

‘SECTION 28’ AND THE PRE-RECORDING OF CROSS-EXAMINATION: WHAT CAN ADVOCATES EXPECT IN 2018?

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In 2018, so long as the recently identified technological issues are remedied (rumoured to be about storage capacity for the recordings), pre-recorded cross-examination will be rolled out across Crown Courts in England and Wales. The process evaluation report (MoJ, 2016) for the pilot of section 28 Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999) was encouraging as well as realistic; it acknowledged that findings might not be replicated on roll-out because courts in the study might not be representative of courts in general. The authors believe that the success of the scheme substantially rests in the hands of judges and practitioners. Here we briefly summarise the background to the roll-out, highlight some important aspects of the new guidance in the Criminal Practice Directions (CPD), illustrate practice with real case studies, and discuss the implications for professional development.

The background

On 30 December 2013 the police in three Crown Court pilot areas (Kingston-Upon-Thames, Leeds and Liverpool) began identifying cases with vulnerable witnesses who might be suitable for pre-recording of their cross-examination. In the cases where the section 28 procedures were used, the DVD of the witness’s cross-examination was played to the jury instead of the witness having to attend the trial in the traditional way for cross-examination.

One of the effects on investigators and prosecutors is that the disclosure process must begin at the start of the investigation so that the defence has the material it needs in advance of their opportunity to challenge the witness’s account. Section 28 has been described for defence counsel as a ‘sea-change when it comes to both the

speed and methodology of trial preparation' (Stevenson & Valley (2014) Pre-recorded Cross-examination, CL&J Vol.178 No.21).

Eligibility

A witness will be eligible for section 28 measures if they meet the criteria in section 16 YJCEA 1999 and the witness' interview was recorded in accordance with Achieving Best Evidence (MoJ, 2011) guidance (CPD 18E.6). Section 16 applies to witnesses eligible for assistance on grounds of age or incapacity. In addition, section 28 is also available for a further pilot scheme in Leeds, Kingston and Liverpool Crown Courts, where the witness is eligible under section 17(4) of the YJCEA 1999. Unless the witness has informed the court of the witness' wish not to be so eligible, Section 17(4) provides that the following witnesses, in proceedings relating to that offence (or to that offence and any other offences), are eligible for special measures:

- i. complainants in respect of a sexual offence; or
- ii. complainants in respect of an offence under sections 1 or 2 of the Modern Slavery Act 2015,

The police (effectively the gatekeepers to pre-recording cross-examination) are responsible for identifying eligible witnesses and the CPS and the police should discuss with the witness, or their parent or carer if appropriate, special measures available (CPD 18E.5).

The Plea and Trial Preparation Hearing and the timetable

The Plea and Trial Preparation Hearing (PTPH) must be conducted by a judge who is authorised to hear section 28 cases (CPD 18E.3, 18E.61). '[A] detailed defence statement is not required at this stage, but the defence should identify the core issues in dispute' (CPD 18E.18). In cases where an intermediary has been appointed, the prosecution should ensure that the witness and intermediary availability dates are available for the PTPH (CPD 18E.26). If the application is granted, the orders made at the PTPH are likely to cover, amongst other things, service of the prosecution evidence, disclosure (including third party), service of the defence

statement, editing of the ABE, the date, time and location of the section 28 hearing. The PTPH is also likely to consider the ground rules hearing, which will need to take place before, usually the week before, the section 28 hearing. The timing of the section 28 hearing should, without diminishing the defendant's right to a fair trial, take into account the needs of the witness. For a young child, the hearing should usually be in the morning and finished before lunchtime (CPD 18E.24). However, there could be good reasons to set a section 28 hearing in the afternoon.

Case Study 1

A witness aged 19 with learning disability struggled with communication on a morning due to night-time seizures and medication taken for epilepsy. The Judge directed the section 28 hearing to take place in the afternoon at 2pm. The section 28 hearing was finished by 3:30pm, and the witness did not have to return to court the following day, nor for the subsequent trial.

Ground Rules Hearing

The Ground Rules Hearing (GRH) may be held at any time in the court day, including towards the end of the court day to accommodate advocates and the intermediary (if there is one) (CPD E.64). The GRH will usually be listed for soon after the deadline for service of the defence statement, and the recorded cross-examination and re-examination hearing will be about one week later (CPD 18E.22). Advocates should master the relevant toolkits in advance (CPD 18E.32) as well as Toolkit 1 Ground rules hearings and the fair treatment of vulnerable people in court and the GRH checklist (Cooper, 2016) on The Advocate's Gateway. The judge and advocates should consider the appropriate arrangements to talk to the witness before the section 28 hearing (CPD 18E.30). The GRH discussion must include the intermediary (if there is one) and every discussion will include:

- (i) the overall length of cross-examination;
- (ii) cross-examination by a single advocate in a multi-handed case;
- (iii) any restrictions on the advocate's usual duty to 'put the defence case';
(CPD 18E.35).

