"It's the judicial equivalent of robbing Peter to pay Paul" – The implementation gap in section 28 Youth Justice and Criminal Evidence Act 1999

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Abstract

Section 28, the last of the special measures under the Youth Justice and Criminal Evidence Act 1999 to be implemented, was rolled out across England and Wales between 2020 and 2022. This allows vulnerable and/or intimidated witnesses and complainants, who have first pre-recorded their evidence-in-chief through a police video-recorded interview, to pre-record their cross-examination, which is then presented to the court during the substantive trial. This article critically explores s.28 by drawing upon qualitative data from 108 semi-structured interviews conducted with participants across seven stakeholder groups, including criminal justice practitioners, and complainants and their families in sexual offences cases. Through a critical consideration of the articulated benefits associated with s.28 within the context of sexual offences cases, we argue that there continue to be substantial challenges associated with its implementation that reduce its prospects for success, and which need to be addressed as a priority.

Introduction

The Youth Justice and Criminal Evidence Act 1999 (YJCEA) introduced a range of special measures designed to help vulnerable and/or intimidated complainants and witnesses give their best evidence during a criminal trial. These special measures include the use of screens to shield the witness or complainant from the defendant (Youth Justice and Criminal Evidence Act 1999, s.23), the use of a live video link allowing the witness or complainant to give evidence from outside the courtroom (Youth Justice and Criminal Evidence Act 1999, s.24), and the removal of wigs and gowns by counsel and judges (Youth Justice and Criminal Evidence Act 1999, s.26). Section 28 (hereafter s.28) is the last of the special measures under the YJCEA to be implemented and allows "vulnerable and intimidated witnesses to record their cross-examination before the trial" (Baverstock, 2016: 1). In this article, we draw on findings from a wider project ('Justice in Covid-19 for Sexual Abuse and Violence'), hereafter 'JICSAV', that explored innovations and challenges in the justice journeys of rape and sexual assault complainants during and beyond the Covid-19 pandemic (https://www.coventry.ac.uk/research/research-directories/current-projects/2020/jicsav/). Data for that project was collected between May 2021 and May 2022, with a focus on experiences in the period since the first lockdown came into force in the UK on 23rd March 2020. As such, our data collection coincided with key stages in the piloting and roll out of s.28 in England and Wales. In that context, our participants extensively discussed s.28, revealing a

significant implementation gap for this measure which, we argue, is likely to substantially undermine its effective operation.

In what follows, we divide our discussion into three main parts. In the first part, we provide a brief description of the background to, and design of, s.28 in England and Wales, including an account of its implementation journey to date and the key findings from associated Ministry of Justice process evaluations. We then turn to our JICSAV project, and describe the collection and analysis methods used in relation to the data that underpin the findings and discussion we present here. In the third, and most substantive part, we set out our key findings relevant to s.28. In a context in which the implementation of s.28 has inevitably continued to evolve in the period since our data collection, we also highlight here the extent to which more recent commentary supports the ongoing relevance of our findings, and reflect on the overall implications for the future operation of this special measure, a matter on which there remains considerable concern and debate (UK Parliament 2023). In the final section, we conclude that s.28 has the potential to bring improved experiences for complainants and witnesses. However, there remain substantial challenges to its implementation that reduce its prospects for success, and which need to be addressed as a priority. While some of these may be specific to the English and Welsh context and/or to s.28 procedures, many are apt to also be encountered in other jurisdictions – including, for example, Scotland, Northern Ireland, New Zealand and some Australian states – where reforms to expand modes of testimony-delivery to include more routine use of pre-recorded cross-examination, particularly by witnesses in sexual offence cases, have recently been recommended, announced, or implemented (see further, e.g. Victims, Witnesses and Justice Reform (Scotland) Bill 2023; Sexual Violence Legislation Act 2021 (New Zealand); Victoria Law Reform Commission, 2021; Gillen, 2019).

Section 28: Background and Implementation

S.28 of the YJCEA 1999 allows vulnerable and/or intimidated witnesses and complainants in England and Wales to pre-record their cross-examination before the trial, so that the s. 28 recording can be presented during trial without the witness needing to attend. This special measure can only be used where an Achieving Best Evidence (ABE) investigative interview has already been video-recorded by the police (under Youth Justice and Criminal Evidence Act 1999, s.27), which is typically then relied upon to provide the complainant's evidence-in-chief.

Any complainant who is eligible for, and may benefit from, utilising s.28 should be identified by the police investigating officer as early as possible in the investigation process, as outlined in the Criminal Practice Directions (2023, 6.3.3). The Crown Prosecution Service (CPS) should also be notified by the officer at an early stage that the case is one that could potentially involve use of s.28. Once a positive charging decision has been reached, the CPS prosecutor should notify the Magistrates' Court at the First Hearing about any s.28 application, which is then made at the Plea and Trial Preparation Hearing (PTPH) in the Crown Court. If the s.28 application is accepted, the timetable for the case should also be agreed at the PTPH. Although its availability is not restricted to witnesses in sexual offence cases, recent evidence submitted to the Justice Committee Inquiry on the use of s.28 has indicated that, since the commencement of pilot provision to vulnerable witnesses in 2016, these have constituted the overwhelming volume of cases where the measure has been used (88%) (Thomas, 2024: para 2.2).

Case management in a s.28 case requires early disclosure, and a Ground Rules Hearing (GRH). In relation to the former, processes for securing and screening disclosure should begin immediately, even prior to any charging decision (Baverstock, 2016: 74). This is key to ensuring timely case progression more broadly, but in s.28 cases it can be particularly important since many of the benefits to complainants and witnesses of earlier evidence-capture will be negated if they have to be recalled for further cross-examination because of new information or evidence in the case. The right of the defendant to a fair trial in s.28 cases is also safeguarded in this context. In relation to the GRH, the individual needs of the complainant should be discussed, as well as the particulars of the cross-examination process. In the case of vulnerable complainants, the length of the s.28 hearing and the questions to be put will also be determined (Criminal Practice Directions, 2023: 6.3.33-6.3.34). The s.28 hearing marks the beginning of the trial (Criminal Practice Directions, 2023: 6.3.36). At the hearing, the complainant "will be cross-examined and re-examined, if required, via the live link from the courtroom to the witness suite … and the evidence will be recorded" (Criminal Practice Directions, 2023: 6.3.37). Following the hearing, the judge will then make further orders in relation to the progress of the case, as well as any editing of the recording as agreed between the prosecution and defence counsel (Criminal Practice Directions, 2023: 6.3.39). The cross-examination recording is then stored securely until it is played to the jury at trial.

S.28 cases thus have distinctive practical features. Amongst them is the expedited timeframe required in relation to case investigation and preparation, charging, and disclosure. This means that much of the work in s.28 cases is 'front-loaded', particularly for the police and CPS. A further feature is the requirement for continuity of prosecution counsel throughout the PTPH, GRH, s.28 hearing, and the remainder of the substantive trial. Whilst continuity of defence representation is also encouraged, it is not currently mandatory unless ordered by the judge (Criminal Practice Directions, 2023: 6.3.51-6.3.52). Similarly, whilst it is possible that the same judge may sit throughout the case, this is not required unless ordered by the Resident Judge or nominated lead s.28 judge (Criminal Practice Directions, 2023: 6.3.53).

The recording of cross-examination prior to trial allows it to take place earlier in the process, which may aid witness and complainant recall, and thereby improve the quality of substantive evidence (Roswell et al., 2023: 52). S.28 also aims to improve the experience of the criminal justice process for witnesses and complainants more broadly by reducing the anxiety that might otherwise be associated with attending court and enabling them to access support earlier (Baverstock, 2016: 1), e.g. counselling and therapy for complainants in sexual offences cases. Despite widespread support for these aims during the legislation's drafting and enactment, and the more rapid implementation of other special measures contained within the YJCEA, s.28 "was not immediately implemented due to concerns about the procedural changes required, the available IT at the time and the cost" (Baverstock, 2016: 1). Indeed, it was not until 2014 that it was first piloted in three Crown Courts in England (Liverpool, Leeds, and Kingston-upon-Thames), with this pilot being specifically restricted to the category of vulnerable witnesses and complainants. Vulnerable witnesses are those who are under the age of 18 at the time of the hearing, or whose quality of evidence is likely to be diminished because they are suffering from a mental disorder, they have a significant impairment of social functioning or intelligence, or they have a physical disability or are suffering from a physical disorder (Youth Justice and Criminal Evidence Act 1999, s.16).

