"Every young person is different"

“Every Young Person is Different”: A Qualitative Analysis of Professionals’ Perspectives on the Introduction of Section 28 Pre-Trial Cross-examination

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Abstract

It is widely assumed in adversarial legal systems that cross-examination is the most effective method to ascertain the truth. However, a growing body of literature demonstrates the efficacy of cross-examination can be negatively impacted by individual differences such as age, and case factors including the delay between witnessing the event in question and testifying at trial. Moreover, the process of cross-examination can be a distressing experience for young witnesses. The introduction of 'Section 28' pre-trial cross-examination in courts throughout England and Wales is an attempt to improve the experiences and evidence quality of young witnesses in light of these concerns. This paper presents the views of seven police officers and six charity workers (commissioned through the local Police and Crime Commissioner to provide emotional support to young people affected by crime) who were interviewed prior to the national implementation of the Section 28 scheme for pre-trial cross-examination. It remains the only work that draws on insights from those from the charitable sector who support young witnesses through trial. It also provides more recent insights from police officers on their perspectives of the, then prospective, scheme. Two superordinate themes were identified: (a) the need for careful application, and (b) the impact of Section 28 on defendants. The findings are discussed considering the current literature, and context of the implementation of Section 28 since the study was conducted. Limitations of the research and suggestions for future practice are discussed.

Key words: Section 28 Hearings; Vulnerable and intimidated witnesses; Cross-Examination; Young Witnesses; Barristers; Judges; Police Officers; Charity Workers.

Introduction

Young people aged 18 and under, who are called as witnesses in criminal trials in England and Wales are encouraged to give their testimony in live court. There is a lack of reliable data on the number of young witnesses who testify per year due to how these figures are recorded. However, in 2017-2018 the Crown Prosecution Service (CPS) recorded 12,318 young people appearing as witnesses in magistrates' and Crown courts in England and Wales (Plotnikoff and Woolfson, 2019). A freedom of information request revealed that at least 21,575 children were summoned to testify in criminal trials as victims between January 2017 and September 2019 according to the UK Crown Prosecution Service Victims Management Information System.[1]

A gamut of special measures have been introduced under the Youth Justice and Criminal Evidence Act (YJCEA) 1999 (see s.16-30) to help support young (and other vulnerable and intimidated) witnesses to give their best possible evidence. One such measure is pre-recorded cross-examination, whereby the young witness' cross-examination is recorded in advance of the trial in the presence of the judge, prosecution, and defence advocates. This pre-recording replaces the live cross-examination in the trial process and is played to the jurors during the trial alongside a pre-recording of their evidence in chief (from their Achieving Best Evidence (ABE) interview). The YJCEA provided the legal basis for pre-trial cross-examination (Section 28), but it was left unimplemented until more recently (a pilot programme was initiated in August 2020). This was largely the result of concerns from

[1] A Freedom of Information (FOI) was submitted in September 2019. These figures require several caveats to aid interpretation; first, not all jurisdictions use the Victims Management System and therefore the figures given may underestimate the number of children appearing as victims nationally. Second, the figures relate to the numbers of young victims subpoenaed to appear as victims; there may be several reasons the child does not eventually give testimony, including late guilty pleas by the defendant and adjournments of the court.

researchers, policy makers and practitioners that its use could potentially hinder the case of the defence (McEwan, 1990).

Although these concerns prevailed, a Ministry of Justice pilot study of Section 28 was conducted in Liverpool, Leeds, and Kingston Crown courts in 2016 and revealed promising results (Baverstock, 2016). Interviews with professionals involved in the pilot (including Police, CPS, Defence, Judiciary, Ushers, Clerks, Intermediaries and Witness Service) highlighted that most felt the shorter delays helped to aid witness recall, yielded better quality evidence, and improved the experience for witnesses overall because witnesses appeared to be less distressed. Section 28 was approved for national implementation, but this 'proceeded in fits and starts' and was plagued with significant delays because of technological complications (Plotnikoff and Woolfson, 2019). Despite this, it is now the case that Section 28 hearings are available in all Crown courts for young and vulnerable adult witnesses.

It is vital that research explores the perspectives of frontline professionals regarding the inauguration of pre-trial cross-examination to guide future implementation. This is particularly important given the recently implemented extension of the measure to adult complainants of sexual assault (Law Gazette, 2020). To date, the 2016 review of the Ministry of Justice Section 28 pilot (Baverstock, 2016) sought views from the judiciary, police staff, CPS staff, defence advocates, court staff, intermediaries, witness care officers and witness service staff specific to three geographical locations in England. A 2019 review surveyed members of the judiciary and intermediaries (Plotnikoff and Woolfson, 2019). This means that the last time frontline police professionals were consulted about Section 28 was during the 2016 pilot review, before the scheme was implemented, and charitable agencies have not, to date, been consulted. This leaves a significant gap in our understanding of how effectively the Section 28 scheme operates. Police officers can provide an important perspective of the scheme as key players in the process of suggesting individuals who are suitable for special measures (Fairclough, 2018). Charity workers often work alongside young people and their families in a supportive capacity up to, during, and following the trial, and often experience specific insights relating to user experience.

This research begins to fill this lacuna, drawing on interviews from seven police officers and six charity workers, to gather their perspectives on the implementation of the Section 28 scheme. In the next sections we will provide a brief history of children as witnesses in England and Wales, the introduction of special measures, the introduction of Section 28 pre-trial cross-examination, and explore the potential impacts of the scheme as considered by previous research.

