



Justice Committee
Inquiry into the use of pre-recorded cross-examination under Section 28 of the Youth
Justice and Criminal Evidence Act 1999
Bar Council written evidence

About Us

The Bar Council represents approximately 17,000 barristers in England and Wales. It is also the Approved Regulator for the Bar of England and Wales. A strong and independent Bar exists to serve the public and is crucial to the administration of justice and upholding the rule of law.

Scope of Response

This submission addresses certain questions the Committee has sought evidence on. Questions 4 and 5 as well as Questions 7 and 8 have been grouped together to provide the best possible response.

Summary

- Although section 28 (s28) is appropriate for young and very vulnerable complainants, it is being used in far too many other cases.
- Its overuse is a major factor contributing to the shortage of Rape and Serious Sexual Offences (RASSO) Counsel because:
 - the fee paid can be inadequate to compensate for the work required.
 - s28 hearings create serious listing and diary management challenges for Counsel.
- Section 28 is thought to lead to fewer convictions because recorded evidence is less compelling than live evidence.
- Section 28 is not working well so it should either be reviewed, or guidance should be given as to a) when it is appropriate to use it and b) how to deal with the listing problems that inevitably arise.

Question 2: The level of use of section 28 before and since its roll-out, and the extent of up-take for cases which are eligible;

1. Section 28 hearings are used far too frequently. The default appears to be that s28 is the only way, not the question as to whether it is the best way. It has also led to the “turbo charging” of one part of the system. The true utility of s28 lies in having young or vulnerable witnesses give their account whilst events are still fresh for them.

However, they are often being used in cases where it has taken 18 months to charge the defendant (and where the defendant is going to be giving evidence another 18 months down the line). Or it is used in absurdly unhelpful cases such as s28 being conducted the day or the week before the trial commences.

Question 3: The quality of technology used to operate section 28, and how this could be improved;

2. The current technology needs improvement to enable downloading of testimony by counsel, so that wi-fi access is not needed at all times. Furthermore, the police should be given access to the recordings so that transcripts can be prepared. Currently, the requirement is for the judge to take a note of the answers at the s28 hearing which can then cause real difficulties in the preparation of accurate editing proposals, or indeed for any new judge who takes over the case.

Question 4: The process used to decide whether to use section 28 in a particular case;

Question 5: The effect of the use of section 28 on the experience of vulnerable and intimidated witnesses, victims, defendants and juries;

3. The starting point for application of s28 should be for truly “vulnerable witnesses”. For example, where there is a tangible benefit in evidence being presented in that way (or at least an appropriate presumption) or if the public interest means that we should avoid the attendance of that witness for face-to-face examination. Pre-recorded video evidence is of particular use when the witness is a young child, or a vulnerable adult, or someone who may need an intermediary. Simply put, if the witness is very young/vulnerable and the allegation is one of recent abuse, then s28 is appropriate. However, if the allegation is historic, it is hard to see the imperative for s28, even with a teenage witness.
4. For example, it is our experience that 15/16-year-olds without learning difficulties are often well able to cope with a ‘traditional’ cross-examination, provided it is properly and sensitively conducted by an experienced advocate (and well managed by an experienced judge). There is no need for the use of s28 for non-vulnerable adults and the temptation to use them in those cases ought to be resisted.
5. Furthermore, there should be greater scrutiny as to the precise type of s28 required. There is an over-use of the provisions requiring questions to be provided in writing, and pre-authorised by the judge, in a s28 case. Some witnesses may benefit from a pre-recorded cross-examination close in time to the complained-of event, and the Achieving Best Evidence (ABE) interview, but not require any particularly tailored form of questioning. The requirement to create and clear the ‘script’ is time-consuming and delivery of the script often leads to an ineffective, halting, questioning style which may be unavoidable when dealing with the very young/truly vulnerable, but not for others, e.g. 15/16-year-olds without developmental issues. Conversely, where expert evidence has identified that a witness requires specific forms of questioning but will have a good ability to recall events comparable to other adults, that tailored questioning can easily happen within the confines of ‘live’ testimony at trial, without the need for pre-recording.

6. Courts should also be more prepared to consider whether it is in the overall interests of the case for the evidence to be presented in the ways set out by the s28 procedure, including by proper research. Generally speaking, the over-wide promotion of s28 must be resisted.
7. However, the culture on s28 appears to be slowly changing, at least so far as the judiciary are concerned. A culture was developing where s28 applications were being made in every RASSO case regardless of the characteristics of the witness. Judges are now looking far more critically at the applications which is welcome. Everyone is supportive of the use of s28 in an appropriate case e.g. young children and truly vulnerable witnesses. It is the widening of the use to witnesses purely on the basis that it is a RASSO case that has, and is, causing real difficulties.