The Ministry of Justice commissioned a process evaluation of this pilot "to help understand whether the pilot processes worked as intended and to help guide policy decisions on whether and how best to roll out s.28 more widely after the pilot" (Baverstock, 2016: 3). This evaluation, published in 2016, captured the perspectives of 40 practitioners alongside 16 witnesses and their parents/carers who utilised the s.28 measure. It also analysed monitoring data collected during the pilot, in order to generate "indicative estimates" of the potential outcomes and timeliness of s.28 cases and the potential volume of cases in the event of a wider roll-out (Baverstock, 2016: 3). It concluded, based on analysis of 194 cases where s.28 was used by witnesses in the pilot courts, that the measure could save court time by reducing trial length (Baverstock, 2016: 8), and may encourage greater use of guilty pleas by defendants as a consequence of evidence being gathered and disclosed to the defence sooner (Baverstock, 2016: 9 and 33). The evaluation also reported that the majority of professionals and trial parties involved felt the measure facilitated improved witness recall, better quality evidence (Baverstock, 2016: 67-68), and a less distressing engagement with the justice process overall (Baverstock, 2016: 7).

Following on from this broadly positive appraisal, in 2019, the pilot was extended within the three original courts to include intimidated witnesses and complainants (Flury, 2021), that is those whose quality of evidence is likely to be diminished by reason of fear or distress in relation to testifying in the case. Complainants in sexual offences and modern slavery cases automatically fall into this category (Youth Justice and Criminal Evidence Act 1999, s.17). Four additional courts – Durham, Isleworth, Wood Green, and Harrow – also joined the extended pilot in 2021 (Flury, 2021). In 2020, s.28 began to be rolled out nationally across the Crown Court estate, albeit limited at that stage to vulnerable witnesses and complainants.

In June 2021, the Government's long-awaited 'End-To-End Rape Review' report was published. Within it, amongst other things, there was a commitment to evaluate the pilot involving intimidated witnesses and complainants, prior to also rolling out s.28 to this cohort at all Crown Courts (HM Government, 2021: para 110). A second evaluation was to be commissioned, which would:

> "explore witness and practitioner views and experiences of s.28 to help understand whether the s.28 provision for s17(4) intimidated witnesses … worked as intended. It also aimed to identify which parts of the process were working well and any improvements that could be made" (Ward et al., 2023: 1).

As part of this second process evaluation, interviews were conducted with 29 criminal justice practitioners and 13 intimidated witnesses, 11 of whom had used the s.28 special measure (Ward et al., 2023: 1). Though its findings were not, in fact, published until 2023, in the period following the 'End-To-End Rape Review,' a phased roll-out of s.28 for intimidated witnesses and complainants was nonetheless undertaken, being completed across England and Wales in September 2022 (Ward et al., 2023). While this expedited process rendered the findings of the second evaluation somewhat redundant in determining the appropriateness of a national roll-out for this cohort, it nevertheless provided useful insight into the challenges and opportunities associated with the operation of the provision and its effects on trial processes. These included "an improved experience for witnesses giving evidence via s.28, compared to cross-examination live at trial" (Ward et al., 2023: 2), but mixed perceptions around the

benefits of s.28 in relation to witness attrition and engagement, and concerns about negative impacts on court listing pressures (Ward et al., 2023: 3). In addition, although the process evaluation did not explore the impact of the use of s.28 on pleas or conviction outcomes directly through data from the pilot sites, it reported that participants felt that there would likely be minimal impact thereon (Ward et al., 2023: 3).

Together, these two process evaluations, commissioned by the Ministry of Justice, do provide important insight, not least since – until very recently – they afforded the only published analyses of s.28, which incorporated qualitative data gathered from criminal justice professionals and witnesses. By the authors' own admissions, however, both are limited in their scope. The 2016 pilot process evaluation utilised a small sample of practitioners (*n*=40) and witness interviews (*n*=16), and an analysis of monitoring data from the three pilot courts (Leeds, Liverpool, and Kingston Crown Courts), with a potentially significant acknowledgement from the outset that "the courts chosen for the pilot were selected because judges in those courts were supportive of the principles of [s.28]" (Baverstock, 2016: 23). As such, the generalisability of the evaluation's findings outside of the pilot areas is unclear. Similar issues also befall the 2023 evaluation, which "summarised the views and experiences of a small cross-section of practitioners and witnesses in a select few pilot areas, working at different stages of the rollout" (Ward et al., 2023: 2). The focus within both evaluations solely on the pilot regions means that their wider applicability may be limited, particularly given the additional resourcing afforded to original pilot sites for their role in the development and implementation of s.28, and the significant variability of infrastructure, listing pressures, and personnel resources across the country. It is also notable that no members of the judiciary were interviewed in the 2023 evaluation, despite their importance to the effective operation of s.28, with the Judicial Office instead only providing a written response (Ward et al., 2023: 59-64).

A Justice Committee Inquiry, initiated in 2023, has now generated further important insight via submissions from various practitioner and academic stakeholders, including the JICSAV team (JICSAV, 2023). These submissions have documented findings that supplement existing process evaluations, for example, through additional research interviews with practitioners involved in s.28 cases outside of pilot regions (Fairclough, 2023), and/or through observation of the current day-to-day realities of the trial process for vulnerable and intimidated witnesses, whether or not they make use of s.28 measures (Kyneswood, 2023; Jackson et al, 2023). Some submissions have highlighted with particular urgency and concern the practical effects of the extended roll-out of s.28 on court listings and barristers' workloads (CBA, 2023; COEUS, 2024), while one has reported a potentially negative effect on the prospects for conviction as a result of using s.28, at least under current conditions of implementation (Thomas, 2024). Together with other related research that has recently explored broader shifts within the landscape of adversarial cross-examination (Jackson et al, 2024) and evaluated the adequacy of current prosecutorial strategy in rape and serious sexual offences (RASSO) cases (King et al, 2024), this has presented a complicated picture. It is one in which it is clear that, as we discuss below, s.28 has the potential to bring improved experiences and positive outcomes for complainants and witnesses, but there have been, and continue to be, substantial challenges to implementation that reduce prospects for success, and which must be addressed as a priority.

Methods

This article provides insight into the implementation and impacts of s.28 against a fast-evolving policy and practice context. We draw specifically on novel qualitative data in the form of 108 in-depth semi-structured interviews, which were conducted with participants across seven stakeholder groups, including criminal justice practitioners, and complainants and their families in sexual offences cases. This represents a larger and more diverse cross-section of interviewees than in the s.28 process evaluations or pre-existing academic research. Our participants came from across England and Wales, and unlike the Ministry of Justice's evaluations, our study included direct discussion with judges authorised to hear RASSO cases. Though our data clearly does not address all of the questions that require to be considered in a rounded evaluation of s.28 – in particular, for example, we do not have access to quantitative data regarding scale of usage, timeframes for case progression, and plea or conviction outcomes – it does provide important and original insights regarding users' experiences of the special measure in practice, and the ways in which oversights and shortfalls in implementation have, at times, presented substantial barriers. Moreover, while our fieldwork ended in mid-2022, as we will demonstrate, our findings continue to resonate with more recent accounts, affording confidence when extrapolating findings from this dataset to contemporary debates.

As noted above, the data underpinning this article were collected as part of the JICSAV project (JICSAV, 2022), which aimed to identify impacts of the Covid-19 pandemic on criminal justice policies and practices in sexual offences cases, as well as on practitioners, complainants, and their families; and to pinpoint innovations that could improve the experiences of complainants in sexual offences cases beyond the pandemic. Whilst s.28 was not introduced in response to the pandemic, nor was it an initial focus of JICSAV, in early interviews with criminal justice practitioners it was discussed by all participants because a phased national roll-out had begun in 2020, during the pandemic period. Due to the emphasis placed on s.28 by these participants, the interview schedule was amended to specifically include questions about it. A substantial amount of qualitative data was thus gathered about the implementation and impact of s.28 in sexual offences cases in the Crown Court. The fact that the data we explore in this article originated from a project looking at the wider effects of the Covid-19 pandemic on justice systems, rather than one designed specifically around s.28, is important to bear in mind given the self-selecting nature of participation. Indeed, the prominence of views and experiences regarding s.28 that emerged across interviews designed to span a wider range of issues is itself a significant finding, illustrating the scale of respondents' engagement with, and concern about or appreciation of, this innovation.