A Brief History of Children as Witnesses in England and Wales

Prior to the late 1980s, in England and Wales, children—if they were legally able to give evidence—were generally expected to give evidence in the same manner as adult witnesses (Spencer and Lamb, 2012). That is, in live court with little to no protections, such as access to special measures (e.g., live link, screens, intermediaries; Marchant, 2017). Additionally, the hearsay rule determined that the only acceptable form of giving testimony at this time was verbally by the witness themselves. This means that pre-recorded evidence, or an adult giving evidence on behalf of a child, was not admissible. Over time, child complainants were increasingly called to act as witnesses in criminal trials and academics and practitioners became aware of the difficulties child witnesses encounter, such as fears of facing the defendant, challenges with memory retrieval and the retraumatisation caused by reappearing as a witness (McEwan, 1990; Spencer, 1992). Because of the problems associated with child witnesses appearing in court, the Criminal Justice Act (s.32, 1988)

introduced the option for children under 14 years to give evidence from a separate room via closed circuit television link, known as 'live link'. Spurred on by this advancement, supporters of videotaped evidence pressed the government to consider wider revisions to the hearsay rule (Westcott, Davies, and Spencer, 1999). Subsequently, the Home Office Advisory Group on Video Evidence (known colloquially as the Pigot Committee) was formed in the latter 1980's to further explore the impact of video evidence in trials involving vulnerable witnesses such as those under 18 years old.

The aims of the Pigot committee (1989) were first to explore the potential adaptations which could be made to criminal proceedings, and second to respond to suggestions that child abuse was increasing throughout England and Wales (NSPCC, 1990). The committee was driven by the need to ensure the acceptable treatment of children within the criminal justice system and recognised that, to achieve this, many children would require additional support in the courtroom environment. The committee felt that the child should be kept out of the courtroom wherever possible, they concluded that video-recorded evidence in chief could be introduced (where the child's forensic interview is presented in court to prevent them from having to repeat their story again) to mitigate some of the distress experienced by child witnesses. They advised these measures should be extended to all sexual abuse victims under the age of 17.

The Introduction of Special Measures

The main supposition behind the Pigot report (1989) is that young people's involvement in criminal trials should be expedited quickly and they should be afforded the possibility to give evidence in circumstances which do not overwhelm them. Following the Pigot report, the Criminal Justice Act (s.32A, 1991) permitted the use of video evidence, collected during forensic interview, to be used as the child's evidence in chief. The aim of this was to aid memory recall of the child by reducing the time period between disclosure and trial, prevention of the retraction of the child's testimony due to pressure in familial abuse cases, and to reduce the traumatic impact of holding several interviews with the child (Hill and Hill, 1987). An analysis of 150 cases between 1991 and 1999 demonstrated that this measure reduced the stress of the child generally but did not increase conviction rates of defendants (Wilson and Davies, 1999). Critics of this method however raised concerns that video evidence lacks the persuasive impact of in-person testimony, therefore making it difficult to assess credibility of the child's testimony (Hoyano, 2000).

As a result of identified issues related to forensic interviewing practice in England and Wales, two sets of guidelines for forensic interviews of child witnesses were published: The Memorandum of Good Practice (Home Office and Department of Health, 1992) and the subsequent Achieving Best Evidence guidelines (Ministry of Justice, 2011; the most recent iteration). Other special measures designed to help elicit the best possible evidence from child witnesses, initially suggested by the Pigot Committee, were introduced in the YJCEA. These include physical screens in the courtroom so the child is shielded from the accused and the public gallery, intermediaries to assist with communication, and the removal of wigs and gowns to reduce the intimidating nature and formality of the court environment.[2]

Section 28 Pre-Trial Cross-examination

2 For a full run-down of the history, development, and motivations behind special measures, see Fairclough, S. (2021) 'The Lost Leg of the Youth Justice and Criminal Evidence Act (1999): Special Measures and Humane Treatment. Oxford Journal of Legal Studies. 4-7. https//doi.org/ 10.1093/ojls/gqab014

The introduction of pre-recorded evidence in chief and good practice/ABE guidelines, and the later expansion and development of special measures under the YJCEA, made significant advances in conditions for young witnesses appearing in criminal trials. However, the key recommendation from the Pigot report (1989)—for child witnesses to stay outside of the courtroom entirely and also have their cross-examination pre-recorded—remained unimplemented, despite the YJCEA laying the legal base for it under Section 28. As outlined in the introduction, a successful pilot of this measure in 2016 led to its national implementation, some 20 years following its initial enactment. While all child witnesses under 18 are automatically entitled to the use of special measures (YJCEA, s.16(1), 1999), there are some additional criteria to satisfy to qualify for Section 28. As well as their age, the child witness must also have given their account in a video-recorded interview under ABE principles (Section 27) and be testifying in a Crown Court trial (Crown Prosecution Service and the National Police Chiefs Council, 1999).

Supporters suggest that this approach will have numerous advantages, such as reducing delays, helping the witness feel less pressure and a reduction in the potentially traumatising impacts of appearing in court as a witness (Baverstock, 2016; Davies and Hanna, 2013; Hoyano, 2000), whereas critics argue it will potentially hinder the defence (McEwan, 1990). A review of the psychological evidence for these viewpoints follows.

