# BRIEFING PAPER

# Is Pre-recorded Cross-examination (YJCEA 1999, s. 28) Achieving Best Evidence in Sex Offence Cases?

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## Overview

This paper summarises doctoral research investigating pre-recorded cross-examination and related measures in sex offence cases. Related measures are defined here as ground rules hearings (GRHs), written questions on cross-examination, and best practice on cross-examining vulnerable witnesses. The research focused on the piloting of the s. 28 procedure for adult complainants who are "intimidated witnesses" for the purposes of the YJCEA 1999.[1]

Methods comprised court observation and interviews with barristers during the first six months of the s. 28 pilot for intimidated complainants. The study provides a detailed snapshot of how the s. 28 pilot scheme was working at that time. Main themes identified include that:

1. Multiple barriers affected intimidated complainants' access to s. 28 and related measures in practice.

2. Safeguards associated with the success of the first s. 28 pilot for "vulnerable witnesses"[2] were deemed unnecessary or applied inconsistently in intimidated cases.

3. Cross-examination was slower and calmer at s. 28 hearings but s. 28 did not materially affect the nature of defence questions.

4. Problems arose with the quality and playback of ABE interviews and s. 28 videos at trial, yet jurors were expected to evaluate the evidence the same way as live testimony.

The study concludes that clearer law and guidance is needed to realise the potential of s. 28 and related measures in sex offence cases. Greater investment in the design of recordings and the presentation of video evidence at trial is essential to achieve best evidence.

## Background

Pre-recorded cross-examination was the last special measure introduced under the YJCEA 1999. Initially, s. 28 was piloted for vulnerable witnesses but a second pilot for intimidated complainants began in June 2019.

Though pre-recorded cross-examination has recently been rolled-out for vulnerable witnesses *and* intimidated complainants in England and Wales,[3] there is scant research on how the procedure affects cross-examination and trial, particularly in sex offence cases.[4]

To date, much of the literature on s. 28 and related measures has focussed on vulnerable witnesses, e.g., children and those with cognitive or communication difficulties. Therefore, the extent to which protections associated with the s. 28 process apply to intimidated complainants is unclear, not least because the terms 'vulnerable witness' and 'vulnerability' is sometimes used to refer to adult victims of sexual violence, or as shorthand for all eligible witnesses under the special measures scheme.

The aim of the PhD was to address how s. 28 and related measures apply to intimidated complainants, since law is unclear.

[1] Under YJCEA 1999, s. 17(4).
[2] YJCEA 1999, s. 16(1)-(2). See Baverstock, J (2016) 'Process Evaluation of Pre-recorded Cross-examination Pilot (Section 28)', MOJ.
[3] Since November 2020 and September 2022, respectively.
[4] See Ward, D et al (2023) 'Process Evaluation of Section 28: Evaluating the use of Pre-recorded Cross-examination (Section 28) for Intimidated Witnesses', MOJ and Ipsos.

## Methods

- Court observation for 8-months, including 6 months at a s. 28 Pilot Court (Jun-Nov 2019).
- 36 cases observed, namely 22 s. 28 cases and 14 non-s. 28 cases.
- 46 hearings attended in s. 28 cases, including 15 GRHs; 18 s. 28 hearings; and 8 s. 28 trials.
- 21 barristers interviewed to supplement observation data.
- Study granted ethics approval by the HSSREC, University of Warwick.
- Judicial permission sought and granted to observe/take notes of open court proceedings.
- Further details, including limitations of the project, are discussed in Chapter 2 of the thesis.

## Key findings

### ➢ *Intimidated complainants lack status*

Barristers specialising in sex offence cases did not recognise or use the term "intimidated complainant". Rather, adult complainants in sex offence cases were described by barristers as "ordinary", "non-vulnerable" or "robust" in contrast to vulnerable witnesses.[5]

### ➢ *Loopholes in standards of advocacy*

Since adult complainants were regarded as "non-vulnerable", barristers did not consider that best practice on cross-examining "vulnerable" witnesses applied to intimidated complainants, nor did those interviewed believe a specific toolkit on the treatment and questioning of intimidated complainants was needed. However, barristers conceded that standards of advocacy varied "wildly"[6] in sex offence cases and expressed frustration that some defence advocates were not as trained or experienced as CPS RASSO Level 4 prosecutors.[7]

### ➢ *Problematic perceptions of the pilot*

Those interviewed did not understand the rationale for extending s. 28 to adult complainants, viewing them as less deserving or eligible for s. 28 compared to vulnerable witnesses. Consequently, barristers were confused about whether there was, or should be, a "higher test"[8] for s. 28 in intimidated cases, or whether it was "just another special measure".[9]

### ➢ *The formality of s. 28 applications*

In most cases, s. 28 applications were judge-led at Pre-Trial Preparation Hearings (PTPHs)