Between May 2021 and May 2022, in-depth semi-structured interviews were conducted with 108 individuals across seven stakeholders groups: 20 third sector professionals, Independent Sexual Violence Advisors (ISVAs) and Children and Young People's Independent Sexual Violence Advisors (CHISVAs); 14 professionals from Sexual Assaults Referral Centres (SARCS); 21 police officers working on sexual offence investigations; 9 CPS Senior or Chief Crown Prosecutors working within RASSO units; 6 RASSO certified criminal barristers with experience both in prosecuting and defending cases; 19 judges holding authorisation to hear RASSO cases; and 19 complainants and/or their family members. Six online workshops (attended by over 150 practitioners, policy-makers and academics) were also held over the project, where findings, including in relation to the design and implementation of s.28, were discussed.

Interview participants were approached for involvement through a range of avenues, including via researchers' existing networks, project partners and advisory group members, and social media. Whilst criminal justice practitioners and complainants and their family members were opportunistically sampled, attention was paid to the diversity of participants throughout with the aim of being as representative as possible, e.g. in terms of participants' gender, race, geographic location, professional role, etc. Professionals and practitioners were asked about the impacts of the Covid-19 pandemic on the progression of, and responses, to sexual offences cases. Complainants and their family members were invited to discuss their experiences of being involved in any aspect of the criminal justice process during the pandemic, for example, reporting the offence, ISVA support, police and CPS case decision-making, or the trial process. Interviews were mostly conducted online using video-conferencing software, with a small number being conducted by telephone. All were audio-recorded, before being transcribed and anonymised, with identifying information removed.

Ethical approvals for the research were gained from the authors' universities. Formal permission for judicial involvement in the project was obtained from the Judicial Office, and CPS involvement was approved by CPS Headquarters. Project leadership included lived expertise and the Charter for Engaging Survivors in Research (Perôt et al., 2018) informed our engagement with complainants and their families who were given details of support services that could be accessed, both prior to and following their interviews. These participants were also each provided with a £20 voucher to thank them for their time. All participants received a detailed information sheet prior to their interview, and they all signed consent forms.

The qualitative data underwent thematic analysis, using both inductive and deductive approaches (Braun and Clarke, 2021). Each transcript was firstly reviewed and coded by hand by two members of the team, with each independently drawing out key patterns and themes that emerged and then comparing them to ensure cross-validation of findings. To support this manual process, transcripts were then coded electronically using NVivo. This allowed themes to be further refined, additional themes and sub-themes to be identified, and for any associations between themes to be explored. The project's Research Associate supported data analysis across all participant groups to ensure consistency and quality. Themes identified in this way informed the six workshops held across the project. Discussions therein further supported and refined our analysis, ensuring the robustness and quality of research findings.

In what follows, we provide a critical appraisal of s.28 and its implementation, informed by the experiences and perspectives provided by our research participants. Discussions are organised thematically around the following four overarching themes: promoting recall and recovery, and reducing re-traumatisation; resourcing, listings, and logistical challenges; mediating effects and malfunctioning technology; and silver bullets and second chances. These themes continue to resonate with more recent commentaries around the operation of s.28, which have emerged since we completed our data collection and which we engage with below. As such, they reflect issues around implementation and impact that remain of ongoing concern, albeit often within the broader context of a recognition of the potential benefits associated with s.28 for some complainants and witnesses in sexual offences cases.

Section 28 Implementation: Goals and Gaps

Promoting Recall and Recovery, and Reducing Re-traumatisation

Across our interview participants, there was a fairly settled view that the introduction of the s.28 special measure, at least for use by those identified under s.16 of the YJCEA 1999 as 'vulnerable' witnesses, and in particular young children, was a welcome innovation. Two principal benefits associated with the use of s.28 by this cohort were highlighted. First, that early capture of evidence might improve prospects for accurate recall, and second, that it avoided the prospect of testimony-giving and court-attendance looming over witnesses for an extended period of time in a context in which the damaging effects of trial delays and disruption are substantial and well-documented (Rape Crisis England and Wales, 2023).

In relation to the first point, a Detective Constable (P21) reflected, for example, that "it can massively help in cases where you're dealing with children" and recounted a case involving a six-year-old complainant whose memory had already deteriorated in the time delay between his original ABE interview and s.28 examination. P21 hypothesised that, if this witness had been required to await a trial date before completing their cross-examination, it "could potentially mean that he wasn't able to give any evidence … and could mean that we end up losing cases at court." Indeed, several participants were clear that s.28 was of most benefit to child complainants, for whom "recollection was thought to be more at risk of impairments whilst waiting for trial" (Ward et al., 2023: 16) when compared to adult witnesses, something that has also been documented within existing literature (Gudjonsson and Henry, 2003).

Though such benefits in relation to recall and recovery could also be relevant to the use of s.28 by intimidated (adult) witnesses, it was clear that several of our participants were less convinced by their value in this context. For example, a RASSO ticketed judge (J13) stated that s.28 "should be limited to those witnesses for whom memory or trauma really is a live issue … so … children … or witnesses with pronounced learning difficulties or very difficult mental health issues." Within this context, another RASSO ticketed judge (J15) likewise questioned the value of s.28 for recall and recovery in cases where the adult witness was giving testimony in respect of an allegation of non-recent abuse. They explained:

> "it is excellent to be able to capture someone's evidence well in advance, particularly if they're very young – it's absolutely crucial because obviously children's memories are different to adults and shorter. But where you've got an adult complainant making a complaint about something that happened 25 years ago, perhaps s.28 is really quite pointless and may not be to the advantage of the complainant or the prosecution."

As we discuss in more detail later in the article, such contributions may reflect a wider scepticism amongst some professionals regarding the extent to which otherwise competent adult witnesses need (or, indeed, should be routinely offered) such special measures in relation to testimony-giving. This appeared to be connected, at times, to a concern that jurors could be less sympathetic to, and engaged with, accounts provided by adults via a pre-recording, even where they might be able to appreciate its value or appropriateness in relation to child complainants.

In relation to the second benefit highlighted by participants, which was linked to expedited timescales for evidence-completion, a Detective Sergeant (P20) emphasised that use of s.28

for child witnesses will “make a big difference” in that it “will speed up that process,” which they envisaged would be of considerable benefit to “that child’s wellbeing.” Meanwhile, speaking more generally, a Chief Crown Prosecutor (C10) maintained that s.28 was a “massive benefit to complainants” for whom “if they can do their bit, it’s on the record … it takes away that burden of having in the back of your mind all the time, ‘I’m going to have to give evidence about this, I’m going to have to be cross-examined’.” Likewise, a District Crown Prosecutor (C5) emphasised that, when s.28 is used, the victim’s contribution is “done and dusted” and “they can kind of move on a little bit”; while a Senior Crown Prosecutor (C6) described victims as being able to “step back from the process and get on with their lives” after the s.28 hearing is completed. Such sentiment has since been formally echoed by the CPS in their recent submission to the Justice Committee Inquiry, where findings from research into wider operational shifts in RASSO cases as a result of ‘Operation Soteria’ – piloted in a timeline that broadly coincided with the roll-out of s.28 to intimidated witnesses - were also drawn upon (King et al., 2023). There, the CPS underscored lawyers’ frequently positive appraisal of s.28 as “revolutionary,” “making life easier for the complainant”, and giving them “some control back” in respect of the criminal justice process (Crown Prosecution Service, 2023a: para 18).