Young Witness Best Evidence: Memory, Recall and Cross-Examination

The ability of the young witness to access their memories and recall accurately under cross-examination has been a focus of much research. In practice, memory recall during cross-examination can easily be manipulated by being asked leading questions that infer an answer (Jack and Zajac, 2012; Segovia, Strange and Takarangi, 2017; Zajac and Hayne, 2003). Additionally, the time delay between experiencing the event and cross-examination is also a serious issue for the administration of justice, especially as current practice in England and Wales often sees significant delays, often running into years, before trial commencement (Victims Commissioner, 2022). A delay of two months can cause significant detriment to memory recall (Martin and Thomson, 1994).

During a study with two groups of young people aged between five and six, and between nine and ten, the participants witnessed an event and were interviewed one week and six months later. Memory accuracy decreased over time, especially in the five-to-six-year-olds (O'Neill and Zajac, 2013). This is supported by previous research conducted on five- and six-year-olds using a cross-examination questioning style following witnessing a contrived event. Participants were more likely to change their original responses following longer time delays combined with cross-examination questioning, compared to after a shorter time delay (Zajac and Hayne, 2003). The consequence of children changing their responses after a long delay was lower levels of accuracy. In short, many agree that a longer delay before memory recall, combined with a leading questioning style, can reduce the quantity or quality of young people's memory reports. Therefore, it is posited that pre-trial cross-examination may promote better memory recall due to less delays experienced overall.

Retraumatisation of the Young Witness

Attending court as witness to a crime is a stressful experience for any individual, but particularly so for young people (Hayes and Bunting, 1992; Knoche, Summers and Miller, 2018). Acting as a witness may serve to retraumatise the young person (Robinson, 2015) and it has been suggested that pre-trial delay 'makes everything worse' (Randell et al., 2018). Stressors include the prospect of cross-examination, facing the defendant, and being exposed to court procedures (Randell et al., 2018). Furthermore, advocates for young people in the criminal justice system argue that the power imbalance in the procedure is

weighted against them causing further undue stress for young witnesses (Knoche, Summers and Miller, 2018). Research examining the long-term impacts on young witnesses over approximately twelve years found that poor later psychological adjustment was associated with a younger age at time of testimony, repeated experiences of giving testimony, and lenient sentencing of the defendant (Quas et al., 2005).

The process of cross-examination, if mishandled, can compound the negative experiences of a young witness. The traumagenic model provides a conceptual framework for understanding the dynamic process of trauma resulting from sexual abuse (Finklehor and Browne, 1985). This model suggests that four trauma-causing factors interplay in a unique way: traumatic sexualisation (the process whereby the young person's sexuality develops in an inappropriate fashion due to abuse), betrayal (the realisation that a trusted individual has caused them harm), powerlessness (leaving the young person disempowered) and stigmatisation (the negative self-image caused by feelings of guilt and shame). These factors create trauma by 'distorting children's self-concept, world view and affective capacities' (Finklehor and Browne, 1985). It is argued that cross-examination processes can replicate these trauma-causing factors and mirror the abuse the young person suffered as a result of the offence (Westcott and Page, 2002).

The potential benefits of Section 28 for traumatised young witnesses include not having to face the person they have accused; even the potential of 'running into them' in the courthouse is reduced due to the pre-trial cross-examination occurring on an earlier date than the actual trial (Hoyano, 2000). Additionally, if a second trial is needed, the pre-recorded evidence from the first trial can be used, meaning the young person does not have to appear as a witness again and therefore have to go through the same distressing experience twice (Davies and Hanna, 2013). There are pockets of good practice for facilitating vulnerable witnesses to give their best evidence in court, but there are also examples of poor practice (Westcott and Page, 2002); there is therefore a need for a standardised approach. The advocates for Section 28 argue that pre-trial cross-examination would provide the standardised approach required to support traumatised young witnesses to give their best evidence (Westcott and Page, 2002).

Legal and Financial Advantages of Implementing Section 28

In addition to the psychological considerations outlined above, there are also legal and financial advantages related to the implementation of Section 28 proceedings. From the prosecution's perspective, these include both the withdrawal or downgrading of charges at an earlier point as appropriate following the young person's pre-recorded testimony and earlier defendant pleas. Both of these could mean the likelihood of a drawn-out process is reduced and less court time and resources are required (Hoyano, 2000). For the defence, potential benefits of Section 28 include sparing the defendant the public stigma of the criminal trial as they would be able to advise their client better regarding the realistic prospect of conviction and potentially increase the likelihood of early guilty pleas from defendants (Davies and Hanna, 2013; Hoyano, 2002). Similarly, the pilot study found that 48% of cases with Section 28 hearings concluded with an early guilty plea compared to planned cross-examination at trial (9% early guilty pleas; Baverstock, 2016). The above arguments highlight a system which could potentially be expedited in a more effective manner, reducing the burden on the criminal justice system as well as the individual players.

Potential Limitations of Implementing Section 28

A Home Office briefing paper (Birch and Powell, 1999) argued that the main aims of expediting the process and removing the young person from a traumatic situation had been

achieved through the introduction of the other special measures, and the introduction of Section 28 would therefore be superfluous. Additionally, researchers have highlighted that the comfortable surroundings afforded by a Section 28 approach may inhibit the solemn nature of a trial, which highlights to the young witness the serious nature of the proceedings (Hoyano, 2000). Some critics of Section 28 have voiced that video evidence may lack the 'immediacy and persuasive impact' of the young person's live testimony, meaning the jury may struggle to connect to the evidence given via video (Hamlyn et al., 2004; Hoyano, 2000; Payne, 2009). In summary, although psychological and legal research can hint to the positives and negatives of Section 28, ultimately it is difficult to predict the consequences for practice until pre-trial cross-examination is fully implemented and evaluated.