Question 6: The effect of the use of section 28 on the number of cases brought to trial, and on the outcome of cases;

8. There is an over-reliance which makes it appear that 'trials' have been effective when in fact the substantive trial is not listed until a far-away date. This can give the appearance of prioritising complainants' interests over defendants to a disproportionate extent.
9. The problems in fixing the hearings at a time when barristers are at a premium and involved in other serious trial work are well known, or ought to be. We are also concerned at the impact of pre-recorded evidence (not as compelling as a live testimony) on a jury, who may be less likely to return a guilty verdict.
10. Where s28 hearings are recorded substantially in advance of trial (which occurs regularly) there is insufficient time to prepare. Challenges also arise with relevant disclosure being made to the defendant in advance of the hearing so that cross examination is full and proper. Late disclosure sometimes requires a further s28 hearing, which creates yet further problems with diaries and imposition on the complainant. This is especially acute in custody cases in which the Crown Prosecution Service (CPS) have made a charging decision in absence of third-party material and phones.
11. It is also the common experience of the Bar that s28 cases are used as a convenient way of putting those cases to the back of the queue in terms of listing for trial once the complainant's evidence is "in the bag". Some cases take over a year to come to court because of delays in CPS charging decisions. Asking for s28 in those circumstances (which can then knock back the trial date further) does not help a complainant. The money saved from not using s28 so much could be put towards funding earlier charging decisions.

Question 7: What effect the use of section 28 has had on listing, capacity and delays in the Crown Court;

Question 8: The availability of barristers to act in cases where section 28 is used;

12. If section 28 is used, then there has to be an absolute guarantee that Counsel are given the time to deal with such cases notwithstanding their other commitments. In essence,

a s28 hearing should have the same status as a Court of Appeal hearing. Counsel should not be negotiating with judges about being released from part-heard trials. The current guidance in the Practice Direction does not mandate that Counsel has to be released, just that the judges concerned 'shall resolve the conflict as regards the advocate's availability, taking into consideration the circumstances of the case and the interests of justice'. We find that in practice few judges are willing to do this because it creates serious issues logistically.

13. For example, if Counsel has a trial in Stafford, but the s28 is in Hereford (both Midland Circuit courts) the s28 may in theory take an hour (minimum), but the journey between the two court centres means most of the day is lost, therefore some judges will refuse to release Counsel to undertake s28. There is an increased likelihood of cases having to be returned where the cases are in different court centres and this causes problems if Counsel has already met a complainant, or if the ultimate trial has been fixed for their availability. CPS insist on continuity, and it is almost impossible to achieve.
14. It may help to understand **why** it is so important that the same defence advocate conducts the s28 and the trial. The work involved in preparing a s28 is very significant. The cross-examination of the complainant(s) is often the most work-intensive part of a RASSO case for the defence – particularly where there is no other significant source of evidence, as is often the case in RASSO cases. Preparing the cross-examination of a central witness such as a complainant involves considering **all of** the witness statements and exhibits. This includes viewing the ABE as well as reading and taking instructions from the client and reviewing **all** the unused material before constructing a proper approach to undermining or testing that complainant's account, including by reference to the **other** evidence or unused material in the case. That is even before taking into account the extra work involved in constructing appropriately formulated questions for young or vulnerable witnesses, as s28 witnesses normally are. As such, in effect, preparing for a s28 means that effectively the entire case has to be prepared to the level one would prepare a trial – months in advance of that trial listing. The work involved is that which one would normally do for an entire trial fee (brief fee and multiple refreshers). If a different advocate does the s28 and the trial, then the advocate who has done the s28 has done a trial-level amount of work for a much smaller fee. Similarly, that level of work then has to be effectively duplicated again by the trial barrister, who themselves has to understand why the previous barrister did what they did, and accordingly prepare the conduct themselves of the examination of the other witnesses, the defendant, make closing speeches and any legal applications. Having to have two defence advocates prepare both cases to such high levels is extraordinarily wasteful, and the current system does not properly compensate at least one of them, given the amount of work involved.
15. Given the real risks of that occurring, an increasing number of barristers are accordingly refusing to undertake s28 cases. The work that is required to prepare questions, edit the ABE, undertake a Ground Rules Hearing (GRH), consider a s41¹ application and unused material means that the workload is unbearable coupled with

¹ <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-11-sexual-history-complainants-section-41-yjcea>

what can be an inadequate fee (though we recognise the recent increase in the fees). Court centres do not appear to liaise with each other, and judges are understandably reluctant to interrupt serious trials to release Counsel to conduct s28 hearings. Given that the same specialist Counsel are often instructed, that can mean interrupting one serious sexual offence trial to allow Counsel to cross examine on another similar trial. The serious impact on Counsel (effectively having to be trial ready for 2 trials at the same time) is one that should not be underestimated.