For many interviewees in our research, this meant – amongst other things – that complainants were able to access counselling support with greater confidence that it would not undermine the justice process. It was also recognised that there could be a reduced likelihood of complainant withdrawal if their evidence could be secured at an earlier stage with the prospect of further traumatisation in the courtroom being removed. Indeed, the Head of a CPS RASSO Unit (C1) explained, “we know that delay causes attrition … the longer a case goes on … the more likely the victim will say I’m out of here, so [s.28] allows them to give their evidence in chief and cross examination earlier in the process, and that’s a clear benefit.”

The potential for some significant benefits to accrue as a result of using s.28 in terms of recall and recovery, particularly in relation to child witnesses are, therefore, clear. Nevertheless, other participants in our study were keen to caution that earlier capture of evidence did not always, or fully, relieve complainants’ anxiety regarding an impending trial and its outcome (see also Support after Rape and Sexual Violence Leeds, 2024; Citizens Advice Witness Service, 2023; Rape and Sexual Abuse Counselling Centre Darlington and Durham, 2023). As one Senior ISVA (13S19) explained: “even if they've done a s.28 … they've still got a wait for the outcome, so they just can't get on with their lives, they can't focus on their recovery, because they've still got this thing hanging over their heads.” This was a sentiment echoed by a s.28 ‘lead’ judge (J19), who acknowledged the practical realities associated with an impending trial: “if you do a s.28 it could be months. A defendant could be on bail in the area where you live, and you've given your evidence, and you're worrying about them having seen what you've said.” Likewise, the Criminal Bar Association’s (CBA) submission to the Justice Committee concluded that to “take the view that s.28 solves problems of delays in a backlogged criminal justice system by enabling victims to get their part in the trial process over with sooner” is “false reasoning,” and ignores the reality that “victims and defendants still have the case as a whole hanging over them until the final verdict” (CBA, 2023: para 45).

As noted in the extract from the CBA above, these issues are particularly pertinent in the context of the substantial backlog of cases, RASSO and otherwise, waiting to be heard in Crown Courts. As of December 2023, 9,792 RASSO cases were waiting to go to the Crown

Court – a new record high (Rape Crisis England and Wales, 2023). This backlog has increased significantly since the Covid-19 pandemic, when jury trials were initially suspended and then reinstated with strict social-distancing restrictions. There have also been intervening periods of barristers' strike action and an overall attrition of practitioners from the criminal bar – particularly pronounced in respect of practitioners undertaking RASSO work (CBA, 2023: para 60) - compounding that impact. Indeed, the current RASSO backlog represents an 85% increase from 2020 and the beginning of the Covid-19 pandemic (Rape Crisis England and Wales, 2023). The benefit for complainants of delivering their evidence earlier in the process can be, at least partially, undermined where the trial is delayed or takes place a significant time after the s.28 hearing; and one barrister has recently suggested that an increase in s.28 cases has itself "exacerbated the backlog of cases yet to reach trial" (Mushtaq, 2024: para 30. Certainly, new data, shared with the Justice Committee Inquiry, suggests that the average length of time between the s.28 recording and case completion has increased significantly as the measure has been rolled out nationally (Thomas, 2024)). Further investigation is clearly needed, however, to be able to ascertain whether these delays are a reflection of broader court congestion, a diversion of trial resource to s.28 proceedings, or greater success in 'front-loading' investigations to allow for completion of s.28s at an earlier stage.

It was also noted by some of our participants that a completed s.28 hearing could, paradoxically, reduce the impetus amongst professionals to push for a timely trial process. A Senior Crown Prosecutor (C2) observed that with "cases that should be prioritised because there's a vulnerable victim or witness, the trial dates are actually getting bumped off further than those which haven't been identified as having vulnerable complainants or witnesses, because they've done their bit." This was echoed too by individual barristers (Mushtaq, 2024; Roberts, 2023), as well as the CBA, in their submissions to the Justice Committee, with the CBA reporting that, across their members' collective experience, "courts often prioritise trials with live witnesses, meaning that s.28 cases can be delayed as judges consider 'the evidence is already in the can'" (CBA, 2023: para 44). In this context, Senior Crown Prosecutor (C2) was at pains to highlight during their interview that true "closure" cannot be achieved for trial parties until after the verdict, regardless of when evidence is captured. They explained that this is why "I am not keen on s.28" because, as they put it, if the witness "actually just pitched up to the trial, giving evidence in person, they would have had that closure much sooner."

It is worth underscoring here that, following the s.28 hearing, the witness is, of course, still unable to discuss the content of their evidence with anyone who is a witness in the case (including, in the case of children, their parents), which can present substantial difficulties. One parent (ISURF16) reflected on this in a context in which there had been an 18 month delay between their child's s.28 recording and their own testimony-giving at trial: they shared that not only did they feel unable to properly reconnect with their child during this period, but they felt disempowered as a parent from being able to support them in their recovery: "I kind of felt that I didn't have all the little details and yet I'm her sole carer. I'm expected to care for her without knowing everything." This difficulty was also recognised by a Senior District Crown Prosecutor and Head of a RASSO Unit (C4) who reported to us that:

> "when there's a parent who is also … connected and a witness in that case, I'm told by ISVAs and CHISVAs, particularly CHISVAs actually, that that's creating some problems for them because they want to undertake work that is for the family and that's very

> difficult when you've got one person who's completed, the child has completed their evidence, but the adult hasn't".

This particular consequence was also recognised by the Citizen Advice Witness Service (2023) in their submission to the Justice Committee, who noted that:

> "a long gap between the [s.28 hearing] and the trial may cause particular issues where young family members have given evidence through s.28 but others are required to be witnesses at the trial – this can cause real emotional difficulties within the family, exacerbated by the long time lines involved."

Indeed, such considerations led a s.28 'lead' judge (J19), to reflect that "when you speak to people, they say what the victim wants is closure, and they're not getting it with s.28."

Though it may be optimistic to position the criminal justice system as a vehicle for providing closure to victims of rape and serious sexual offences (Munro, 2023; McGlynn and Westmarland, 2019; Daly, 2017; Herman, 2005), it was clear in our interviews that, for some of those who had been involved in s.28 processes, the experience had been substantially less traumatising than what they had anticipated based on their expectations of the adversarial courtroom. In this context, the benefits - both potential and in some cases realised - of s.28 are, therefore, significant. For example, one mother of a complainant (ISURF10) described her daughter's use of s.28 in her sexual offences trial to the researchers in the following way:

> "s.28 is absolutely amazing, the best thing perhaps to come out of the criminal justice system … it took the edge off my daughter having to physically go into a courtroom and give evidence. Even with the special measures that are put in place, it's still intimidating for a young girl … All our needs were met and then the good thing about it was that the questions were limited."

The importance of this ought not to be lost sight of, despite concerns regarding implementation challenges.

Resourcing, Listings, and Logistical Challenges

With child and adult witnesses alike, concerns were expressed by many criminal justice practitioners in our study about the pressures that the expedited timeframes in s.28 cases can cause. For example, a RASSO ticketed judge (J10) observed that "in order to get a s.28 teed up, all the things that normally take several weeks to achieve have got to be done within a very short period of time … that puts enormous pressure on lots of different agencies." They also observed that it requires "a lot of hand-holding, a lot of micro-managing … to make sure things are done in the right timeframe" by the judiciary. This front-loading was often felt most acutely by the police (see also National Police Chiefs Council, 2023) and CPS. A Detective Constable (P04), for example, highlighted the requirements that it imposed on the police "to have got your full schedules together in a much more limited time," so as to ensure appropriate disclosure to the defence ahead of any s.28 cross-examination. This is particularly challenging in the context of already stretched resources across the criminal justice system, and an insufficient number of specialist RASSO police officers, CPS lawyers, and barristers, as well as increasing reporting rates and caseloads (Mushtaq, 2024; see, further, King et al, 2024).

