

## Justice Committee

### [Oral evidence: Evidence in sexual offence cases, HC 1436](#)

Monday 26 June 2023

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Members present: Sir Robert Neill (Chair); Janet Daby; James Daly; Maria Eagle; Edward Timpson.

Questions 1-65

#### Witnesses

I: Professor Cheryl Thomas KC (Hon), Professor of Judicial Studies, University College London; Mary Prior KC, Barrister, The 36 Group, Chair, Criminal Bar Association's RASSO sub-committee; John Riley, Barrister, 23 Essex Street, Vice Chair, Criminal Bar Association's RASSO sub-committee.

II: Professor Penney Lewis, Commissioner for Criminal Law, Law Commission, Professor of Law, King's College London.

## Examination of witnesses

Witnesses: Professor Cheryl Thomas, Mary Prior and John Riley.

**Chair:** Good afternoon. Welcome to this session of the Justice Committee. This is a hearing that we are having to consider the approach to evidence in sexual offence cases—particularly RASSO cases, as they are sometimes called—and the pre-recorded examination of witnesses under section 28, which is often discussed.

Before we start with our witnesses, we have to deal with our declarations of interest, which we have to do at the start of every meeting. Most people have heard them all before, but we still have to do it. I am a non-practising barrister and a former consultant to a law firm, and I should say that I know Mr Riley, who is giving evidence, very well from the Bar. We have known each other for a long time and have been against each other in court on a number of occasions—good to see you.

**Maria Eagle:** I am a non-practising solicitor.

**Edward Timpson:** I am a barrister with a current practising certificate, a former Solicitor General, former chair of CAFCASS and former chair of the national child safeguarding practice review panel, and my brother is chair of the Prison Reform Trust.

**James Daly:** I am a practising solicitor and partner in a firm of solicitors.

Q1 **Chair:** Perhaps our witnesses could introduce themselves for the record. Mary, do you want to start? Otherwise, the person speaking remotely sometimes gets left to the end.

**Mary Prior:** My name is Mary Prior KC. I am a criminal practitioner. I prosecute and defend on a 50:50 basis. I am head of the rape and serious sexual offences group for the Criminal Bar Association and for the Midland circuit.

**Professor Thomas:** I am Professor Cheryl Thomas. I am a professor of judicial studies at University College London, and I am the director of the UCL Judicial Institute and the UCL jury project.

**John Riley:** I am John Riley. I am a practising barrister at 23ES, as we now call ourselves; we used to be called 23 Essex Street. I have been in practice for a very long time. I am deputy chairman of the Criminal Bar Association RASSO sub-committee and deputy chairman to Mary.

Q2 **Chair:** Thank you very much, all, for coming to help us today. Perhaps I can start, fairly briefly, with some scene-setting questions. I am grateful for the written evidence that a number of you provided as well. We know the objective of section 28—let us start with that as the principal topic of conversation—about cross-examination before the trial, but there is examination in chief in many cases as well. You have to have had examination in chief pre-recorded before you can qualify for section 28—I think that is right.

**John Riley:** Yes.

Q3 **Sir Robert Neill:** How does it work in practice? We have the theory; how does it actually work in practice? Mr Riley, you submitted a memorandum for us on that.

**John Riley:** In practice, what happens is at a very early stage of the investigation, the police will identify vulnerable witnesses who might qualify for section 28. As you will have seen in the note that we provided, there are two criteria for vulnerability: section 16 and section 17 witnesses, so children, and adults in different criteria form. Once the police have identified the individual vulnerable witness, when the case is sent on to the CPS for the preparation and presentation of the case before it goes to counsel, a decision will be made for an application to be made for a section 28.

First of all, as the Chairman says, the evidence in chief—the first part of a witness's evidence—will be taken, and that will be recorded. That is dealt with by the police, not by a barrister. They take that evidence by way of an interview, which is recorded. It is a dual function: it is for investigative purposes and also to be played as the evidence in chief, so there is no barrister involvement at that stage. At an early hearing in the Crown court, called a plea and trial preparation hearing, a judge will be told that the Crown—usually the Crown—is asking for section 28 based on the criteria from the Youth Justice and Criminal Evidence Act.