Methodology

Thirteen participants from the Thames Valley Region completed a semi-structured interview between the August – September 2020, which took place via a remote method chosen by the participant (i.e., phone call, FaceTime or Zoom). The Covid-19 lockdown rules in place at the time removed any possibility for in-person interviews. Seven participants were police officers from Thames Valley Police Service and were the 'Officer in Case' for young people due to attend court as witnesses. The remaining six participants were charitable sector workers who are commissioned by the Police and Crime Commissioner to support young people affected by crime in the Thames Valley Region. Full approval for the research was granted by the Science, Technology, Engineering and Mathematics Ethical Review Committee at the University of Birmingham in March 2020. The first author received gatekeeper approval for this research by the lead Police Superintendent for the Section 28 roll-out and the Board of Trustees for the charitable organisation in May 2020. The participants were recruited through an email cascade. This email included a recruitment flyer with brief information regarding the purpose and procedure of the study and the contact details for the first author. Three of the participants had direct experience of a Section 28 hearing at the time of the interviews (Police Officer 4, Charity Worker 2 and Charity Worker 4).

Recordings of the interviews were transcribed verbatim and analysed using thematic analysis which is a method for identifying, analysing and reporting patterns (themes) within data and a flexible approach that is well suited to applied research (Braun and Clark, 2006).Quotations from respondents are identified in the following section as either Police Officer or Charity Worker and a number (e.g., Police Officer 1).

Findings and discussion

This research identified two superordinate themes namely (i) the need for the careful application of Section 28, and (ii) the impact of Section 28 on defendants, each with several subthemes.

Theme One: Need for Careful Application

Consistent with previous research, participants believed that the Section 28 could reduce stressors and distress (Cooper, 2005; Finklehor and Brown, 1985; Robinson, 2015). One point that has not previously been raised in the literature was the belief that Section 28 will reduce distress of the young person by creating 'distance' between them and the trial process. Available literature, which tends to focus on the perceptions of legal counsel as opposed to other professions, states that the biggest advantage of Section 28 for child witnesses is the reduction in likelihood of seeing the defendant (Hoyano, 2000) and most researchers believe pre-trial cross-examination is going to reduce the stress experienced by young witnesses through the trial process (Davies and Hanna, 2013).

The participants in this research however, expressed that unconditional application of Section 28 for all witnesses under the age of 18 could serve to intensify the distress felt by some young people, because it would not allow young people to make an informed choice about which measures, if any, they would prefer to use.[3] This could also have potentially negative consequences for other non-professional individuals involved in the trial in the trial, such as jurors, who may also lose a sense of justice if the trial is too far removed from their expectation. This is particularly important to consider because there have been calls for the extended use of Section 28 measures to manage the backlog of Crown Court cases and ensure vulnerable victims are not left to 'fall through the gaps' (The Guardian, 2021).

Subtheme One: Potential to Reduce Distress

During Section 28 hearings, the young person is not required to attend the live court hearing, appearing in a closed hearing prior to trial instead, which the participants believed would mitigate the distress experienced by young people including stress (Cooper, 2005; Robinson, 2015), shame (Cooper, 2005, Finklehor and Brown, 1985) and powerlessness (Finklehor and Brown, 1985). A reduction in uncertainty was seen as a consequence of creating distance between the young witness and the trial and thus, the anxiety of the young person is likely to be lessened:

> "I think it all links back to that uncertainty, there are things we can help the young people have some control over… you are instantly going to relieve some of those anxieties I think." (Charity Worker 4).

Fewer delays, a reduction in the number of people physically present in the courtroom, including the defendant, and the physical distance between the young witness and the courtroom were identified as benefits of Section 28 hearings. With pre-trial cross-examination, the young witness is given a specific time to attend court to give evidence. The expectation is that this will make the experience less stressful and elicit the best possible evidence from young people:

> "For me, that is the biggest thing is that they will know what is going to happen and when… I think that will cause better evidence." (Police Officer 1).

> That's got to be a massive bonus with Section 28 because you are going to have a pre-set time where you are going to have your cross-examination recorded. It may vary within an hour or so. I can't see the young witness hanging around for days on end, or hours on end, anticipating what's going to come. (Police Officer 6).

Trials require a significant number of players, including both the defendant and professional adults. Participants noted that young witnesses are consciously aware of who is in the courtroom. By holding the Section 28 hearing on another day, prior to the trial, it should prevent the possibility of the witness seeing the defendant, and therefore reduce their anxiety regarding this:

> "They wouldn't have to panic about going to that building, facing the idea of seeing the suspect." (Police Officer 3).

[3] Indeed, this was the case when the old 'primary rule' mandated live link use by certain child witnesses in need of 'special protection' under the YJCEA before the 2009 amendments. See YJCEA s 21.

In addition, participants described how the authority court staff hold can be just as intimidating as seeing the defendant for a young witness. As a results, they felt that the fewer people were present in the court, the less distressing of an experience it would be for young witnesses:

> It would just be the judge and the two barristers and that would be it. There wouldn't be anybody else there so if it is explained to the young person that that is what's going to happen, I would imagine that it would be a lot less stressful for the young person." (Charity Worker 5).

There was a general sense that a reduction in anxiety would benefit recall and ultimately lead to better evidence:

> "That's the whole point of it isn't it? To give their best evidence." (Police Officer 5).