Interviewees explained that one of the biggest hurdles in relation to s.28 was around the requirement for early disclosure. One RASSO barrister (C12), for example, expressed concern about the extent to which this was achieved in practice, noting "the problem with doing s.28

cases is that, quite often, you end up with material being disclosed after you've conducted the cross-examination, that would have had an impact on the way that you cross-examined." This was echoed by J3, a RASSO ticketed judge, who noted that it was more likely to arise as an issue, in their view, in relation to adult complainants in sexual offence cases: "The difficulty with adult s.28 cross examinations is that very often disclosure of that type, phones and other extraneous things, takes a lot longer and so you run the risk that you may say to the witness, right that's the end of your cross examination but then some new evidence comes in." Though it remains formally open to the court to allow further cross-examination in order for lines of questioning to be put to the witness that might not have previously been identified, participants indicated there would be considerable reluctance to this in practice, not least since – as discussed above - it would undermine one of the key aims associated with the provision of s.28, which was to give witnesses some assurance that their role in proceedings was concluded and that they would not later need to come to court. As J3 went on to express it, "you then have to re-address the whole issue of whether the s.28 was finite or not."

These challenges around the requirements of early disclosure in s.28 cases, particularly involving intimidated witnesses, were also noted by Jackson et al in their submission to the Justice Committee Inquiry, based on research into the changing nature of cross-examination. They explained how in instances where "full disclosure is not made in time for the s.28 hearing, there was an obvious reluctance to schedule a second pre-recorded cross-examination" (Jackson et al, 2023: 6). As a result, disclosure failures were potentially left to be addressed by an admission of agreed facts, which could operate to the disadvantage of a complainant who is then not afforded the opportunity to give a response to the issue subsequently raised (see also, CBA, 2023: para 26, which expresses similar concerns).

Another dominant theme across participant contributions was the extent to which s.28 had imposed additional demands on court resources and personnel in a context in which there were already acute shortages and overwhelming case backlogs to contend with. In particular, the requirement for continuity of counsel and the subsequent logistics of ensuring that counsel can be available to conduct a s.28 hearing on the scheduled date is challenging. The reality is that, in most cases, the permission of a presiding judge in a live trial in which counsel are engaged is required to hold over those proceedings and enable counsel to travel elsewhere to conduct the s.28 hearing. Where this permission is not granted, s.28 hearings often have to be delayed, which undermines their benefits in terms of early capture and certainty for witnesses. In the alternative, they may proceed but then need to be conducted at short notice by someone other than the designated counsel who will lead the rest of the trial. This frustrates the requirement for continuity of counsel and can introduce confusion into the cross-examination process in a variety of ways, including for trial parties and the jury. Indeed, the mother of a young complainant that we interviewed during our research (ISURF10) explained how on the morning of their child's s.28 hearing, they were informed that the prosecution barrister had changed to one they had never met before. This understandably caused anxiety for both her and her child, and may have reduced the quality of evidence adduced if the barrister had insufficient time to familiarise themselves with the case.

Whilst the principle of continuity of counsel is important, it has placed additional strains on courts in terms of being able to predictably and efficiently list hearings to maximise available

resource. As one RASSO barrister (C14) put it, "there have been huge listing problems" arising as a consequence of the roll-out of s.28 nationally and to a wider cohort of witnesses:

> "it is causing all sorts of knock on problems to all sorts of other trials because, you know, you've got to be there in person to do a s.28 and if you're in the middle of a trial somewhere else, you've got to be there in person … So it's the judicial equivalent of robbing Peter to pay Paul."

Similarly, another RASSO barrister (C7) observed that "when there was only a few of them it was manageable" but substantial shortages of barristers nationally, coupled with Crown Court backlogs, had already put huge pressure on diaries, and they suggested this has only been compounded by the logistical challenges of s.28 (see also Mushtaq 2024; Roberts, 2023). The judiciary are then tasked with managing requests from counsel to be released from trials to conduct s.28 hearings, which often presented significant dilemmas. This was reflected in the observations of J10, a RASSO ticketed judge, who described having been asked to excuse counsel from a "3-week horrible familial rape and sexual abuse case", and observed that "you just think, we're juggling competing vulnerabilities here." Meanwhile, other judges described the wider availability of s.28 as "incredibly disruptive" for trial listing and management (J18, a RASSO ticketed judge), "placing enormous pressure on every aspect of the system" (J5, a RASSO ticketed judge) and imposing a "huge burden on court staff" (J19, a s.28 'lead' judge), with a Resident Judge (J23) observing that "you shouldn't have a new system implemented which requires that level of optional cooperation" since it is doomed to be unsuccessful.

These concerns regarding the logistics of attending s.28 hearings and ensuring consistency of representation across trial processes were clearly acute for professional participants. It was apparent, however, that they were often considered to be less insurmountable when the measure was restricted in its availability to vulnerable witnesses, as defined under s.16 of the YJCEA. This was partly because of the lower volume of cases involving such witnesses. But it was also linked to the tighter management of s.28 in these s.16 cases; and in particular, to the use of GRHs to scrutinise the (typically, written) questions that defence counsel envisaged putting to the witness, to ensure that they were appropriate in tone and scope. Doing so, it was suggested by interviewees, encouraged a more predictable s.28 process. A Resident Judge (J9) reflected, for example, that "what has changed is that approach to cross-examination of young and vulnerable witnesses": a change they attributed largely to the effects of a robust GRH during which the judge will rule out lines of cross-examination that "are really grandstanding for the defendant rather than asking pertinent questions of the witness." This was echoed by a Chief Crown Prosecutor (C10), who noted, in relation to young and vulnerable witnesses, that "the cross-examination process tends to be more concise" (see also, Jackson et al, 2024). Thus, s.28 hearings involving vulnerable witnesses and children can typically be completed fairly quickly, with many judges listing these hearings first thing in the morning to minimise disruption to other trials they were presiding over, or counsel were appearing in.

The position is, however, currently quite different in relation to intimidated witnesses. Whilst it would be open to courts to impose a similarly structured process for scrutiny of questions intended to be asked of intimidated witnesses, emerging evidence of the early operation of the provision indicates that this rarely occurs (Kyneswood, 2022). Instead, GRHs tend to be substantially more perfunctory with advanced sight or detailed scrutiny of the questions intended for adult witnesses typically perceived to be unnecessary. As a s.28 'lead' judge (J19) put it, in relation to s.28 hearings with vulnerable witnesses, "all the questions are all set out,

the intermediaries approved them, and it's just a question of rat-a-tat-tat. Questions are asked, we know what the answers are going to be to most, they're going to be yes or no, and there we go." This was contrasted directly to the situation of an intimidated adult making a rape allegation who "will not be cross-examined in the same way with the same restrictions as a child. There may be topics requested as opposed to specific questions, but it won't go any further than that." Leaving aside concerns about the tone or relevance of such questioning, which we return to further below, at a practical level, J19 underscored "the impact that's going to have on the courtroom that the s.28 is taking place in, let's say it takes two hours rather than half an hour … it is just going to cause complete and utter chaos." This concern was echoed by the CBA in their submission to the Justice Committee Inquiry, where they opined that the s.28 provisions had been "pasted onto" the existing special measures regime "with good intention, but without the infrastructure to make it workable in practice" (CBA, 2023: para 9), and noted that while "s.28 may be an extremely useful tool in some cases," they were concerned that it was being used "far too widely" in practice with the "highly problematic" extension to s.17 intimidated witnesses having "compounded this issue" (CBA, 2023: para 10).

Mediating Effects and Malfunctioning Technology

Many participants expressed concern that the delivery of cross-examination via pre-recorded video (particularly when following use of a pre-recorded police interview as evidence-in-chief) might 'dampen' the impact of testimony for jurors, with associated effects on assessments of credibility and sympathy that could influence verdicts. Barristers and judges, in particular, warned that s.28 ran this risk "because you're playing them an ABE which is an initial account and then you're playing them a pre-recorded cross examination, it's almost as if they're watching a movie" (C14, RASSO barrister). This was contrasted with what was considered to be the "much more impressive" and "poignant" (C8, RASSO barrister) experience of witnesses giving evidence live in the courtroom. Though several participants felt that the risk of juror disassociation may be less substantial in respect of child witnesses, they were confident that it would be an issue in relation to adults. As a s.28 'lead' judge (J4) put it:

> "if you don't have an adult in the courtroom and they're just recorded, I think you do lose the impact of the witness in court … it's my gut feeling that juries don't listen the same way as if somebody is in the same room and, of course, the defendant is present always through the whole trial and never lose sight of him."

