Feature

Worth waiting for: The benefits of section 28 pre-trial cross-examination

By Joyce Plotnikoff and Richard Woolfson, Lexicon Limited

It is 27 years since Judge Pigot proposed that children's cross-examination be videoed before trial.[1] Eventually enacted as s.28 of the Youth Justice and Criminal Evidence Act 1999, this became one of a package of special measures covering all young and some vulnerable adult witnesses. Combined with the police interview filmed as evidence-in-chief[2], the aim was to capture all of the witness's evidence before trial. This could then be played to the court; the witness need not attend the trial. However, a scheme to pilot s.28 did not receive the government "green light" until adverse publicity surrounding child sex exploitation cases in 2013.[3]
The evaluation ran for 10 months in 2014 at the Crown Court in Liverpool, Leeds and Kingston upon Thames. So many benefits emerged that the pilot courts continued to use s.28 when the formal evaluation period ended and extended its use to most of their judges. In July 2016 – in response to Ann Coffey MP's tenth query about s.28's status – Justice Minister Mike Penning announced its national roll-out, albeit without "full government clearance".[4]
The Ministry of Justice evaluation of the pilot has not yet been published.[5] Although cost-effectiveness was not an explicit evaluation objective[6], the lead judges believe that s.28 could result in considerable savings. They are keen for the measure to be adopted nationally:

> "It would be a gross mis-service to the administration of justice and vulnerable witnesses if s.28 is not rolled out. There are so many advantages if it is operated correctly";
>
> "It could be one of the single most beneficial improvements in delivering justice to some of the most vulnerable in society";
>
> "There are no downsides."

The Lord Chief Justice has commended the "very significant benefits" to be achieved by implementation.[7]
Section 28's success can be attributed to a group of case-management minded judges and a case management framework undreamt of by Pigot or those drafting the 1999 Act. Elements include rigorous judicial control driven by Criminal Procedure Rules, Practice Directions and (now) new Plea and Trial Preparation Hearings; heightened awareness of inappropriate questioning reinforced by robust Court of Appeal judgments; and tighter rules on disclosure and discounts for early guilty pleas. Courts must now take "every reasonable step" to facilitate witness participation.[8] This has resulted, for example, in the judge joining the lawyers and witness in the live link room for face-to-face s.28 cross-examination.
Operation of the special measure is governed by a Judicial Protocol[9], a pilot court Guidance Note[10] concerning ground rules hearings and a police-CPS joint agreement. Pilot criteria for inclusion of vulnerable adults were unchanged from the 1999 Act but young people's eligibility was lowered from under 18 to under 16. Even so, most cases in the pilot and its continuation involved children. Section 28 was used not just for sexual offence complainants but also for witnesses to murder, fraud and theft. Witnesses meeting s.28 criteria are also eligible for communication assistance from an intermediary (s.29 of the 1999 Act). However, few such appointments have been made.

Impact on delay and closure for the witness

Judges report that pilot procedures dramatically reduced witness waiting time at court. Section 28 recordings should be the first matter listed in the morning (Protocol, para.62). Timing and duration should take account of witness needs; for "a young child", the hearing should "conclude before lunch time" (para.23). In Leeds and Liverpool (but not Kingston, where it was not feasible), most recordings were scheduled for completion before the start of regular court business. This approach was generally welcomed, but the early start did not suit witnesses living far away or those on medication better accommodated by a later schedule.
Reducing the time cases took to reach cross-examination was not an explicit pilot aim[11] even though expedited timetabling is integral to the regime. Time interval data are likely to be skewed by inclusion of cases pending for a year or more before the pilots began. One judge observed that: "I still accept cases identified late. Even with delays, the section 28 process is much better."
Successive governments considered s.28 to be unworkable on the basis that disclosure was unlikely to be completed until just before trial.[12] Tight timetabling of disclosure by lead judges enabled many s.28 recordings to take place months before trial: "We insist on disclosure keeping to the timetable and resist late, inappropriate requests". However, as more judges became involved at pilot courts, control was not always so exacting: some s.28 recordings have had to be re-