Young people are often assumed by the lay public to be unreliable witnesses due to the expectation they will have poorer memory recall than adults (Westcott and Page, 2002). Better memory recall was cited by the participants in this research as an advantage of Section 28 due to the decrease in delays getting to trial and a reduction in the distress caused by uncertainty and disempowerment of the trial process. Participants felt that better memory recall was more likely to produce the witness's 'best evidence' and was therefore advantageous for the administration of justice. The literature supports this notion concluding that longer delays can significantly impact memory detrimentally for young people therefore impacting on the quantity of accurate recall (Martin and Thomson, 1994; O'Neil and Zajac, 2013; Spencer, 1992; Zajac and Hayne, 2003). Shortening the time period between disclosure and trial offered by Section 28 could lead to more complete recall for young witnesses, and may result in fewer errors from leading questions compared to longer delays.

Subtheme Two: Critical Reflections on Application

An additional finding of this research is the concept of choice and empowerment. Previous research highlights that witnesses are often not offered a choice regarding special measures (Beckett and Warrington, 2015; Burton, Sanders and Evans, 2007; Majeed-Ariis et al, 2019). Individual needs and the right of the young person to choose which special measure they wish to use was a common theme throughout the interviews with the charity workers:

> "I think I would have liked still, young people as victims, to have the option and to be empowered to make that decision, rather than just be told you are going to do Section 28." (Charity Worker 2).

The charity workers felt that Section 28 might not necessarily suit all young people. The individual needs of the young witness are often overlooked, and, in their experience, an unconditional approach is adopted, particularly the tendency for adults to make decisions on behalf of young witnesses, removing freedom of choice. Failure to consider individual needs, and the unconditional application of pre-trial cross-examination for all young people could potentially disempower them further by removing young witnesses' decision-making ability and sense of justice.

> We do come across young people where we might instantly say, this would be a great idea for them…you have a frank conversation with them, and you realise that the opposite is true and they might want to have that experience on the day. (Charity Worker 4)

This may result in them feeling excluded and on the periphery of the subsequent trial process:

> "Some young people might want to have their day in court, and they might want to have a jury there and they might want to be listened to." (Charity Worker 6).

Charity workers concluded that every young person is different, and that pre-trial cross-examination should therefore be viewed as an add-on to the existing measures, as opposed to an unconditional decision made based on age.

Although pre-trial cross-examination was seen as a welcome change to the traditional live trial process, police officers reflected on the distance created by such proceedings possibly diminishing the seriousness, and therefore the salience, of the trial for young witnesses. As such, police officers questioned whether young witnesses would recognise that they are taking part in a trial:

> "If you remove everything from that trial situation, would a child or young person recognise how serious it is?" (Police Officer 1).

Additionally, police officers noted that removing the presence of a child witness from the trial process could create consequences for non-professional players, including jurors and the public:

> "They still have to have certain things put in place for them to understand process, to understand evidence." (Police Officer 2).

The trial process has been in existence for years and police officers felt that a divergence away from the expected process may mean that the relevance and salience of the trial process, and therefore justice, is lost to such key players.

Despite the identification of distance being a positive consequence of pre-trial cross-examination, the participants in both groups expressed that too much distance could be detrimental. The YJCEA (s.19(3)(a), 1999) states that the witness's wishes regarding giving evidence via special measures should be considered when making the application. The charity workers anticipated that well-meaning professionals could potentially apply an unconditional directive of Section 28 hearings in all trials with young witnesses without considering their individual needs or wishes. Young people have a developed sense of what justice should look like and removing them from this process can lead to further disempowerment.

Several of the police participants also suggested that removal of the young person from the "seriousness" of the court process could impact on their ability to give accurate evidence. The concerns about distance and loss of salience are echoed in the literature as researchers warn that Section 28 hearings could diminish the gravity of the trial for the young witness and the other, non-professional, participants such as jurors (Davies and Hanna, 2013; Hamlyn et al., 2004; Hoyano, 2000; Payne, 2009).

Theme Two: The Impact of Section 28 on Defendants

Because the charity worker participants in our research did not have professional contact with defendants, we only asked police officers about the impact of pre-trial cross-examination on defendants.

Subtheme One: Unfair Advantages and Disadvantages

Police officers suggested that defendants may see Section 28 hearings as an unfair advantage for young witnesses by being afforded the opportunity to give evidence in preferential circumstances:

> "They've still got to appear in the court building, they've still got to answer the prosecution in front of all those people." (Police Officer 2).

> There may be a concern for them that the questioning isn't particularly how they would have wanted it, or they may feel that there is an unfair advantage for the person because they are not having to go through the same thing that the other witnesses are. They may feel that that is a slight unfair advantage. (Police Officer 7)

The police participants did also identify some advantages of the pre-trial cross-examination process for the defendants. The certainty of the Section 28 hearing happening when it is meant to happen was seen as a positive for defendants as it is important to also manage defendants' expectations. Additionally, several of the police officers noted that Section 28 hearings with child witnesses can also be of advantage to defendants since the aim of pre-trial cross-examination is to elicit better quality evidence, which may lead to a possible acquittal:

> "It could mean it causes that reasonable doubt…that leads to an acquittal. And I think better quality evidence is better for everyone because it helps us get at the truth." (Police Officer 1).

Alternatively, Section 28 may encourage earlier guilty pleas once or even before the witness' testimony is secured, which are rewarded with a reduction in sentence (Hoyano, 2000; Davies and Hanna, 2013):

> "If they go guilty, it's a benefit to the defendant because the courts will take that into consideration, they might get slightly reduced sentence, so in some senses it is a win-win situation." (Police Officer 3).