This was reiterated to us by a RASSO ticketed judge (J3), who explained that "it's much easier to explain to a jury that the reason why they've had s.28 is because they're a child, or because they have mental health difficulties," but "I'm not enthusiastic with the whole roll out" since "it's going to be very difficult to address in judicial directions" as to why an adult would require a s.28 rather than giving testimony in the standard way. Such concerns around the potentially pejorative impacts of not having an adult witness giving evidence 'live' in the criminal courtroom are well-documented (Munro, 2018). As such, it is perhaps unsurprising that this issue was raised by several participants in our study, as well as being featured in evidence submitted by several practitioners (CBA, 2023; Mushtaq, 2024; Roberts 2023; COEUS, 2024) and academics (Jackson et al., 2023; Thomas, 2024) to the Justice Committee Inquiry.

Though the CBA have opined that "juries well understand the fact of a child or a young child being on a recording," they have also cautioned that jurors "may be less likely to understand

this in the case of an older child, or adult, who appears not to have any deficiency in communication or understanding" (CBA, 2023: para 27(d)). In this context, they suggest that a complainant's making use of pre-recorded evidence, including via s.28, "might confer an unintended advantage to the defence" (CBA, 2023: para 18). Recent research evaluating investigative and prosecutorial strategy in rape cases in England and Wales has further documented the tenacity of this perspective amongst many professional stakeholders; but it has also highlighted the extent to which there may be a growing divergence of views on the matter as between those involved at earlier and later stages of the criminal justice process (King et al, 2024). On the one hand, this research, which included a series of 146 interviews with stakeholders in policing, the CPS, and third sector, as well as RASSO counsel and sex-ticketed judges, reported a common view amongst counsel and the judiciary that it is "much more impactful" for witnesses to give evidence "face-to-face" with the jury (King et al, 2024: 87-88). However, it also documented strong endorsement of the use of special measures amongst police and many prosecutors, with the tensions this can provoke reflected poignantly in one comment by a CPS reviewing lawyer that "I'm sick and tired of judges and barristers saying that they want the victim in court behind a screen, so the jury can see them cry and shake" (King et al, 2024: 88). The researchers noted that such tensions could be particularly acute in respect of s.28, with barristers variously describing its use as "dangerous", "dehumanising" and "doing a disservice" to victims by "allow(ing) juries to completely disassociate," whilst CPS lawyers described it – in line with the CPS's submission to the Justice Committee (CPS, 2023) – as "revolutionary" and "brilliant" (King et al, 2024: 88-9).

In reality, the impact upon the jury resulting from the use of s.28, by different categories of witness and in different types of trial, remains uncertain. Prior research – much of it conducted with mock jurors via simulations, given legal prohibitions on research that asks about the content of real jury deliberations – has indicated that the removal of witnesses from the courtroom, for example through use of live-linked testimony, could operate to increase the credibility of the complainant for some observers, as much as it reduced their perceived credibility for others who found themselves feeling more detached (Ellison and Munro 2014; Taylor and Joudo, 2005). However, this work has not typically explored the impact on jurors of the compound use of pre-recorded evidence-in-chief (through video-recorded police interview) alongside pre-recorded cross-examination, which is the mode utilised under s.28.

Emerging research conducted in England and Wales exploring the effect of s.28 on conviction rates has indicated the existence of a potentially significant impact, and one that operates – for vulnerable and intimidated witnesses alike - in the direction of reducing the prospects for conviction when compared to live testimony (Thomas, 2024: para 2.8). Indeed, Thomas (2024) has reported that, in the period from 2016 to 2022, the jury conviction rate was 9% lower overall in cases where s.28 was used, with this figure increasing in respect of specific offence and witness categories, including rape of a child aged 13 to 16 (14.4%) and rape of a woman aged over 16 (18.1%) (Thomas, 2024: Table 12). These findings are stark, but as Thomas acknowledges, the extent to which they are best attributed to the mode of delivery *per se*, or to the circumstances in which pre-recorded evidence is currently operationalised and/or additional barriers to credibility associated with witnesses for whom use of s.28 may be necessary, remains unclear. Further work to explore the impact of s.28 on jurors, and thus to better understand what may be driving this apparent shift in conviction outcomes, is ongoing (Thomas, 2024). In those cases where special measures (including s.28) are used, however, it

will often be precisely because the individual witness is unlikely to be able to withstand giving testimony through conventional mediums, or may be at risk of withdrawal from the process altogether if that were to be their only option. Thus, the counter-factual against which the impact of use is to be measured is not one where the witness was necessarily present for, nor able to give, clear and effective evidence live at trial. This was emphasised by a Senior Crown Prosecutor (C6) in our research who explained that any concerns around potential lower conviction rates in s.28 cases needed "to be contrasted with the fact there's been a trial at all … at *least* we've had our prosecution, at *least* she's had the chance to give evidence." In this context, findings from a recent project exploring changings forms and content of cross-examination, particularly in rape and sexual offences trials, are also instructive. Reporting that of the 12 trials in which complainants relied on pre-recorded cross-examination, only 5 resulted in convictions, the researchers noted "it might be tempting to infer that … video-links do, in practice, impact negatively on juries." They went on to underscore that "all things, however, are not equal." More specifically, they adjudged "there were evidential weaknesses in the prosecution case in each and every one of the video-link cases," and noted there was also no higher a conviction rate within their sample of observations in cases involving screens relative to the cohort that relied on remote forms of court testimony (Jackson et al, 2024: 58).

Any data regarding the impact of s.28 on conviction must be situated in the context in which potential and realised benefits to the experiences of complainants and witnesses are recognised, which includes how the provision has been, and currently is, operationalised. As discussed, this is one in which numerous obstacles to best practice have been encountered. Thus, any negative effects on conviction rates linked to use of s.28 might reflect the implementation gap that we expose in this article, as much as the mode of delivery *per se.* Indeed, while Senior Crown Prosecutor C6 averred that "defence lawyers never resist a s.28 application, which I think says a lot," it is possible that this tells us far more about the shortfalls in how pre-recorded evidence is currently captured and presented in the trial process than about its potential to empower witnesses to effectively communicate their account to jurors.

Certainly, a number of interviewees expressed concern about the adequacy of the equipment used for capture and playback of s.28 recordings within courtrooms. It was suggested this could further "dampen the effect" (C14, a RASSO barrister) of complainants' testimony because of poor audio and visual quality, or a lack of integration across playback media. Indeed, a circuit judge (J8) noted that issues with sound quality could be such that "the jury might need to have a transcript or something just to follow it"; but this causes additional difficulties since such transcripts are not routinely available. Playback failure was also reported: the mother of a complainant described the additional stress caused when there were technical issues with her daughter's pre-recorded evidence being played to the jury:

> "The playback wouldn't work on the day that they planned to do it … just wouldn't playback and so then there was a lot of faffing and then deciding what they were going to do then because obviously they couldn't do it in the order that they wanted … and it just felt like, 'really?' We've waited all this time and now the videos don't work" (ISURF16).

Technological issues of this sort have been identified as a consistent challenge in both Ministry of Justice process evaluations (Baverstock, 2016; Ward et al., 2023), as well as in contemporaneous academic research exploring s.28's implementation (Jackson et al., 2023;

Kyneswood, 2023), and submissions by practitioners to the Justice Committee Inquiry (National Police Chiefs Council, 2023; Roberts, 2023; CBA, 2023; COEUS, 2024). Though the scale of the funding challenges associated with improving court infrastructure and IT equipment to render it fit for purpose cannot be underestimated, the fact that the Government has pushed forward with roll out of s.28 in the absence of a clear strategy for ensuring appropriate infrastructure investment and modernisation is, in itself, problematic.

In this context, it is also worth noting that concerns about audio-visual quality were not restricted to s.28 recordings: concerns were frequently expressed too about whether police ABE interviews were 'fit for purpose'. A RASSO ticketed judge (J15) provided an example of a witness being filmed against the background of a sunny window, with the consequence that the jury members could only see their silhouette. J15 also explained: "the biggest problem is not being able to hear [complainants], you can hear the police officer loud and clear, but because they don't want to mic up the witness, I think probably because they don't want to appear too formal … it often means you can't hear the witness properly."[1] Where witnesses make use of s.28, they have already provided their evidence-in-chief through an ABE video-recorded police interview. The conjoined effect of poor quality recording and playback across both mediums may be particularly damaging, potentially reducing the ability of jurors to follow, understand and connect with their testimony. Thus, as Kyneswood recently put it when drawing on her research into the operation of s.28 for intimidated witnesses in her submission to the Justice Committee Inquiry: while "judges and barristers are concerned that jurors may disconnect from video evidence or treat it like a 'soap opera'," there is a basis for arguing instead that "the experience of viewing pre-recorded testimony should be more like TV, not less" in the sense of demanding improved audio-visual quality (Kyneswood, 2023: para 6).