1 Home Office Advisory Group on Video-recorded Evidence (1989).
2 Youth Justice and Criminal Evidence Act 1999 s.27.
3 Ministry of Justice *Section 28 Newsletter* (27 March 2014). Interest in s.28 revived following the judgment in *Barker* [2010] EWCA Crim 4 and publication of *Children and cross-examination: time to change the rules?*, J. Spencer and M. Lamb eds (2012) Hart Publishing.
4 Minister for Policing, Fire, Criminal Justice and Victims, Hansard, 6 July 2016, col 1016.
5 We are indebted to HHJs Cahill QC, Tapping and Collier QC for their comments: unless otherwise noted, quotes came from one of these judges. Thanks also to Registered Intermediary Rosemary Wyatt, who collated feedback from RIs involved in pilot cases. We did not have the opportunity to seek feedback from advocates, but the Criminal Bar Association plans to do so later this autumn.
6 'The aim of the pilot is to improve the court experience of young people, victims of sexual abuse and vulnerable witnesses who, as result of disability, illness, age or personal circumstances are also covered within scope': HM Courts and Tribunals Service *Section 28 Pilot* (27 March 2014.)
7 Judiciary of England and Wales *The Lord Chief Justice's Report 2015*, p 9.
8 Criminal Procedure Rule 3.9(3)(b). This commitment covers helping defendants as well as witnesses.
9 Judiciary of England and Wales *Judicial Protocol on the Implementation of section 28: Pre-recording of cross-examination and re-examination* (September 2014.)
10 HHJs Aubrey QC, Cahill QC and Tapping *Draft Guidance Note for s.28 ground rules hearings at the Crown Court in Kingston, Leeds and Liverpool* (September 2014.)
11 HM Courts and Tribunals Service *Section 28 Pilot* (27 March 2014), see fn 6.
12 See, for example, Spencer and Lamb 2012, p 13, fn 3.

scheduled due to failure to adhere to disclosure timetables. Another barrier to implementing s.28 was concern that witnesses would probably have to give evidence again. Out of hundreds of witnesses, only one has been recalled to give further evidence, also dealt with by pre-trial recording (Protocol, para.50). Section 28 provides witnesses with finality (though non-eligible witnesses who are family members must still give evidence at trial). In the event of a re-trial, relatively common in vulnerable witness cases, s.28 evidence has already been captured. There is no risk that prosecutions will collapse simply because witnesses refuse to give evidence again.

Where multi-defendant trials are split, recorded cross-examination can be re-played as often as necessary rather than requiring the witness to attend each trial. For example, a "grooming" case with over 30 defendants but just one complainant is being managed as four trials. In a two-day s.28 hearing, lead counsel cross-examined on credibility, and then the witness was briefly questioned without repetition by other advocates. Relevant parts of the recording will be played at each of the four trials taking place over a year.

Section 28 can even be employed when trials are adjourned at short notice. In a non-pilot case involving an elderly witness and offences later described as "a grotesque breach of trust of the highest order",[13] parties were present for trial but it could not proceed as scheduled. As this occurred at a pilot court, it was decided to record the woman's cross-examination that day. The witness died before the re-scheduled trial, but her evidence was played to the jury and the case resulted in a guilty verdict.

Review and control of questioning

Section 28 cross-examinations often last less than an hour. As a result, trials are shorter. Pilot judges say: "Cases that used to end on a Friday now end on a Wednesday". This is regarded as the "pay-off" for time invested in preparing and reviewing questions beforehand.

All s.28 cases must have a ground rules hearing before the day of the recording (Protocol, paras 20, 62), facilitating "the judge's duty to control questioning if necessary" (Guidance, para.3). Length of cross-examination must be discussed (para.11). As noted above, this includes multi-defendant trials. In one "four-hander", the judge described counsel organising themselves into two pairs:

> "The first counsel asked questions for D1 (the main defendant) and D2. This lasted less than 15 minutes. This was followed by a break with the recording running, so that the jury saw how the child behaved. Second counsel then asked questions for D3 and D4 but was only allowed to deal with new matters. This was completed in less than 10 minutes. The process was not unfair. Only D1 was convicted and he is now serving a lengthy sentence."[14]

Proposed questions must be submitted in writing for review by the judge and any intermediary (Guidance, "Section 28 Defence Ground Rules Hearing Form"), preferably with alternatives depending on the witness's response.[15] The aim is to avoid grounds for intervention because all questions are agreed beforehand. One judge described the process as "very effective. If I've altered every question on the first few pages, I send counsel out with the remainder to revise the rest in their own time". Judges assess how questions can be simplified but they can also strike out those that are irrelevant, inappropriate, repetitious or simply comment. (These issues fall outside the intermediary's role and it is therefore helpful if judicial scrutiny precedes that of any intermediary.) The review encapsulates existing judicial responsibilities but this is the first time that they have been exercised quite so systematically.

In *Lubemba,*[16] the Court of Appeal confirmed that a trial judge: "is not only entitled, he is duty bound to control the questioning of a witness... He is entitled to and should set reasonable time limits and to interrupt where he considers questioning is inappropriate". The same issues arose in *RL,*[17] a s.28 pilot case where appellant counsel described the editing of questions as 'draconian' and claimed that his cross-examination was "emasculated". The Court refused permission to appeal.