Subtheme Two: Future Considerations

Although Plotnikoff and Woolfson (2019) discuss in depth the management of vulnerable young defendants (such as access to intermediaries), as far as we are aware, no previous research has explored professionals' perceptions regarding offering defendants the opportunity to give their evidence via a Section 28 hearing. Generally, police officer participants felt that Section 28 could also be used as a method of giving evidence for vulnerable defendants, and that this would only be fair. However, the participants emphasised that this should only be offered in cases where such vulnerability had been fully established. For example, where the defendant is under the age of 18, diagnosed with a mental health condition under the Mental Health Act (1983), or identified learning difficulties (Crown Prosecution Service and the National Police Chiefs Council, 1999).

> Why wouldn't they be covered under the same umbrella and given the same opportunity because surely, as much as we want to make sure the victim can give their best evidence, surely we need that from the defendant as well in order to get as close to the truth as possible. (Police Officer 4)

The lack of availability of Section 28 to vulnerable defendants is one of several disparities in the provision of special measures to vulnerable individuals (Fairclough, 2018). However, the absence of pre-recorded provisions for the accused (both Section 27 and 28) is likely justified due to the fact that the defendant's evidence (should they choose to give it) is given in response to the prosecution's case. It would thus be logistically very difficult—if possible at all—to pre-record their testimony in advance of the trial.[4] In addition, the criminal justice system is based upon the principle that the person accused of the crime will appear in court to face the accusations. One respondent in this study suggested that to allow a defendant's testimony to be pre-recorded may impact on how open and transparent the trial is perceived to be:

> "There is evidence to suggest this person, who is the defendant, has done something which is really bad, and this is their time to answer that." (Police Officer 2).

Admittedly, this is perhaps a less convincing reason for the denial of Section 28 from a legal perspective, but it is still indicative of the views of those working on the periphery of the trial.

Implications for Practice

A cautious key finding of this research is the principle that well-meaning adults should not apply a "one size fits all" approach when considering applications for special measures. However, further research is required on this topic with both the professionals responsible for supporting young people through a section 28 process and the young people themselves. An emergent literature base focuses on transforming criminal justice settings, such as courtrooms, into trauma-informed environments through the provision of trauma-informed policies, practices, and settings (Knoche, Summers and Miller, 2018). Guidance published in the United States by the Substance Abuse and Mental Health Services Administration (2014) states that organisational ability to realise, recognise, respond, and resist traumatisation all contribute to the formation of a trauma-informed environment. It would appear sensible, given that young witnesses are likely to have been subjected to adverse traumatising experiences, to apply trauma-informed thinking to the courtroom milieu. Importantly, this research indicates that the informed choice of young witnesses should be a fundamental part of the trial process and professionals should avoid an unconditional application of Section 28 proceedings based on age alone (Substance Abuse and Mental Health Services Administration, 2014). Moreover, empowerment, voice, and choice are identified as important factors of trauma-informed care (Substance Abuse and Mental Health Services Administration, 2014). Practitioners working in this field should consider current guidelines on age factors, including Gillick Competence guidelines (Gillick v West Norfolk and Wisbech, 1986) and the Young Witness Protocol (National Police Chiefs' Council, The Crown Prosecution Service and Her Majesty's Courts and Tribunals Service, 2018), which suggest that families should be involved in decision making involving younger children and those with identified additional needs (such as learning difficulties) in healthcare settings. Such principles are also applicable as guides to best practice for criminal justice settings, such as criminal trials.

The loss of seriousness or relevance of the trial has been raised throughout the literature in the past 30 years as a concern about the implementation of Section 28 (Davies and Hanna, 2013; Hamlyn et al., 2004; Hoyano, 2000; Payne, 2009), though, to date, there has been no empirical research published on this topic. A first key step is to determine if Section 28 does result in a loss of salience. If so, judicial instruction to non-professional players (such as jurors) regarding Section 28 methodology, outlining both the benefits and limitations, should

[4] Some such concerns were expressed in the Court of Appeal and House of Lords regarding pre-recorded examination-in-chief in *R v SH* [2003] EWCA Crim 1208 at [23]-[24] and *R v Camberwell Green Youth Court* [2005] UKHL 5 at [58].

be introduced in trials where young witnesses are present to negate the loss of significance for such non-professional members of the court.

Previous research has highlighted potential financial and legal benefits to the Section 28 scheme, including the withdrawal or downgrading of charges at an earlier point and the defendant being advised to plead guilty at an earlier point by their defence advocate; therefore, avoiding a drawn-out legal process (Hoyano, 2000). This proposition has been supported by the police and charity worker participants in this research. Several participants in this study highlighted that they believed, due to their experiences of supporting child witnesses, that the introduction of Section 28 will reduce delays overall and will encourage more early guilty pleas from defendants.

Limitations and Future Research

The nature of this qualitative research is that it provides a snapshot of professional perceptions of the section 28 scheme, within two disciplines, in a particular location, at a certain point in time. The opinions of the professionals interviewed for this research may have changed now that they have more (or indeed some) first-hand experience of the Section 28 scheme in action. It is not possible to suggest that the findings from this research would reflect the perspectives of other professionals within the court arena from different disciplines, such as judiciary, prosecution, defence, and witness service operatives in other areas of England and Wales. Therefore, future studies could seek to recruit such participant groups. Moreover, consideration of the impact of Section 28 hearings on defendants may naturally come from interviewing professionals who have a wider remit within the courtroom process. Additional research exploring the possibility of Section 28 procedures for vulnerable defendants would serve to promote best practice and the gathering of best evidence. Finally, there is currently a small amount of research focusing on the impact of trauma memories during cross-examination and other adversarial questioning situations. Future research into the introduction of Section 28 hearings could explore the differences and similarities between the impact of trauma and non-trauma memories on accurate recall in cross-examination situations.