The ongoing use of the ABE as evidence-in-chief in s.28 cases was raised by the CPS in their recent Justice Committee submission, who noted that an alternative would be "to collect the victim or witness' account by written statement or by video recorded interview, but to then pre-record both the examination-in-chief and the cross-examination in one hearing" (CPS, 2023: 7; see also COEUS, 2024; para 3.44). This may go some way towards addressing concerns about ABE quality, which intervening research on the prosecutorial handling of rape complaints in England and Wales has similarly confirmed to be frequent and well-grounded, with judges in particular variously describing ABEs as "chaotic," "confusing," "appalling" and "abysmal" (King et al, 2024: 35-36). However, it introduces alternative challenges, for example, by increasing scope for inconsistencies – real or apparent – to emerge across witnesses' accounts; and without substantial investment in the technology to store, playback, and display recordings to jurors in courtrooms, such a move is also unlikely in itself to overcome all concerns regarding poor audio-visual quality and its consequences.

Other technological issues were reported by professional participants in our study, most frequently associated with the centralised system in place for recording, storing, and playing back s.28 hearings. Participants explained that the need to pre-book a timeslot to record and

[1] For broader discussion of Achieving Best Evidence interviews, see also Westera, N., Powell, M. & Milne, B. (2017) Lost in the detail: Prosecutors' perceptions of the utility of video recorded police interviews as rape complainant evidence 50(2) *Australian & New Zealand Journal of Criminology* 252–268; McMillan, L. & Thomas, M. (2009) Police Interviews of Rape Victims: Tensions and Contradictions in M. Horvath & J. Brown (eds.) *Rape: Challenging Contemporary Thinking*, Willan, 255-280.

playback a s.28 hearing was impractical, inflexible, and did not reflect the complex reality of hearings within the courts (see also, Jackson et al., 2023: 4). As a RASSO ticketed judge (J13) put it: "the booking system is impracticable. You know, you have to book a particular slot. So, if anybody's delayed, you're stuffed; or if an issue arises, a point of law or something like that, if you lose your slot, you miss your slot and that includes for playback as well." J13 went on to explain that once a trial is listed, playback slots need to be booked months in advance:

> "we have to decide now, when it's going to be replayed to the jury and the trial is listed in July of next year … so counsel have to sort out, right, who am I gonna call first? How long do I think they're gonna take? Can we guarantee that we'll have a jury at 10 o'clock on the Monday morning? Can we guarantee there won't be any issues of law that might arise, or anything like that?"

Even once a recording slot is booked and the s.28 hearing completed, a RASSO ticketed judge (J1) reflected on how recordings in their court, and the wider court premises, have often failed: "my technology fails more times than it doesn't ... We've all had a non-recorded recording and I've only done four or five of them." Further difficulties were also raised by a RASSO barrister (C14) in relation to accessing the recorded cross-examination ahead of time to check that "it's audible, it's watchable, there are no problems with it and to suggest any edits." C14 said the process had been "unnecessarily complicated" with "an awful lot of chasing and fixing behind the scenes" to secure access from the external provider who was responsible for retention of recordings, and who was described by J2, a resident judge, as "useless." C14 concluded that this had made "an easy job unnecessarily difficult." Similar sentiments were also reflected in submissions made to the Justice Committee Inquiry, with the s.28 technology labelled as "archaic" by one RASSO barrister (Roberts, 2023) and the editing process described as "onerous and time consuming" by another (Mushtaq, 2024).

Silver Bullets and Second Chances

Notwithstanding the potential benefits of s.28 for witnesses in terms of recall, avoidance of re-traumatisation, and recovery, and irrespective of the extent to which resourcing, logistical, and technological challenges could be overcome to improve the measure's operation in practice, a number of participants were keen to underscore that its availability should not be framed as any kind of 'silver bullet' to longstanding, and much lamented, challenges facing the investigation and prosecution of RASSO cases in England and Wales. Behind such contributions was often an evident concern that the provision had been rolled out nationally to intimidated witnesses without sufficient consideration, and this had been precipitated by political pressure to respond to the decline in charge and conviction rates, and an associated crisis in public confidence, that had also prompted the 'End to End Rape Review' in 2021. As a RASSO barrister in our study (C12) put it, "the theory is great [but] again, it's been politicised … there's a desire for quick fixes … without anyone asking any awkward questions."

For many participants, such 'awkward questions' included demanding greater scrutiny of and accountability by police and the CPS in relation to the timeliness with which cases were investigated, charged, and built for prosecution, and the appropriateness, or otherwise, of decisions made regarding disclosure strategies and charging thresholds. As one RASSO barrister (C12) explained in regard to the early handling of cases by police, "there needs to be more resources in terms of the investigation that takes place … complaints are made and quite

often they'll make the [ABE] video but then they won't charge someone for an age … it's 12 months before they get round to doing it, because there simply aren't the resources." In this context, the push to expedite justice outcomes by bringing forward the point of complainants' cross-examination through s.28 recordings could be argued to be wide of the more significant need to facilitate timely investigations. Another RASSO prosecutor (C15) recounted a case involving two child complainants who had waited 18 months from the date of their ABE interviews before the case reached the court and counsel even had an opportunity to request cross-examination via s.28. They explained: "whilst it can be expedited effectively once it gets to the court, what needs to be expedited is the whole process between complaint and charge … the CPS and police have to put the resource into getting those cases expedited through the system." It was suggested too by participants that the implications of this may be particularly significant in the context of adult, intimidated witnesses, given the nature of many such investigations involving contested claims regarding consent and the increased likelihood of them requiring more extensive disclosure. As a RASSO ticketed judge (J1) put it, for example:

> "for many people, and I'm not talking 3, 4 or 5 year-olds, for which I absolutely accept, in those tiny, tiny number of cases, the idea that they can be cross-examined sooner is obviously an advantage. But actually, if you … think about downloading phones and checking Facebook and getting medical records and school records … you're not going to get to a s.28 hearing very much quicker than a properly run prosecution."

Across police forces and CPS areas in England and Wales, there has been a concerted effort under the banner of 'Operation Soteria' to improve the timeliness and effective progression of investigations and prosecutions in adult rape cases. Evaluation of those initiatives indicates that a combination of increased use by police of Early Advice from the CPS to delineate the scope of reasonable lines of inquiry, alongside improved mechanisms for monitoring the completion of Action Plans and ensuring more effective escalation of concerns in cases where timeliness targets are not being met, has ensured some improvement (King et al., 2023; King et al, 2024). The structures that support this have now also been incorporated as standard practice in refreshed National Operating Models for rape, launched by both police (College of Policing, 2023) and the CPS (Crown Prosecution Service, 2023b) in 2023. It is, nevertheless, abundantly clear that resourcing and capacity remain significant challenges, and that without substantial and sustainable investment, the prospects of continued improvement in relation to the timeliness of investigation, charging decisions, and trial preparation will be remote. The introduction of s.28 cannot, therefore, offer any 'quick fix' solution to these deeply entrenched issues, despite policy rhetoric which several participants felt too often suggested otherwise.

