than represented matters. The main reason for this perceived difference was the time taken to assist an unrepresented accused. The length of time may also vary with the seriousness of the proceedings, and whether it is contested. A number of magistrates commented on the fact that unrepresented matters are not necessarily legally complicated but take longer due to management issues. This can be exacerbated where an accused has a substance abuse problem, mental health condition, or language difficulties. Although matters may take longer to explain, it may be that the answers from an unrepresented accused are not as comprehensive as those from an accused with representation.

The data also reflect the courts that we observed, with almost half of the matters involving an adjournment. This skew towards relatively simple matters is likely to impact on the overall difference in average time taken. That is, the difference in time taken with and without representation is far less or non-existent in such cases, whereas in more serious matters such as pleas, the difference is more pronounced.

Also consistent with earlier studies, the role of adjourning and standing down matters as part of case management was a notable feature of the observed sample.<sup>189</sup> While there are many reasons for a matter being adjourned or stood down, the need to seek legal representation or legal advice arose in a significant number of cases. Although beyond the control of the magistrate, matters that are adjourned or stood down clearly have a flow-on effect on other parties including court staff, judicial officers, and the court itself.

187 Canadian prosecutor quoted in Department of Justice, Canada (n 21) 39.

188 Mack, Roach Anleu and Wallace (n 79) Chapter 4.

189 Ibid.

It was clear from the observational data, that even relatively simple matters could be derailed by challenges involving unrepresented accused. These could include behavioural problems, language difficulties, or simply not understanding the process. All of this could greatly increase the time taken, with magistrates concerned to ensure the process is fair to all involved. Bail matters were of particular concern where an accused was unrepresented, given the seriousness of the consequences and the challenge of explaining the complex tests for bail to an accused.

Pleas and sentencing hearings were a particularly significant category, with magistrates often commenting on their concern that an accused may plead guilty without fully understanding the ramifications of doing so. These were also the matters where the difference in average time taken was most pronounced. Driving offences were the majority of matters involving unrepresented accused. Although relatively simple, these offences can have serious consequences which an unrepresented accused might not fully appreciate. On the other hand, there is often limited discretion in terms of outcome, and this category of offences might therefore particularly benefit from information provided to unrepresented accused in advance of the hearing.

It is beyond the scope of this study to offer recommendations for reform, but some observations can be made on the importance of future research. While this study contributes to our understanding of the issues, there is clearly more research to be done. As has been made clear in the literature, both for civil and criminal matters, there is a need for more accurate and longitudinal data to be collected, so that debates in relation to the development of solutions and policies can be evidence based.

Secondly, there are numerous suggestions for measures to address the challenges of unrepresented accused, many of which were endorsed by the magistrates interviewed.<sup>190</sup> Beyond changes to legal aid eligibility, these include the provision of practical self-help material to unrepresented accused, a focus on assistance being provided at an early stage to facilitate the timely resolution of matters, and the role of duty lawyers. Unrepresented accused also have an impact on broader questions of case management. In particular, the prevalence of adjournments was described in an earlier study as 'perhaps the most substantial problem increasing the overall workload demands of the criminal list.'<sup>191</sup>

There is extensive literature in the civil context looking at measures put in place to assist self-represented litigants.<sup>192</sup> There is clearly a need for research focusing on those measures that are in place for unrepresented accused in criminal matters, evaluating their effectiveness, and proposing further reforms based on a clearer understanding of the problem.

Finally, while the focus on unrepresented accused is often on the time taken in court, it is clear that the challenges they face may arise much earlier, and have ramifications which then flow through to the court room. It is therefore important to remember that 'identifying solutions and implementing them is best done in a systems/holistic approach, one that explores the potential influence of all court participants at all stages of the process.'<sup>193</sup>

It is hoped that these findings will be valuable unrepresented accused, other stakeholders, and policymakers, and will contribute to evidence based debates for the development of solutions and policies.

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190 For a discussion of reforms in the criminal context, see Department of Justice, Canada, (n 21) 39-42.

191 Mack, Wallace, and Roach Anleu (n 79) 189.

192 Victorian Department of Justice and Regulation, *Access to Justice Review* (n 2) Ch 8; Richardson, Grant and Boughey (n 14) 52-73; Julie Grainger, *To Examine Strategies Adopted in Other Jurisdictions for Dealing with Litigants in Person in the Civil Justice System* (2012) Churchill Fellowship Report.

193 Department of Justice, Canada (n 21) 42.

# Appendix A

## Coding Sheet for Observation of Unrepresented Accused Matters

<b>Date</b>		
Time Started		
Time Ended		
Total Time		
Nature of case (e.g. plea, contest, bail, etc)		
Offence Type		
Consent to jurisdiction?	Y/N/NA	
Plea (where applicable)	G/NG/NA	
Result (e.g. sentenced, adjourned, stood down) Include outcome where possible		
Represented? (Y?N) Where possible, include nature of representation (e.g. solicitor, barrister, duty lawyer)	Y/N	
Accused asked if they had sought legal advice?	Y/N	
Had accused sought legal advice? If yes, nature of advice.	Y/N	

Discussion about whether the accused could/should seek legal advice/obtain representation?	Y/N	
Number of witnesses (if any)		
Any other preliminary matters discussed? If so, what?	Y/N	
Beginning of prosecutor's summary (time)		
End of prosecutor's summary (time)		
Set out below each interaction according to the coding protocol (see reverse) and provide a brief summary of the nature of the interaction. Where relevant, include qualitative comments such as whether accused appeared to understand.		
Any other issues?		

Set out below a brief description of the interactions in the courtroom following on from the prosecutor's summary of the case using the following codes.

**MP:** Magistrate Addressing Prosecutor  
**PM:** Prosecutor Addressing Magistrate  
**MA:** Magistrate addressing Accused  
**ML:** Magistrate addressing Lawyer  
**AM:** Accused Addressing Magistrate  
**LM:** Lawyer Addressing Magistrate  
**PA:** Prosecutor Addressing Accused

**PL:** Prosecutor Addressing Lawyer  
**AP:** Accused Addressing Prosecutor  
**LP:** Lawyer Addressing Prosecutor  
**MD:** Magistrate reading documents/deliberating  
**XC:** Examination in chief  
**XXN:** Cross-examination  
**RX:** Re-examination

**Other:** e.g. translator, support person,  
 For each interaction, briefly characterise the nature of the interaction:  
 Fact  
 Law  
 Evidence  
 Penalty  
 Personal circumstances.  
 Other

# Appendix B

## Questions for Interviews with Magistrates

1. How long have you worked as a Magistrate?
2. What are the typical matters that you hear in the criminal jurisdiction?
3. How often would you estimate you deal with accused who do not have representation?
4. In your experience, are there particular types of cases that are more likely to have unrepresented accused?
5. In your experience, do matters concerning unrepresented accused typically take more time than those with representation? If so, why?
6. In your experience, are matters involving unrepresented accused more complicated to deal with than those with representation? If so, in what way?
7. Are there any challenges unique to unrepresented accused when compared to accused with representation? If yes, what are those challenges?
8. Can you give examples of things that you would typically do or say differently for matters concerning unrepresented accused?
9. What education have you received regarding how to deal with unrepresented accused?
10. What additional education would you like (including topics and formats)? What other forms of education would you like to see?
11. How could unrepresented people be better supported? (e.g. by the courts; by Victoria Legal Aid)?

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