Lubemba also stated that the trial judge "is not obliged" to allow a defence advocate to put their case to the witness. In s.28 cases, any such restriction must be discussed at the ground rules hearing. The defence must request directions about putting the case (for example, whether a witness is lying) or whether, due to witness vulnerability, the advocate should not do so. However, the Guidance emphasises that "it should not be assumed [putting the case] will be restricted" (Para.11).

Where restrictions on putting the case are justified, this is counterbalanced by opportunities to explain the defence case and such limitations to the jury.[18] Rather than insisting on the "right" to put their case, as happened initially, advocates may now come to ground rules hearings offering to forego putting their case or even asking any questions at all. Intermediaries assert that the evidence of almost all witnesses can be tested by challenging questions asked in a simple, direct way; not giving them the opportunity to do so is "throwing the baby out with the bathwater".

Judges differ in their approach to such defence requests. Some are robust:

> "I press advocates on how to challenge the witness when they say they can't – I insist on it";

> "I don't want counsel complaining at trial that they were not allowed to put their case. Virtually everything can be put in one way or other".

In contrast, others may accede to counsel's request:

> "It is okay if counsel declines to ask the key question. I don't usually ask it myself but sometimes prosecution will do so. However, all this should be hammered out at the ground rules hearing".[19]

Two recent training films (one for Judge Rook's vulnerable witness pan-profession advocacy course, being rolled out by the Inns of Court College of Advocacy, and the other made by the Judicial College) both show an advocate at the

13 http://www.dailymail.co.uk/news/article-3399482/British-diplomat-Moscow-learned-dying-mother-s-87-000-life-savings-stolen-family-paid-care-UK.html.

14 Para.33(b) of the Protocol provides for 'cross-examination by a single advocate if the case is multi-handed'. While the number of advocates has been reduced, it is unclear whether this provision has been invoked.

15 In the absence of intermediary advice, lawyers are expected to draft questions in accordance with toolkits at www.theadvocatesgateway.org: Protocol, para.30.

16 [2014] EWCA Crim 2064.

17 [2015] EWCA Crim 1215.

18 Criminal Practice Direction 3E.4.

19 Different approaches to this issue are discussed in Plotnikoff and Woolfson (2015) *Intermediaries in the Criminal Justice System: Improving communication for vulnerable witnesses and defendants*, Policy Press pp 225-236.

ground rules hearing who initially declines to put his case to a vulnerable witness and a judge "encouraging" him to do so in a short, direct manner.

Section 28 requirements are exacting and, at least initially, ground rules hearings took longer than the norm. The time involved depends on the preparedness of counsel. Some cases required more than one ground rules hearing, with emailed exchanges of questions in between. The schedule should allow time for the intermediary's review, otherwise draft questions are often sent to the intermediary the night before the ground rules hearing.

It is "essential" for the hearing to be conducted by the judge allocated to the s.28 recording and "highly desirable" for the same judge to conduct the trial (Protocol, para.60). Pilot judges feel that continuity of judge is desirable but not essential. Continuity of the defence advocate is expected (para.58), although changes have been accommodated due to illness. Where the judge or lawyer changes before the s.28 recording, ground rules need to be re-confirmed.

Continuity of prosecution advocate is not required, but questions asked by prosecutors in re-examination also need to observe ground rules and be carefully planned. After a "bad experience", at least one pilot judge rules that, where a prosecutor wishes to re-examine the witness, the s.28 recording will be paused for such questions to be reviewed. Intermediaries observe that even experienced advocates can revert to complex wording when unprepared.

The s.28 judge must timetable other matters, including refreshing the witness's memory and the court familiarisation visit; the latter must include "an opportunity not just to view but to practise" with the technology (Protocol, para.28). Intermediaries observe that having the judge and lawyers meet the witness at the court familiarisation visit, with the ground rules hearing to follow, helps inform the review of questions and ground rules decisions.

Outcomes

Judges report that a significant proportion of cases are resolved before trial, to the benefit of the complainant and the defendant. Defence advocates must certify at the ground rules hearing that clients know they will receive credit for guilty pleas entered before the s.28 recording, effectively the first day of trial (Guidance "Section 28 Defence Ground Rules Hearing Form"). Some guilty pleas were also prompted when defendants saw the strength of witness evidence.