Conclusion

This research both reinforces some of the findings from existing evaluations of Section 28 hearings as well as providing new insights into how the scheme operates and how it should do so going forwards. It is clear that every young person is different and holds their own expectation about what justice should look like. This research has indicated that, in the main, professionals from the police and charitable sectors are positive about the introduction of pre-trial cross-examination, but some have reservations regarding unconditional use. The process of cross-examination is a distressing experience for young people, and it is therefore crucial, to avoid further distress, that young witnesses be consulted throughout the trial experience.

References

Baverstock, J. (2016). *Process evaluation of pre-recorded cross-examination pilot (Section 28).* Ministry of Justice Analytical Series. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553335/process-evaluation-doc.pdf

Beckett, H. and Warrington, C. (2015). *Making Justice Work: Experiences of criminal justice for children and young people affected by sexual exploitation as victims and*

witnesses. University of Bedfordshire. https://www.our-voices.org.uk/assets/documents/MakingJusticeWorkFullReport.pdf

Birch, D, and Powell, R. (20024). *Meeting the challenges of Pigot: Pre-trial cross examination under Section 28 of the Youth Justice and Criminal Evidence Act*. Home Office Briefing Paper

Braun, V., and Clarke, V. (2006). Using thematic analysis in psychology. *Qualitative Research*. (2006) 3(2). 77, 77-101.

Burton, M., Evans, R. and Sanders, A. (2007). 'Vulnerable and Intimidated Witnesses and the Adversarial Process in England and Wales'. *International Journal of Evidence and Proof,* 11(1), 1-23.

Cooper, D. (2005). Pigot unfulfilled: Video-recorded cross-examination under Section 28 of the youth justice and criminal evidence act 1999. The *Criminal Law Review*, 456-466.

Cooper, D. (2016). Pigot unfulfilled: Video-recorded cross-examination under Section 28 of the youth justice and criminal evidence act 1999. The *Criminal Law Review*, 456-466.

Cooper, P. (1999). A double first in child sexual assault cases in NSW: Notes from the first witness intermediary and pre-recorded cross-examination cases. *Alternative Law Journal, 41*(3), 191-194. https//doi.org/10.1177/1037969X1604100311

Criminal Justice Act (1988). S.32. London: House of Commons

Crown Prosecution Service and the National Police Chiefs Council. (2019). A National Protocol between the Police and Crown Prosecution Service in the Investigation and Prosecution of Offences in Relation to which the Cross-examination of a Witness will be pre-Recorded. NPCC: London

Davies, E., and Hanna, K. (2013). Pre-recording testimony in New Zealand: Lawyers' and victim advisors' experiences in nine cases. *Australian and New Zealand Journal of Criminology, 46*(2), 289-305. https//doi.org/10.1177/0004865813485590

Fairclough, S. (2021) 'The Lost Leg of the Youth Justice and Criminal Evidence Act (1999): Special Measures and Humane Treatment. *Oxford Journal of Legal Studies*. 4-7. https//doi.org/ 10.1093/ojls/gqab014

Fairclough, S. (2018) Speaking up for Injustice: Reconsidering the Provision of Special Measures through the lens of Equality. Criminal Law Review 4.

Fairclough, S. (2018) 'Using Hawkins's surround, field and frames concepts to understand the complexities of special measures decision making in Crown Court trials'. Journal of Legal Studies. 41(3). 457-485. https://doi.org/10.1111/jols.12100

Finklehor, D., and Browne, A. (1985). The trauma impact of child sexual abuse: a conceptualisation. *American Journal of Orthopsychiatry. 55,* 530-541. https//doi.org/10.1111/j.1939-0025.1985.tb02703.x

Gillick v West Norfolk and Wisbech AHA AC 112 ((HL)) 1986

Hamlyn, B, Phelps, A, Turtle, J, and Sattar, G (2004) *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses*, HORS 283. London, UK: Home Office. http://library.college.Police.uk/docs/hors/hors283.pdf

Hayes, D., and Bunting, L. (2003). 'Just be brave' - the experiences of young witnesses in criminal proceedings in Northern Ireland. *Child Abuse Review, 22*(6), 419. https//doi.org/10.1002/car.2242

Henderson, E. (2016). Best evidence or best interests? what does the case law say about the function of criminal cross-examination? *The International Journal of Evidence and Proof, 20*(3), 183-199. https//doi.org/10.1177/1365712716642356

Hill, P. and Hill, S. (1987) 'Videotaping children`s testimony: An empirical view. *Michigan Law Review.* 85. 809-833.

Home Office and Department of Health. (1992). *Memorandum of Good Practice on Video Recorded Interviews with Child Witnesses for Criminal Proceedings*. HMSO.

Hoyano, L. (2000). Variations on a theme by Pigot: Special measures directions for child witnesses. *The Criminal Law Review,* 250-273.

Jack, F. and Zajac, R. (2014). The effect of age and reminders on witnesses' responses to cross-examination-style questioning. *Journal of Applied Research in Memory and Cognition.* 3(1). 1-6. https://doi.org/10.1016/j.jarmac.2013.12.001.

