

Section 28 Youth Justice and Criminal Evidence Act 1999

Introduction

Section 28 of the Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999) provides for the special measure of pre-recording evidence and cross-examination prior to trial. This special measure is subject to judicial discretion and currently enables vulnerable complainants and witnesses to have their evidence and cross-examination recorded closer to the time of the offence. The recording is played in court during the trial in lieu of the complainant or witness attending court in person.

Vulnerable complainants and witnesses who can access section 28 include children, and anyone whose quality of evidence is likely to be impacted because they are suffering from a mental disorder, who have a significant impairment of intelligence and social functioning, or who have a physical disability or disorder. The use of section 28 was piloted prior to the Covid-19 pandemic, and rolled out to all Crown Courts across England and Wales during the pandemic (by November 2020).

It is widely anticipated that the government will continue the roll out of the section 28 special measure to intimidated witnesses, defined as those suffering from fear or distress as a result of testifying in a case, which automatically includes all adult complainants in sexual offences cases.

What did we do?

JICSAV set out to identify specific impacts of the Covid-19 pandemic on criminal justice policies and practices in sexual offences cases, as well as document innovations that could improve the experiences of complainants of sexual violence and abuse engaging with the criminal justice system (CJS).

Across the duration of the project, we interviewed 109 individuals; 19 complainants and/or family members; 21 Independent Sexual Violence Advisors (ISVAs) and third sector professionals; 14 professionals from Sexual Assault Referral Centres (SARCs); 21 police officers; 6 Crown Prosecution Service (CPS) professionals working within Rape and Serious Sexual Offences (RASSO) units; 6 criminal barristers who were RASSO prosecutors; and 19 judges holding authorisation to hear serious sexual offences cases.

Whilst section 28 was not introduced in response to the pandemic, it was rolled out nationally during this time and therefore was discussed by many of those interviewed. Findings in relation to section 28 were presented at six workshops held across the duration of the project, which were attended by over 150 professionals, practitioners, policy-makers, and academics.

Key findings

Section 28 underpinning principles were universally endorsed

The section 28 special measure has been implemented to allow vulnerable people to give evidence closer to the time of the alleged offence. The expectation here is that this will not only aid memory recall, and thereby enhance the likelihood of obtaining best evidence, but will allow witnesses to begin the recovery process earlier, in the knowledge that their testimony has been taken. There was universal agreement from interviewees who mentioned section 28, that these principles were the right ones.

“I think the concept is a really good one. So, obviously, [you’re] getting the evidence in the bag quickly and also, for re-trials if there is one, so, you’ve got it captured” -

Circuit judge and section 28 lead

“It reduces the worry doesn’t it, of having to go to court. So whilst the court, they’re not going to get an end result one way or another maybe for another year, a lot of the stress and worry is caused by that unknown of having to be cross-examined in court” - Detective Constable

The issue of attrition through complainant withdrawal in sexual offences cases is well recognised, and it was hoped that section 28 would help to reduce this by allowing complainants to give evidence in a more timely manner.

“It reduces the delay that a victim has to wait for them to give evidence. And we know that delay causes attrition. The longer a case goes on, the more likely the victim will say, “I’m out of here” - Head of CPS RASSO Unit

Similarly, comment was made on the increased importance of section 28 for the most vulnerable complainants and witnesses within the context of the current backlog of cases within the Crown Court, and the significant delays in cases coming to trial.

“Section 28 is brilliant. I mean, it’s absolutely brilliant and I’ve tried to push it as much as possible because I’ve seen it as a way to try and get those vulnerable people into a court and completed in their evidence as soon as possible and it kind of overcomes the trial, backlogs that we’ve got” - Senior District Crown Prosecutor and Head of RASSO Unit

Positive experience for complainants

The mother of a child complainant that we interviewed explained how the section 28 process of pre-recording evidence and cross-examination had been very positive for her daughter.

“When she actually went in to do her Section 28 I think, and literally she was 10 minutes at the max. And, she was “oh, I’m really nervous.” She came out, she was smiling. I was like gobsmacked, she was smiling”

ISVAs who had supported clients through section 28 hearings also often spoke positively of the experiences of complainants.

“On the whole section 28 works really well, it’s organised, it’s quick, it’s how a court is supposed to be, questions are agreed beforehand, nobody gets a hammering. You know, everybody’s respectful of the process, it’s just easy-peasy really, they are just significantly less stressful [for complainants]” - Children and Young Person’s ISVA

Many participants highlighted the benefits of section 28 for child complainants and witnesses in reducing stress and addressing potential memory and recall challenges.

Logistical challenges

Significant practical and logistical concerns over the use of section 28 were raised amongst all the professional groups we spoke to, with these being particularly relevant to the proposed expansion of this special measure to intimidated witnesses. Comment was made by CPS and police participants on the increased speed with which everything must be completed in a section 28 case, and the additional pressure placed on professionals involved in these cases.

“The logistical challenges are really on the basis that ... from the PTPH [pre-trial preparation hearing] to the section 28 hearing, there is a need for both prosecution and defence to get their houses in order. So, us to serve our case, disclosure, make sure disclosure’s done, the defence to serve a defence case statement, make sure that is done, us to respond to that. Also, we can have the Section 28 hearing, and that’s quite a run. That’s quite a tight timescale” - Senior Crown Prosecutor

The requirement for continuity of prosecution counsel in section 28 cases also poses logistical challenges within a system in which there is currently a significant shortage of barristers.