At that hearing, a timetable is set for the defence to submit a series of questions, which essentially are the questions in chief. Then, there usually is a ground rules hearing, which the parties attend, and the nature of the questions is discussed. It depends what type of witness you have. If it is a child, you might have an intermediary who advises on the nature of the child's understanding, the scope of the questions and their frequency, and so forth. If it is an adult witness, you may still have an intermediary but less so. The parameters of asking questions are dealt with at that ground rules hearing. Literally, you go through a list of questions that the defence has submitted. Then, a date is set for the section 28 hearing. You have already had the recording of what we call the ABE, achieving best evidence, which is the evidence in chief. A date is set, and then on that date the witness comes to court. Usually, they will be in another room other than the courtroom. They will be on a linked screen, as we have with Mary here. The judge and the counsel will be in court.

The questions will be asked in this way. First of all, the prosecution are entitled to ask additional evidence—questions in chief—which is not always understood. Once that is done, the prepared questions are asked in cross-examination, and then the Crown—as they are entitled to do anyway—can ask questions in re-examination. Those are questions based on cross-examination. All that is recorded, then that is reviewed, checked by counsel and the judge and stored in the cloud, depending on who has been contracted to keep it. All that is played to a jury during the course of a trial, whenever that may be. That is how it sets out in practice.



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Q4 **Chair:** Okay, that is very helpful. Mary, any further thoughts from a practitioner's point of view on that?

**Mary Prior:** The first thing that I would say is a child or vulnerable person who is giving evidence under the section 28 procedure has less ability to avoid coming into the court building than a child or vulnerable witness who is giving evidence via a live link on the day of trial. Children and vulnerable adults can give evidence from a remote link site, which is a much more attractive option for children and vulnerable witnesses because they do not have to come into the court building, running the risk of coming into contact with a perpetrator or having the overwhelming feeling of being in that very large building. Currently, that is not available for those giving evidence via the section 28 technique.

Q5 **Chair:** The legislation is there, isn't it? Is it just because it has not been brought into force or the arrangements have not been provided?

**Mary Prior:** The technology in the remote link sites and the technology for section 28 have not had any joined-up thinking.

Q6 **Chair:** Okay, that is pretty clear. Professor Thomas, anything from your perspective at the moment?

**Professor Thomas:** I do not think so, in terms of how section 28 operates.

Q7 **Chair:** The thing that I want to ask, Mr Riley—just to probe a little bit on that—is about the idea that the evidence in chief, under the achieving best evidence concept, is actually done in effect with an interview by a police officer and the defendant. The police officer, very early on in the process, is using questions partly, as you rightly say, to throw up fields of inquiry, potentially.

**John Riley:** One of the observations that we and the RASSO sub-committee—or group, as we like to refer to it—have been making for a long time is that the prosecution are to an extent emasculated, because we do not have control over our primary witness. The police ask the questions, which become questions in chief. If the barrister wants to ask further questions in chief before the cross-examination is asked—we have gone through a number of different legal frameworks. There was a time when you had to ask permission; there was a time when it was thought that you could not ask additional questions at all. We are now in a position where you can, but not everybody does, because sometimes there is not anything additional to ask at that time. Very often, you can find something you can ask, because apart from anything else, the first person who asks the primary witness for the Crown any questions is the barrister for the defence, so it is not, as it were, their barrister in that sense.

The original idea before we had "Achieving Best Evidence" or, indeed, "Memorandum of Good Practice"—as you will remember, Chair, that was the document before "Achieving Best Evidence"—was in a report by the recorder of London, as he then was, Sir Thomas Pigot, which was that the barrister for the Crown would ask the questions in chief, then cross-examination would be asked, and it would all be done by barristers and

recorded and then played. We have moved away from that very early original idea to where we are now.

**Q8 Chair:** Is there any indication as to why that was done?

**John Riley:** I think because the police needed an investigative tool to talk to the witness initially. Don't forget, originally, it was all aimed at children, so "Memorandum of Good Practice"—the forerunner of "Achieving Best Evidence"—which dealt with all witnesses, was really just about children and most of it was teaching police officers way back in the '80s how to ask questions of children. I was involved in the training of that very early on, where we taught officers who were conducting interviews with social workers in those days how to ask difficult questions of children in those types of cases.