> *…the application process for s. 28 was more formal and required intimidated complainants to prove their fear and distress to the satisfaction of the court.*

because police and prosecutors were unaware of the pilot for intimidated complainants. In contrast to screens or live link, the application process for s. 28 was more formal and required intimidated complainants to prove their fear and distress to the satisfaction of the court. Applications were adjourned at the PTPH if witness statements were not sufficiently detailed for this purpose. Though the statutory test is the same, applications for s. 28 appeared more difficult to substantiate, e.g., in one case the judge rejected the s. 28 application but granted screens at trial.[10]

### ➢ *Defence responses to s. 28 applications*

Some defence barristers submitted that live link ought to be granted instead of s. 28 in historic cases or when s. 28 was scheduled close to trial. This stems from a reductive view among some practitioners that the aim of s. 28 is merely to speed-up the process of testifying. Yet, data suggests that s. 28 may enhance intimidated complainants' ability to give their best evidence and exercise voice and control in significant ways, including where trials are postponed due to defendant ill-health, listings, or in the event of re-trial.

[5] See Ch 3 of the thesis, pp 94-102.
[6] Interview DB, Case 9 (s. 28, intimidated complainants), Ct F.
[7] https://www.cps.gov.uk/advocate-panels/advocate-panels-2020-panel-general-crime-and-rasso-list. See Ch 3 of the thesis, pp 105-107.
[8] Interview DB2, Case 25 (s. 28, 'vulnerable' complainant), Ct F.
[9] Interview PB, Case 32 (s. 28, intimidated and 'vulnerable' complainants), Ct F.
[10] Interview DB2, Case 25 (s. 28, 'vulnerable' complainant), Ct F. See further, Ch 3 of the thesis, pp 129-136.

### ➢ *Impact of listings on access to s. 28*

Accommodating s. 28 hearings for adult complainants was regarded as problematic because they take longer and are scheduled during the court day. Listing pressures may also affect the expertise of counsel willing to take on such cases as well as continuity of counsel.

> *…the regulatory element of the GRH had been stripped away…. it was merely "the physical procedure under s. 28 being adopted."*

### ➢ *Role of GRHs in intimidated s. 28 cases*

GRH's were listed in most intimidated s. 28 cases observed but they lacked the function and legitimacy they commanded for vulnerable witnesses. The pervading view among judges and counsel was that the regulatory element of the GRH had been stripped away. There was "no question of judicial intervention in questioning, save in the normal way" because it was merely "the physical procedure under s. 28 being adopted".[11] In one s. 28 case, the GRH was abandoned because the judge and barristers agreed it was unnecessary; "it was just normal cross-examination".[12]

### ➢ *Topics rather than written questions*

At PTPHs, judges ordered defence barristers to "indicate general areas of cross-examination"[13] on GRH Forms, rather than set out all their proposed questions. Data suggests that topics were requested to indicate the volume of questions and duration of the hearing for listing purposes, rather than as a means of exploring and moderating cross-examination at GRHs.

### ➢ *Matters discussed at GRHs*

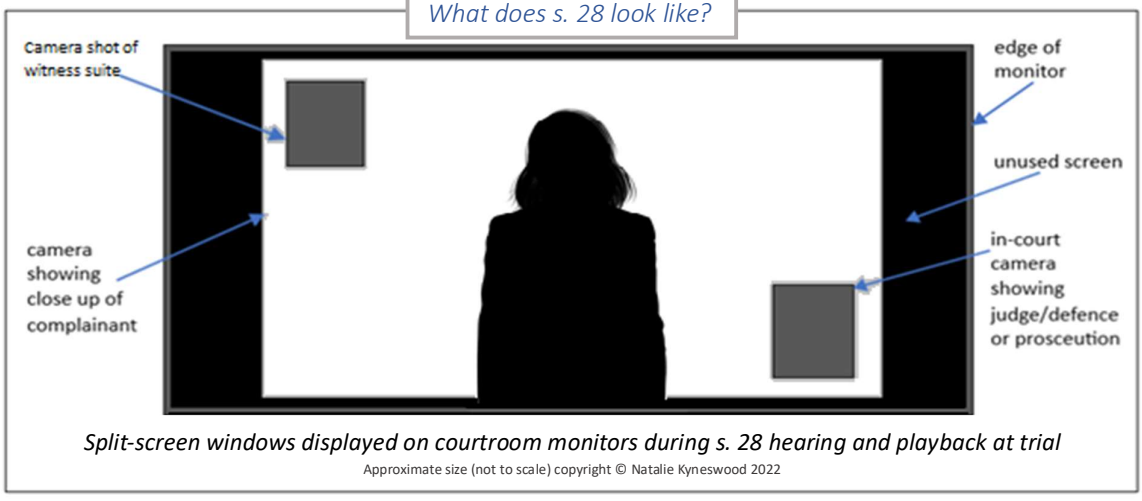
Though listed for an hour, GRHs tended to last under 10 minutes and consisted of checking the length of cross-examination, the date of the s. 28 hearing and ordering the defendant to attend. The treatment of intimidated complainants was only ever discussed in terms of whether the judge and defence counsel should meet the complainant beforehand. Question topics were touched upon at some GRHs observed, but this depended on the initiative of the judge or the prosecutor: "[t]he judge at the hearing will either say nothing about the topics or will question if they are necessary and relevant".[14] Consequently, matters that should have been fully explored at GRHs were still unresolved or outstanding by the time of the s. 28 hearing in some cases.