Knoche, V. A., Summers, A., and Miller, M. K. (2018). Trauma-informed: Dependency court Personnel's understanding of trauma and perceptions of court policies, practices, and environment. *Journal of Child and Adolescent Trauma, 11*(4), 495-505. https://doi.org/10.1007/s40653-018-0219-7

Law Gazette. Pre-recorded evidence now an option across England and Wales. (23rd November 2020).

Majeed-Ariss, R., Brockway, A., Cook, K., & White, C. (2021). 'Could do better': Report on the use of special measures in sexual offences cases. *Criminology & Criminal Justice*, *21*(1), 89–106. https://doi.org/10.1177/1748895819840396

Marchant. R. (2017) 'Special Measures'. In Penny Cooper and Heather Norton (eds) *Vulnerable People and the Criminal Justice System.* Oxford University Press

Martin, S. E., and Thomson, D. M. (1994). Videotapes and multiple interviews: The effects of the child witness. *Psychiatry, Psychology and Law, 1*(2), 119-128. https//doi.org/10.1080/13218719409524835

McEwan, J. (1990). In the box or on the box - the Pigot report and child witnesses *Criminal Law Review,* 363-370.

Ministry of Justice. (2011). *Achieving best evidence in criminal proceedings: guidance on interviewing victims and witnesses, and guidance on using special measures.* London: HM Government. https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/best_evidence_in_criminal_proceedings.pdf

Mulcahy, L. (2011) *Legal architecture: justice, due process and the place of law (*2011) Routledge.

National Police Chiefs' Council, The Crown Prosecution Service and Her Majesty's Courts and Tribunals Service (2018). A Protocol Between the National Police Chiefs' Council, The Crown Prosecution Service and Her Majesty's Courts and Tribunals Service to Expedite Cases Involving Witnesses Under 10 Years. https://www.judiciary.uk/wp-content/uploads/2015/03/police-cps-hmcts-ywi-u10-protocol-20180711.pdf

NSPCC. (1990). 'Child Abuse Trends in England and Wales 1983-1987.' NSPCC (London).

O'Neill, S., and Zajac, R. (2013). The role of repeated interviewing in children's responses to cross-examination-style questioning. *British Journal of Psychology, 104*(1), 14-38. https//doi.org/10.1111/j.2044-8295.2011.02096.x

Payne, S (2009b) Rape: The Victim Experience Review. London, UK: Home Office. https://webarchive.nationalarchives.gov.uk/+/http:/www.homeoffice.gov.uk/documents/vawg-rape-review/rape-victim-experience2835.pdf?view=Binary

Pigot, T. (1989). *The report of the advisory group on video evidence.* London: Home Office

Plotnikoff, J. and Woolfson, R. (2019) *Falling short?: a snapshot of young witness policy and practice.* London: NSPCC

Quas, J. A., Goodman, G. S., Ghetti, S., Alexander, K. W., Edelstein, R., Redlich, A. D., and Jones, D. P. H. (2005). Childhood sexual assault victims: Long-term outcomes after testifying in criminal court. *Monographs of the Society for Research in Child Development, 70*(2)

Randell, I., Seymour, F., Henderson, E., and Blackwell, S. (2018). The experiences of young complainant witnesses in criminal court trials for sexual offences. *Psychiatry, Psychology and Law, 25*(3), 357-373. https//doi.org/10.1080/13218719.2017.1396866

Roberts, P., and Zuckerman, A. (2010) 'Criminal evidence' 2nd Edn. Oxford University Press

Robinson, J. (2015). The experience of the child witness: Legal and psychological issues. *International Journal of Law and Psychiatry*, 42-43, 168-176. https//doi.org/10.1016/j.ijlp. 2015.08.022

Segovia, D.A., Strange. D., and Takarangi, M.K. (2017) Trauma memories on trial: is cross-examination a safeguard against distorted analogue traumatic memories? *Memory*. 25(1). 95-106. https//doi.org/10.1080/09658211.2015.1126608

Spencer, J. R. (1992). Reforming the law on children's evidence in England; the Pigot enquiry and after. In H. Dent, and R. Flin (Eds.), *Children as witnesses* (1st ed., pp. 113-129). Chichester: Wiley.

Spencer, J.R., and Lamb, M.E. (2012). In J.R. Spencer & M.E. Lamb (Eds.). *Children and Cross-Examination: Time to Change the Rules?* (pp. 283–291). London: Hart Publishing.

Substance Abuse and Mental Health Services Administration (2014). SAMHSA's Concept of Trauma and Guidance for a Trauma Informed Approach. https://ncsacw.samhsa.gov/userfiles/files/SAMHSA_Trauma.pdf

The Guardian. *Call for vulnerable victims to give video evidence amid courts backlog.* (5th March 2021).

Victims' Commissioner (2022). Annual report of the Victims' Commissioner 2021 to 2022. London: Office of the Victims' Commissioner.

Westcott, H.L., Davies, G. and Spencer, J. (1999) 'Children, hearsay, and the courts: A Perspective from the United Kingdom' (1999) 5(2) *Psychology, Public Policy and Law.* 282-303. https://doi.org/10.1037/1076-8971.5.2.282

Westcott, H. L., and Page, M. (2002). Cross-examination, sexual abuse and child witness identity. *Child Abuse Review,* 11(3), 137-152. https//doi.org10.1002/car.739

Youth Justice and Criminal Evidence Act (1999). (c. 1). London: House of Commons

Zajac, R., and Hayne, H. (2003). I don't think that's what really happened: The effect of cross-examination on the accuracy of children's reports. *Journal of Experimental Psychology: Applied, 9*(3), 187-195. https//doi.org/10.1037/1076-898X.9.3.187