For sexual offences cases, barristers are having to be released from rape trials that they are already engaged in to participate in section 28 hearings, which often causes delays to existing trials, particularly where barristers are having to travel between courts. Significant concerns were raised about that disruption being worsened if section 28 special measure eligibility is expanded to intimidated witnesses.

“It’s a nice idea in theory but in practice, 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 Section 28. If you advantage someone with a Section 28 ... then you’re disadvantaging somebody else in some other trial in some other Court centre. So, it’s the judicial equivalent of robbing Peter to pay Paul”
- Barrister

The impractical nature of the system used to record section 28 evidence and cross-examination was also highlighted by several participants. The centralised nature of the recording system, and the lack of flexibility in terms of arranging a recording and playback was a clear frustration for those involved in section 28 cases.

“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” - Circuit Judge

Technical issues were also flagged in relation to the use of section 28 recordings during trials. The mother of a complainant that we spoke to described the additional stress caused when there were technical issues with her daughter’s evidence being played to the jury during the trial.

“The playback wouldn’t work on the day that they planned to do it. So then the jury and the public, the people in the public gallery were expecting to see the girls’ testimonies and they just wouldn’t play 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. Because you’d kind of thought that you’d have tested that before people came in.”

Insufficient resources

The judges, criminal barristers, police, and CPS lawyers that we spoke to raised the issue of insufficient resources to adequately support section 28, particularly if eligibility for this special measure was widened. Staff shortages across the CJS were highlighted, as they result in significant additional pressure on professionals, and increasing delays in both section 28 cases and others going through the system.

“On the whole, I mean, I’d say I’m a really massive supporter of Section 28. I think it’s hugely positive. I just wish that we had resources in the right places across the piece so that it worked in the way that it really should do” - Senior District Crown Prosecutor and Head of RASSO Unit

It was noted that whilst complainants and witnesses may be able to record their evidence and cross-examination fairly quickly after reporting the offence, there were still often significant delays in the actual trial taking place, and therefore there being a final outcome in the case. These delays have been further exacerbated by the Covid-19 pandemic and the increased backlog of cases within the Crown Court. This means that complainants felt unable to move on with their lives and begin the healing process.

“That [pre-recording cross-examination] does really help to have that out of the way, that’s a major thing that they’re worried about is the actual bit where they give evidence, but 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” - Senior ISVA

Moreover, delays in the actual trial taking place pose specific challenges in cases where there are multiple witnesses from the complainant’s family giving evidence, but only the complainant, e.g. a child, gives their evidence under the s.28 special measure.

“I’m told by ISVAs and CHISVAs, particularly CHISVAs 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 ... the child has completed their evidence, but the adult hasn’t. I think there is still that feeling amongst practitioners and supporters of victims that the adult is now kind of left waiting for the trial to then be able to reconnect with their child and I think that’s quite difficult” - Senior District Crown Prosecutor and Head of RASSO Unit

Proposed expansion of section 28 eligibility

Significant concerns were raised, particularly by the judiciary, in relation to the proposed expansion of section 28 to also include intimidated witnesses. Whilst supporting the underpinning principles of the section 28 special measure, their concerns were centred around many of the issues raised above. They also highlighted that pre-recording the evidence and cross-examination could potentially take significantly longer with intimidated witnesses due to there being fewer restrictions on the questions that can be asked of these complainants and witnesses. This could have the consequence of moving and exacerbating delays elsewhere in the system.

“You imagine an adult making a rape allegation, he or she will not be cross-examined in the same way with the same restrictions as a child. You imagine the impact that that’s going to have on the courtroom that the Section 28 taking place in, let’s say it takes two hours rather than half an hour. And the fact that that advocate is coming from another trial, and that’s going to lose half a day. So, the compound impact of a Section 28 on the trial that’s going on in the existing court, and on the trial where the advocates are appearing, is just going to cause complete and utter chaos” - Circuit Judge and Section 28 lead

Recommended actions

- 1. Ensure that the challenges and issues currently associated with section 28 are fully understood and addressed as a priority to ensure effective use of the special measure.** The current benefits associated with section 28 may be significantly diminished if the practical and logistical challenges highlighted by practitioners and complainants are not sufficiently addressed. This will have negative implications not only upon section 28 cases, but also upon other cases within the CJS. This is particularly important within the context of any expansion of eligibility to intimidated witnesses, with these issues only worsening if they not sufficiently addressed before any further rollout of this special measure.
- 2. Improve the system for recording and accessing section 28 evidence and cross-examination.** It is widely recognised that the CJS is currently incredibly stretched with insufficient resources. The recording, booking, and playback systems associated with section 28 need to be less rigid to allow recordings to be more easily accessed when needed. This will help to prevent further delays and improve the use and accessibility of the special measure within the context of the current challenges facing the CJS.
- 3. Ensure that steps are in place to minimise any technical disruptions when playing back section 28 and other recordings in court.** Technology within all courts must be fit for purpose and should be regularly tested and updated to ensure that it is working effectively, minimising disruption and distress during trials.



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