**Q9 Chair:** What is your experience as practitioners of the quality of the questioning by the police officers?

**John Riley:** Mary, you go first.

**Mary Prior:** It is almost impossible for a police officer to conduct an ABE interview well, because of its dual function. Partly, it is an investigatory tool, and that should really be a completely separate interview. Secondly, training is sporadic and the quality varies considerably.

What tends to happen is that we have an interview that lasts at least an hour, possibly longer, with a little person who is asked question after question—in respect of which the answer is almost always going to be the same as the one they gave 15 minutes before—by an adult with a clipboard. A clipboard is a pretty alien scenario.

Moreover, almost always, if you were to convert that to doing it yourself, it would take 10 minutes, perhaps 15 minutes maximum, but that is not what happens. I am sure that John will agree with this: the power of listening to the child using their own words, or to an adult using their own words to describe what happened to them in a free narrative is immense, and that is a very good thing for us to be able to capture, but what happens is that there is far too much of the officer and far too little of the victim.

**Q10 Chair:** You would argue that that is something that an experienced advocate would know not to do—

**Mary Prior:** Absolutely.

**Chair:** Considering the impact on the jury of what the witness is saying, which cannot be—

**Mary Prior:** It is the victim who needs to be heard; it is about the victim's words and the manner in which they describe things that they probably should not know about.

**Chair:** Yes, understood.

**Mary Prior:** That is what gets lost in this narrative of investigation.



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- Q11 **Chair:** To take an example that Mr Riley and I will remember, it can be a powerful point if a child is describing something we would never expect a child of that age to have—one hopes, ever—experience of, and it is a legitimate case for the prosecution to make: “The child can only be saying that, because that is what happened.”

**John Riley:** Yes, that is right. It would be a better system if the ABE was used—inevitably, and it needs to be as an investigative tool, because it is the starting point of the investigation—

- Q12 **Chair:** That is legitimate, isn’t it?

**John Riley:** It is entirely. We spend a great deal of time editing these recordings, because inevitably they contain material that might not be admissible or, by the time we get to charging or preparing the case for the Crown court, things may be different. We are discovering what the offences are as the witness is being spoken to, whether that is a child or an adult. The default position is that pretty much all RASSO complainants, whether adults or children, are interviewed by the police. We are at a stage now and have been for some time, where practitioners believe that it would be better to have that, yes, but for counsel—experienced, well-trained counsel—to ask questions in chief in the way that we would normally do for any other witness.

- Q13 **Chair:** Professor Thomas, do you have points to make?

**Professor Thomas:** Yes. This is all about the quality of the questioning, which is important, but another aspect of section 27 can also raise issues: the quality of the film and audio that the jury ultimately has to receive and take on as the evidence in chief. There have been many issues, for a number of years, about whether the way in which the police interview is set up, with a fixed camera and so on, is really the best way of someone achieving their best evidence as evidence in chief. Mary and John may have something to say about this, but it can be particularly the case with children. Mary referred to a little person. It can be a very little person on a very big screen. Sometimes the audio is not comprehensible. As a result, the jury are shown the film but sometimes also have to be given a transcript of what is being said. So, instead of watching the screen to see the witness, they are actually looking at the transcript.

- Q14 **Chair:** I will bring in Mr Daly in a moment. What I take from that is that, although this well-intended system seeks to make it easier for witnesses who may be vulnerable for any number of reasons to give their best in giving evidence, it may actually be counterproductive and produce precisely the reverse result.

- Q15 **Professor Thomas:** It could be, and I think we may come on to talk about how you determine what the impact is of that evidence, but I think we would all appreciate that the quality of someone’s evidence is about the content of their evidence and also the way in which a jury can actually hear and see the witness giving their evidence.

**Chair:** Mr Daly, you wanted to come in.



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**Q16 James Daly:** I just want to ask a brief question of all three witnesses. You may not be able to answer this. It's asking you for figures, and I don't expect you to have these figures, but perhaps you have a feeling about this. In terms of conviction rates in the Crown court for rape trials, how has section 28 impacted those, compared with where we were before section 28 came in?