For example, the only evidence linking defendants to an armed robbery was that of a nine-year-old eyewitness: the child's cross-examination was recorded, and the defendants pleaded guilty shortly afterwards. Section 28 also saved trial time and cost by enabling CPS to discontinue cases where witnesses failed to "come up to proof". Pilot judges thought that s.28 had little impact on jury verdicts. As one commented:

> "The effect of only seeing the witness on a screen will always be debated but what the jury sees in section 28 differs little from ordinary live link cases."[20]

Technology

What is recorded at the s.28 hearing and how this is shown to the jury have both changed since the pilots began. After the evaluation period ended, pilot courts were provided with large mobile screens to play evidential recordings to the jury. Initially, s.28 questioning was filmed to be shown on a split screen, with the questioner in court on one side and the witness in the live link room on the other. The first pilot case involved a four-year-old. The judge accepted the intermediary's recommendation that face-to-face questioning would enhance the child's communication, so the judge and advocates moved into the live link room. Although provided for in the Protocol (paras 37, 38) apparently this was not anticipated in selecting rooms for installation of pilot equipment. Some recordings took place, as one judge put it, with occupants "squashed in knee to knee". The split screen was unsuitable for this scenario and indeed, was quickly deemed inappropriate in all s.28 cases. The screen layout has since been changed so that the focus is now on the witness, with the questioner shown in "picture in picture" format.

Technology problems persist for the recording and playing of police interviews and s.28 hearings; sound quality is often poor. Close-ups are possible but are not routinely employed. Filming should accommodate communication aids. Sometimes their use was not clearly visible on screen: table height can be crucial. (Irrespective of camera focus, judges should direct intermediaries to describe what happens as aids are used and to repeat anything said by a quiet witness that may not be picked up by the recording.) The Protocol requires intermediaries to be "visible and audible" (para.37), but they are sometimes seated off-screen. Their position should be checked before filming starts.

Implications for roll-out

Section 28 is not just one more procedural change. As operated during the pilots, it represents a fundamental shift of approach, with the potential to deliver great improvements to the cross-examination of children and vulnerable adult witnesses and their experiences at court, and resulting benefits and potential savings for the criminal justice process. Evidence can still be tested but in a way that the witness understands and can cope with. The Government suggested that the Crown Court roll-out would begin in late 2016 or early 2017.[21] More lead time is likely to be needed, for example, to address secure management of s.28 recordings stored "in the cloud" (at present, they are played from disk). Implementation will be staggered. Nationally, the schedule should draw on experience thus far, with an oversight body to monitor and advise on how to "get it right first time". Locally, there should be an inter-agency implementation group and a designated court staff "expert" to address administrative and technology queries and monitor performance.

The pilots benefitted from assigning management of s.28 to a small group of committed judges before extending it to their colleagues. Is this feasible on a local or circuit basis? The roll-out strategy also needs to consider the potential number of applications at individual courts. It is desirable for s.28 to be made available to all eligible witnesses as quickly as possible, but will there be adverse consequences if all are included from the outset? Should there be a separate strategy for small courts?

20 Research shows no consistent difference to jury perceptions or conviction rates whichever special measure is used: L. Ellison and V. Munro (2013) *A 'special' delivery? Exploring the impact of screens, live links and video-recorded evidence on mock juror deliberations in rape trials* Social & Legal Studies, 23:1, pp 3-29; L. Hoyano and C. Keenan (2010) *Child Abuse: Law and Policy across Boundaries OUP.*

21 Former Justice Minister Mike Penning, Hansard, 6 July 2016, col 1016.

The impact on individual court workloads should be considered, especially in light of the increasing burden of sex offence cases.[22] Eligibility was reduced for the pilots; limitations on initial inclusion are also proposed in the Ministerial announcement.[23] Should pending cases be excluded? It may improve integration of s.28 if local police, CPS and courts are allowed to introduce it gradually.

Although s.28 results in saving of trial days, it also requires a considerable pre-trial investment of time from the judiciary. Advocates will have to "front load" case preparation even more than at present and commit to firm diary dates. There are listing challenges in accommodating longer ground rules hearings: pilot judges argue that fewer other matters should be put into the judge's list that day. The regime will have a rocky start if the initial influx of cases is hard to manage. Poor early practice is hard to reverse.

Local characteristics also affect the "learning curve". Leeds and Liverpool deal principally with one CPS and police area; both have a fairly consistent group of advocates, permitting lessons from practice to be consolidated. As a result, judges report that less time is required for s.28 ground rules hearings (though intermediaries report that, in contrast with the start of the pilot, these can now sometimes feel "rushed"). In Leeds, they have sometimes been "sufficiently dealt with electronically".[24] In contrast, criminal justice personnel and advocates at Kingston come from a wider area with high turnover: judicial time needed to manage these cases has not diminished.