Other topics will depend on the needs of the individual witness but are likely to include the proposed questions as well as necessary adaptations to the process, including, where appropriate, other special measures such as removal of wigs and gowns, use of communication aids (see Mattison, 2015, Toolkit 14 Using Communication Aids in the Criminal Justice System).

Case Study 2

During the GRH the Judge directed that, in accordance with standard procedure, the witness should view the recording of their ABE interview in advance of the section 28 hearing. The judge also directed counsel to phrase questions according to the witness's understanding and the recommendations of the witness intermediary. The advocates were directed to upload a copy of their questions to the Digital Case System so that the judge could review them in advance of the section 28 hearing.

Restricting cross-examination and requiring questions to be submitted to the judge in advance is standard procedure in vulnerable witness cases. The Court of Appeal has endorsed this approach on more than one occasion and most recently in *Dinc*:

There is nothing inherently unfair in restricting the scope, structure and nature of cross examination and or in requiring questions to be submitted in advance, in any case involving a child witness or a witness who suffers from a mental disability or disorder. The practice has been approved by this court on many occasions; it is the judge's duty to control questioning of any witness and to ensure it is fair both to the witness and the defendant.

Far from prejudicing the defence, it is the experience of many trial judges that the practice ensures that defence advocates ask focussed and often more effective questions of a vulnerable child witness.

Hallett LJ in [R. v Dinc](#) [2017] EWCA Crim 1206

It is essential for the GRH and the section 28 hearing to be conducted by the same judge (CPD 18E.62) and the defence advocate at the GRH must be the same person who will conduct the recorded cross-examination (CPD 18E.34). Advocates should be aware that it is their responsibility on accepting the brief (CPD 18E.59) to be available for the GRH and the trial. Advocates should have their up to date availability with them when the timetable is being set; if the advocate has conflicting court responsibilities (e.g. they are part-heard at another court), Resident Judges must resolve any conflict with the advocate's availability (CPD E 18.60).

At the section 28 Hearing and afterwards

Usually the judge, advocate and parties will be in the courtroom and the witness (and supporter and intermediary, if any) will be in the live link room. The judge however will decide on a case-by-case basis (CPD 18E.39) so that, for example, the advocates or the advocates *and* the judge could be in the live link room with the witness. The court should adjust to the witness, not the other way round:

Case Study 3

The witness, who was aged 14 at the time of the section 28 hearing, had a diagnosis of autism and a hearing impairment. These matters were discussed at the GRH, and the Judge directed cross-examination to be adapted to the witness' needs. The intermediary recommended the use of communication aids (section. 30 YJCEA 1999) in the form of drawing, to assist the witness in giving her best evidence. In addition, the Judge directed counsel to move to, and be seated in, the live-link room when conducting cross-examination, thus addressing the witness' difficulty with communicating via live-link. The Judge remained in the courtroom during the section 28 hearing, with the witness, Intermediary and defence counsel in the live-link room. Due to the limited space in the live-link room, the door remained propped open, with prosecution counsel and the usher seated immediately outside the room, and able to hear proceedings.

Conclusion

We have touched upon some key aspects of the Criminal Practice Directions, however they should be read in full ([CPD V Evidence 18E: Use of s.28 Youth Justice and Criminal Evidence Act 1999: Pre-recording of cross-examination and re-examination for witnesses captured by s.16 YJCEA 1999](#)). Additional guidance has also been issued to cover the section 28 pre-recording provision being tested for section 17 (4) witnesses. Reading the practice directions and the guidance is a good start, however advocates who have not done so already ought to undertake vulnerable witness training.

...it is, of course, generally misconduct to take on a case where an advocate is not competent. It would be difficult to conceive of an advocate being competent to act in a case involving young witnesses or defendants unless the advocate had undertaken specific training.

Per Lord Thomas, CJ, in [R v Grant-Murray & Anor \[2017\] EWCA Crim 1228](#), para 226.

Judges and advocates have an important part to play and time will tell if the success of the section 28 pilot will be replicated across the courts in general.