**John Riley:** It is only relatively recently that section 28 has come in, as I have said in the note, for section 17 witnesses—adults who are eligible by virtue of fear of testifying—so we don't really know the answer to that question, but perhaps Professor Thomas can help a little bit.

**Professor Thomas:** I can't give you the actual statistics today. However, that is exactly the analysis that I am conducting at the moment.

**Q17 Chair:** You are doing that at the moment.

**Professor Thomas:** Yes, so I would be very happy to come back and share the results with you.

**Q18 Chair:** That would be helpful, and you might also be able to help us with some other stats, like how often it has been used and for what type of cases. But that's the work at which you are looking at the moment.

**Professor Thomas:** I can tell you a bit about that.

**Q19 Chair:** Oh yes, can you tell me about what you have at the moment?

**Professor Thomas:** At the higher level, if we combine section 28 with "vulnerable and intimidated"—so, if we are talking about children—that has obviously been rolled out for a lot longer, as John Riley has just said, so there are a lot more cases and defendants where the offences have been dealt with through section 28. There is a total of approximately 3,500 trials where section 28 has been used. That is just over 4,000 defendants, but with approximately 27,000 charges. That is children and adults combined. It is absolutely correct that only a small proportion of those will relate to adults giving evidence.

**Chair:** Understood. Thank you very much.

**John Riley:** Just to go back to what you were talking about in terms of process and effect, when a jury watch an ABE or the evidence in chief recording, they are watching two people talking to each other, very often, so it depends very much on the set-up, in the room, of the recording. They are not seeing somebody face to face, obviously, but they are not even watching someone looking at them. We have seen in section 28 recordings—because they are entirely conducted without a jury present—the way in which the witness looks towards a point. In a case where there isn't section 28 and there is no recording, you always say to your witness, "Don't look at me. Look at the jury; give your answers to the jury," so that the jury can make an assessment of the way in which the person is speaking and what they are saying. In a section 28 recording, you can't have that, because there isn't anyone for them to look at. So inevitably they look at you when you are asking them questions across the camera



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and they never look at the place where the jury are. So we kind of get into a situation where we say, "Right. Don't look at me, but look out of the screen," or, "Look towards the back of the court," hoping that that is where the jury will be, or, if they are in court, they obviously will look at an empty jury box. You need to get a connection between your principal witness and the jury because, on the other side of the coin, the defendant is always live, and when the defendant gives evidence, they are always looking at the jury—and I defend and prosecute.

- Q20 **Chair:** Indeed. As I think do, one forgets, many—perhaps the majority of—practitioners.

**John Riley:** The majority, yes.

**Chair:** The majority do both sides.

- Q21 **Maria Eagle:** Moving on to the evaluations that have been done so far, the MOJ published its process evaluation of section 28 in April this year. What are your views on the evaluation's scope and the method used? I was quite surprised when I read about the methodology, but perhaps Professor Thomas is the best person to give us a view on that.

**Professor Thomas:** I would hesitate to call it an evaluation of section 28, because I think that most people would be expecting that to be evaluating the impact of section 28 in terms of guilty pleas, conviction rates, timeliness, and those types of things. To be fair to the people who conducted that evaluation, they make it clear in the document that their evaluation does not cover any of that. Instead, it was a sort of foundational look at section 28 in relation to adult witnesses. Their methodology was purely through interviews. They interviewed, I think, 13 witnesses, who—

- Q22 **Maria Eagle:** That is a small number.

**Professor Thomas:** It is a very small number. Even if I cannot give you all of the statistical analysis today, I would say that that would amount to about 1% or fewer of any adult witnesses that had used section 28, so of course that is just going to give impressionistic information about how a few people experienced section 28. There is a value in that, but you certainly cannot generalise from those few interviews to exactly how section 28 is operating.