The style and content of effective training also have implications for the roll-out schedule. Time is needed to allow pilot judiciary and experienced practitioners to play a key role. Section 28 training should coordinate with the roll-out of pan-profession advocacy training on vulnerability; that programme draws heavily on lessons from s.28. Those able to observe an experienced s.28 judge should do so: the ground rules hearing and resulting cross-examination are very different.[25]

Even in advance of roll-out, some judges around the country are asking lawyers to submit cross-examination questions for review when dealing with a vulnerable witness or defendant. However, many advocates and some judges (whose own unscripted questions may confuse the witness) appear insufficiently equipped for this task. For example, a judge pre-approved this complex question for a five-year-old:

> "If I said that K told you that if you said S did something to you, she would get some money. Do you agree?"

Those delivering training in communication must have excellent skills *and* be committed to the new approach. Experienced intermediaries should play an integral part in s.28 training and implementation: it is a weakness that they are not involved in the roll out of vulnerable witness advocacy training.

Final thoughts

Intermediaries have been appointed for only a small proportion of s.28 witnesses. Reasons included police failure to seek intermediaries for investigative interviews; pressure on intermediary numbers; and difficulties in fulfilling the sensible the Protocol requirement that courts can only appoint an intermediary if available for both the ground rules hearing and the recording (s.31). Further recruitment would relieve some pressure at roll-out but there is also a need to address the waste of intermediary time elsewhere in the system. Non-s.28 ground rules hearings and trials are often listed without checking intermediary availability, and trials – contrary to policy – are warned instead of fixed, unnecessarily blocking intermediary availability to other courts.

At present, s.28 recordings take place in court live link rooms. Witnesses wishing to give evidence in court cannot be filmed; as a result, at least one witness declined to participate in a s.28 recording. Having a choice about how to give evidence can affect the quality of witnesses' evidence.[26] Improved awareness of options would help. "Combined special measures", preventing the defendant from seeing the witness over the live link, are available to witnesses in s.28 hearings (Protocol, para.38) and presumably again at trial, but this option does not appear to have been used.

Witnesses at s.28 hearings sometimes encounter defendants in or around the building, as often happens at trial. This could be avoided if hearings were filmed at remote link sites[27], which should be close enough to court to accommodate introductions to judges and advocates. Remote sites could also provide more spacious and comfortable facilities. Use of non-court locations for s.28 should be piloted.

Youth court defendants have essentially an automatic right of appeal to the Crown Court; this requires a re-hearing so that witnesses (many of whom are also children) are expected to evidence again. This could be avoided by filming cross-examination of young or vulnerable adult witnesses in the youth court, even if this is only done at trial. This is even more desirable in light of s.53 of the Criminal Justice and Courts Act 2015, which encourages youth courts to retain jurisdiction in more serious cases.

Some may disagree; but it seems to us that after many years on the shelf, s.28 has proved to be not a dusty relic but a cutting-edge device. As one pilot judge concluded:

> "Ten, or even five years ago, I couldn't have forecast the changes we've achieved."

Despite the opposition to s.28 from some quarters Lord Judge, former Lord Chief Justice, anticipates that within the next decade we will be "astounded at what all the fuss was about".[28]

[Editor's note: The Government commitment to rollout and evaluation report were published on 15 September, just as this Issue went to press.]

22 Sex offence cases, many of whose witnesses are considered 'vulnerable', now account for 50% of Crown Court cases. Judges reportedly sat a further 7,500 days last year as a result: http://www.dailymail.co.uk/news/article-3578287/Sex-offence-cases-half-crown-court-time-Long-trials-involving-mobile-phone-evidence-straining-criminal-justice-system.html#ixzz4EQHyJOIq.

23 'We will start with the roll-out in the Crown Courts for those under 18 and for witnesses with mental illness', former Justice Minister Mike Penning, Hansard, 6 July 2016, col 1016.

24 Ann Coffey MP, Hansard, 6 July 2016, col 1014.

25 Hayden Henderson, PhD student working with Professor Michael Lamb at the University of Cambridge, is analysing s.28 and non s.28 ground rules hearings and cross-examinations (80 in each sample).

26 J. Cashmore and N. De Haas (1992) *The Use of Closed Circuit television for Child Witnesses in the ACT* Australian Law reform Commission.

27 See Toolkit 9, *'Planning to question someone using a remote link'* www.theadvocatesgateway.org.

28 Lord Judge (2013) *Half a century of change: the evidence of child victims* Toulmin Lecture in Law and Psychiatry, p 9.