16. The scarcity of Counsel prepared to do RASSO work directly relates to s28. Barristers do not want to accept RASSO briefs because of the impact that s28 has on diaries, preparation and remuneration. Many junior barristers are electing not to apply for RASSO grading at all in light of the well-known diary impacts of s.28 as it will prevent their progress in other areas if they do this work.
17. With regards to fees, barristers are not sufficiently remunerated, particularly if they do not go on to conduct the trial. The pay for a s28 hearing was recently increased from £650 to £1000 which is warmly welcomed, however that still can be insufficient as a stand-alone fee given the amount of work involved as listed above. Given what is required, the remuneration should really reflect that of a brief fee where the case has to be then returned for good reason.
18. It is often the case that Counsel is released just for a 'half-day' to go and do the s28, whilst still keeping their current trial going, or worse to still have the s28 listed at 9 or 9.30 with the trial at 10.30. It is incredibly difficult to prepare for what is effectively portions of two trials for the next day. There is a general perception that greater pressure is placed on Counsel (by the CPS and courts) with little flexibility being afforded.
19. The current position adopted by many courts is putting a dangerously onerous work burden on Counsel. To remove that burden on Counsel, either remuneration would have to be increased to such a high level that Counsel was able to only deal with a s28 in a week and forego conducting another trial or, more realistically, to reduce the use of s28 to accommodate Counsel in terms of listing so that the same Counsel retains the case throughout. We would also suggest that there would be greater numbers of Counsel prepared to undertake this work if it paid an additional fee for the upfront prep if the submission of questions in advance is ordered by the Court.

Question 10: How the operation of section 28 could be improved and reformed;

20. Restricting the use of s28 to those few witnesses who *truly* require it would improve the situation. Blanket eligibility is driving the system into the ground.
21. Given one of the objectives of s28 is to improve the quality of the evidence, there should be extensive scrutiny as to whether the value of the witness being more comfortable with the format of questions, or having a relatively swift examination after the events in questions, is actually outweighed by the benefits of giving evidence in a more traditional way. There is too little scrutiny of acquittal rates and research into jury attitudes to evidence presented on a screen, or in the stilted format of cross-examination following a pre-set script. Furthermore, because s28 examinations take place so long before trial, a jury may be given an extensive jury bundle to which the

witness's pre-recorded evidence does not refer easily, causing distractions whilst the jury flip between various maps/plans etc without anything in the examination to guide them as would be the norm for a 'live' in-trial examination.

22. Regarding listing, a system should be developed at each court centre where listing officers are notified of Counsel's commitments as well as considered when listing s28 hearings. Once notified, the overwhelming presumption should be that Counsel **will** be released from an ongoing trial to deal with a s28, irrespective of the order in which things were listed. The accommodation should not be, in the example of a 1 hour s.28 hearing that the s28 is listed at 9am or 9:30am so that Counsel can return to their trial at 10.30am. The s28 should be listed at 10am and the trial should be not listed before 12pm with the caveat that the trial will simply have to wait if there is an issue.
23. Section 28 cases should not in any event attract a lower prioritisation in terms of actual trial listing, but should be listed promptly for trial, given the seriousness of the allegations.
24. Advance notice of the questions should be the exception, not the rule. The current wording of the Ground Rules Hearing (GRH) form encourages an approach where it is the norm. Reducing the number of times this has to happen has an impact on whether remuneration is acceptable. If there is a judicial order that the questions are provided in advance of a GRH, this work should attract an additional fee.
25. Consideration should be given, in those few cases where pre-recorded examination is **truly** necessary, to also conducting examination-in-chief in the pre-recorded session and not relying on the often poor quality questioning conducted by a police officer (not an advocate) in the ABE, which often requires extensive editing (creating more work) and/or fails to address the real issues in a way which is understandable and accessible to the witness and the jury.

The Bar Council
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