> *"I'm always… a lot slower, a lot calmer because I am aware it needs to be captured properly on the recording."*

### ➢ *Impact of s. 28 on cross-examination*

Live link recording technology and the re-scaling of participants on courtroom monitors at s.28 hearings affected the dynamics and delivery of cross-examination. As one barrister remarked:

*What does s. 28 look like?*




*Split-screen windows displayed on courtroom monitors during s. 28 hearing and playback at trial*

Approximate size (not to scale) copyright © Natalie Kyneswood 2022

[11] PTPH Judge, Case Observation, PTPH, Case 18 (s. 28, intimidated complainant), Ct F.
[12] Interview DB, Case 18 (s. 28, intimidated complainant), Ct F. See Ch 4 of the thesis, pp 145-149.
[13] PTPH Judge, Case Observation, PTPH, Case 34 (s. 28, intimidated complainant), Ct F. See Ch 4 of the thesis, pp 150-158.
[14] Email PB, Case 14 (non-s. 28, intimidated complainant), Ct F.

"I'm always… a lot slower, a lot calmer because I am aware that it needs to be captured properly on the recording".[15] However, though barristers predicted that s. 28 would "tighten up questioning because it makes people more focused",[16] the quality of advocacy and adherence to best practice on cross-examination differed dramatically in s. 28 cases observed. This is because questions were not routinely written out or scrutinised at GRHs and some barristers eschewed best practice or claimed it did not apply. Barristers also said they were less focused at s. 28 hearings than trial.

### ➢ *Matters arising after s. 28 hearings*

Rather than recalling complainants, judges and barristers found alternative ways of dealing with matters arising after s. 28 hearings. However, some methods, such as the use of admissions to put late disclosure of third-party material before the jury, hampers the ability of both parties to test the evidence and denies complainants the opportunity to address issues that may undermine their credibility.[17]

*…the viewing experience…should be more like TV, not less.*

### ➢ *S. 28 trials*

Pre-recorded evidence affected trial advocacy, judicial directions, adversarial discourses and the way evidence "flows and unfolds"[18] at trial. In some ways, it made adversarial trial more fragmented and less coherent. The poor quality of recordings and problems with playback equipment caused delays and distractions. It was not always possible to discern the finer details of the complainant's account from ABE interviews and judges and barristers were not always audible or visible on s. 28 recordings. Judges worried that jurors disconnect with evidence presented on 'TV' but data suggests that the viewing experience of pre-recorded evidence should be more like TV, not less.

## Conclusion

Uncertainty around access to s. 28 and related measures is undermining reforms in this area. Reducing the s. 28 process to the "physical procedure" strips away opportunities to improve the treatment and questioning of intimidated complainants. Technology has the ability to enhance the presentation of evidence at trial but pre-recorded testimony currently "looks cobbled together and amateurish".[19]

*"The aims of Section 28 are…entirely laudable…. However, the practical realities and the theory do not blend together well at the moment."*

## Recommendations

- Distinctions between intimidated and vulnerable complainants need re-evaluating.
- All modes of testifying should be available as of right to complainants in sex offence cases.
- Guidance is needed to define the role of GRHs, written questions and best practice on cross-examination in sex offence cases.
- RASSO training and accreditation should be mandatory for defence advocates.
- A specific toolkit could accompany training to bridge gaps in knowledge and protocol and promote best practice.
- More investment in video design, recording equipment and playback facilities is essential to achieve best evidence at trial.

## Further information


- This research was funded by the ESRC: Ref ES/P000711/1.
- For full text of the PhD thesis, visit: https://wrap.warwick.ac.uk/176755/.
- Natalie Kyneswood has been awarded an ESRC Postdoctoral Fellowship at the Centre for Socio-Legal Studies, University of Oxford, to consolidate her PhD research.
- Visit the project webpage or email natalie.kyneswood@csls.ox.ac.uk for information.

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[15] Interview DB, Case 9 (s. 28, intimidated complainants), Ct F. See further, Ch 5 of the thesis, pp 193-196.
[16] Interview PB, Case 6 (non-s. 28, 'vulnerable' adult complainant), Ct F. See further, Ch 5 of the thesis, pp 198-205.
[17] E.g., the rule in *Browne v Dunn* (1893) 6 R.67, HL. See further, Ch 6 of the thesis, pp 233-239.
[18] Interview DB2, Case 25 (s. 28, 'vulnerable' complainant), Ct F. See further, Ch 6 of the thesis, pp 244-247.
[19] Email DB1, Case 25 (s. 28, 'vulnerable' complainant), Ct F. See further, Ch 6 of the thesis, pp 247-259 and 273-275.