Returning to the 'silver bullet' analogy, one of the key benefits associated with s.28 has been the potential for it to transform the tone, content, and experience of testimony-giving. As with all special measures, s.28 is intended to recognise and respond to the needs of the witness, ameliorating, where possible, those aspects of giving testimony in an adversarial environment that are apt to cause distress. This is particularly critical where these issues might be so acute as to prevent the witness from being able to give an effective account. Research has demonstrated that such incursions into the adversarial norms of the courtroom are often welcomed by witnesses (Burton et al, 2006); an appreciation echoed by several of our participants. However, it is important to recall that changes to the timing and mode of cross-examination do not, in and of themselves, bring changes to tone and content. In respect of vulnerable and child witnesses, the standardised use of GRHs to consider the structure and

length of cross-examination, and scrutinise questions in advance, can ensure a more transformative effect for these complainants when giving evidence. This was noted, for example, by a Chief Crown Prosecutor (C10) who explained that "I think the cross-examination process tends to be more concise … the bad old days when I first started prosecuting this stuff … you just don't see that … you see more concise evidence given which I think is beneficial to all concerned." However, as noted above, it is far from clear that a similar process is routinely undertaken in GRHs in respect of intimidated witnesses (Jackson et al, 2024), or that the majority of legal professionals would consider it necessary, appropriate, or feasible to do so (Kyneswood, 2023: para 39). Indeed, the CBA's submission to the Justice Committee suggested that "not every case should require the defence to provide chapter and verse of the cross-examination to the court"; and argued that, specifically in relation to "a s.17 witness or an adult who for all other purposes is capable, save they are nervous about giving evidence, which is often couched in terms of fear and distress, there is little need for compelling counsel to provide questions in advance of the s.28 hearing" (CBA, 2023: para 27(c)(ii) and (iii)).

This framing of the distress encountered by such witnesses as often being about mere 'nerves' at the prospect of giving testimony may well diminish inappropriately the potential for re-traumatisation that researchers have suggested attends the adversarial trial process. In so doing, though, it may also reflect the professional ambivalence that we have identified above regarding the appropriateness of s.28 and associated protections being made available to adult, intimidated witnesses in the same way as for children and vulnerable witnesses. Recent research observing the cross-examination of adult, intimidated witnesses in both s.28 and non-s.28 sexual offences cases has identified certain substantive effects as a consequence of the use of pre-recorded cross-examination, including a slower and calmer pace to counsels' questioning as required to increase the prospects for effective video capture (Kyneswood, 2022). However, that research has also indicated that the types of questions posed, their tone, substance and potential for re-traumatisation remained largely unaffected (Kyneswood 2022; 2023: para 40). Meanwhile, Jackson et al have recently reported that, though hectoring of the witness was not a common feature in their trial observations, the tactic of using comments disguised as questions was still common in cross-examination, even of vulnerable witnesses; and particularly so in respect of vulnerable adults, where 48.5% of questions were determined to be declarative in form compared to less than 7% of questions to children under the age of 12 (Jackson et al, 2024: 96 & 104). This highlights that the s.28 measure may not be the panacea that it has sometimes been suggested to be, particularly for intimidated witnesses.

Nevertheless, in a context in which there are acknowledged challenges associated with securing convictions in RASSO cases, tied amongst other things to victims' reluctance to participate in an adversarial and intimidating criminal trial and concerns about the predictability and reliability of juror decision-making, there are further benefits associated with the extended use of s.28 in terms of facilitating a 'second chance' at justice that should be acknowledged. A Senior Crown Prosecutor (C6), for example, recounted experience with a recent rape case that did not qualify at the time for s.28 provision, in which a "very weird, really ropey jury" returned as hung after sending questions to the judge during deliberations which indicated victim-blaming of the complainant for getting into the taxi (where she was allegedly raped by the driver) rather than walking home alone: "we went for a retrial and our complainant, about six weeks out from trial, had a nervous breakdown, she couldn't go through the process again" and the case had to be abandoned, but "if there had been a s.28

we would have never had that problem, and that's a big deal." While the frequency with which juries in rape cases will be unable to reach a verdict should not be overstated, another Senior Crown Prosecutor (C9) likewise observed that s.28 can be "beneficial" in giving a "second bite of the cherry, if you like" in such circumstances, because "we've got the video interview and cross-examination." In its recent submission to the Justice Committee, the CBA agreed that this ability to use a pre-recorded cross-examination in the event of a trial collapsing or a hung jury is "one of the most compelling arguments in favour of s.28", whilst also noting that the statutory basis for this was unclear, with no bespoke rules of court in place to deal with its use in a re-trial (CBA, 2023: para 27(e)). This may raise complicated questions in cases where complainants wish to withdraw their support for, or involvement in, prosecutions after having given s.28 evidence, or where a trial involving s.28 recordings has resulted in mixed verdicts. Where complainants remain supportive, however, this certainly provides an opportunity for seeking justice at re-trial with less potential for re-traumatisation, and so may be significant.

Our findings also suggest that, though not perhaps what was envisaged when the special measure was first created, s.28 can offer scope for additional innovation when seeking ways to improve complainants' experiences and justice outcomes in the context of a justice system stretched to capacity. A s.28 'lead' judge (J22) recounted, for example, a case that had to be cut short because the defendant had Covid-19 and was unable to attend. Although not initially a s.28 case, the judge explained, "I was really worried that the four young women in that case, all vulnerable witnesses, all under the age of eighteen, would potentially have to go all through this again, and so I took the decision, with the assistance of counsel, that we would simply get their evidence in the can, and we would do it by s.28, which we did." The additional trauma often experienced by complainants when trials are paused, delayed, or do not go ahead at the last minute is well-known (Rape Crisis England and Wales, 2023; Burman and Brooks-Hay, 2020:3). While, as discussed earlier, there was scepticism amongst participants regarding the extent to which a blanket increase in the use of s.28 by vulnerable and/or intimidated witnesses would be likely to substantially reduce delays and backlogs, as this example by J22 demonstrates, it allows a degree of flexibility that, sometimes in unpredictable ways, can be relied upon to avoid unnecessary, and distressing, ruptures in complainants' justice journeys.

Conclusion

As the Justice Committee continues to consider the submissions to its Inquiry into the operation of s.28 of the Youth Justice and Criminal Evidence Act 1999, and research exploring the effects of its usage on case outcomes across England and Wales continues, vulnerable and intimidated witnesses are required to evaluate - ideally with the benefit of information and guidance from police, prosecutors and specialist support or witness services - the merits and demerits of making use of pre-recorded cross-examination. There are, inevitably, a number of considerations to weigh in that balance. It is clear that there are potentially significant benefits associated with the use of s.28 for complainants and witnesses. However, there is also substantial variability in how s.28 is operationalised and its use responded to by professionals; and this maps, amongst other things, to the category of witness, type of case, level of scrutiny of questioning, quality of technology, courtroom infrastructure and listings or capacity challenges. The long-awaited implementation of s.28 is, in our view, welcome, and our discussion in this article should not be taken as supportive of moves to pause or abandon its

usage. But there is a legitimate basis for concern regarding the pace at which it has been rolled out, the rigour of performance evaluations to date, and the adequacy of its implementation.

Whilst the principles underpinning the introduction of s.28 are important and admirable, and were supported by the majority of participants in this research, it is clear that policy rhetoric has too often overreached in its claims around s.28 as a "silver bullet" to the complex issues facing the investigation and prosecution of RASSO cases. Indeed, against the backdrop of a pronounced lack of investment in criminal justice processes, personnel and infrastructure in England and Wales, along with acute challenges resulting from increased court backlogs and attrition of legal professionals at an unprecedented rate, our research evidences a series of grounded, practical, and often legitimate, concerns regarding the operationalising of s.28 (and, indeed, associated special measures such as ABE pre-recorded police interviews).

The Ministry of Justice process evaluations, focussed predominantly on pilot courts, have yielded some useful insight, but as a RASSO ticketed judge (J1) highlighted, "the problem with the rollout of s.28 is that the courts that were the pilot courts were heavily funded, with judges who I have enormous respect for, but who verged on the zealot on the subject." Further insights have also now been gleaned through evidence submitted to the recent Justice Committee Inquiry. Nevertheless, a more rounded evaluation is clearly still required; one that pays close attention to the scale of variation between current, potential, and optimal modes of implementation, as well as to the needs and experiences of witnesses in all their diversity. Without this, we would argue that there is a risk of retreating too readily from use of s.28 for fear of its unintended negative effects, or conversely of pushing forward too enthusiastically notwithstanding the insufficiency of supporting infrastructure and resource. Either way, the consequence will be – as J1 put it – that the story of s.28's design and implementation could become one of a "a well-meaning disaster" for individuals and justice systems alike.

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