The other issue is that it excluded quite a number of key actors in relation to section 28. No judges or jurors took part in the evaluation, and, if I am not mistaken, there were only three in-trial advocates. Again, there are thousands of in-trial advocates—or hundreds, at least—so you cannot generalise from the findings. As I said, I would give them their due for saying that in the report, but if you read the summary, it talks about, "Most in-trial advocates felt this way," or, "Most witnesses felt that way," and I think we just have to be a bit cautious about the findings.

- Q23 **Maria Eagle:** You are being very kind, but, if you were asked, what advice would you give to the Department on how to conduct evaluations on section 28 in the future?

**Professor Thomas:** Well, actually, as I said, I am conducting an evaluation, which is in conjunction with the senior judiciary and the Ministry of Justice and HMCTS—

Q24 **Maria Eagle:** And what are you doing differently?

**Professor Thomas:** There are three aspects to it. The first relates to Mr Daly's question. I am looking at all of the charges against all defendants in all trials where section 28 has been used since 2016. That will include children as well as adults, so that allows you to have some comparator between that. You may be aware that we published some research in February that looks at the conviction rates in all rape and sexual offences cases. That provides us with the baseline data with which to compare jury conviction rates in section 28 cases with jury conviction rates when section 28 is not used. It also allows a comparison between guilty plea rates when section 28 is used and when it is not. On a statistical basis, that is the important thing.

The next thing that we are doing is that we are seeing complete juries, post-verdict, where section 28 is used, and we will gain information from them about their perceptions of witnesses where section 28 was used. Again, we have a limitation there: that can only tell you how jurors perceived the evidence; it cannot tell you whether it was a factor in their decision making.

The third part of the evaluation is a controlled test with actual juries in court, who will see exactly the same case but some will see it with section 28 and some will see it without. That will enable us to see the extent to which section 28 may be affecting verdicts and the perception of witnesses. It needs an evaluation in that kind of detail. It also needs to be a continuing evaluation, because we are really at the start of section 28 for intimidated witnesses.

Q25 **Maria Eagle:** When do you expect your evaluation to be ready?

**Professor Thomas:** The first part—the statistical analysis—will be completed by September.

Q26 **Maria Eagle:** Perhaps I can ask our practitioners, Mr Riley and Ms Prior, about the process evaluation, which reported that the use of section 28 improved the witness experience. Does that correspond with your experience? Let's go to Mary Prior first.

**Mary Prior:** No, it doesn't. The best experience for a witness is to achieve their best evidence, and regrettably at the moment the technology, to a large extent, means that you are seeing a witness at a distance, without being able to see any of their facial gestures or movements or to engage with them looking the right way on a camera. There is far too much distraction from sofas, officers asking lengthy questions and various little boxes in the corner.

In terms of section 28 cross-examination, the volume is often very poor, the positioning of the witness is often at the back of the room, so that doesn't alter, and the one thing that is causing problems for those of us



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who believe that section 28 is something that should be used is that it is now being used as a reason to delay the trial that follows it, because the listing officers are taking the view that the completion of the section 28 removes that case from being a priority case. There is, therefore, a significant delay after the completion of a section 28, before the end of a case. My perception from speaking to victims is that they want to know the outcome of the case just as much as they want to complete their evidence.

**Maria Eagle:** Thank you. Mr Riley?

**John Riley:** I have set out in my note an example of such a case involving a child. Mary is right that the pressure on listing officers is enormous. The backlog, which goes back way before covid, is very significant, as you will all know. The use of section 28 is seen as being a method by which other cases can then be brought in to be resolved. Trials are going off way into the distance; as we sit here now, cases are being listed in 2024 or 2025 easily—and they will be this sort of case.

The other problem, as Mary has mentioned, is positioning. Among the profession, no one is objecting to the idea of recorded evidence, but the nature of the way that questioning is restricted in order to meet some of the issues with vulnerable witnesses is of concern. More than that, I think it is the fact that the jury are not seeing somebody in front of them.

There is becoming a slight mismatch in terms of the ability to prepare, whether you are defending or prosecuting. I have much more freedom when I am defending to prepare with my client. You have a conference with them—you may have two or three with them—and you get to discuss with them the evidence and ultimately you know they are going to be giving evidence before the jury. When you have a vulnerable witness, very often the first time that trial counsel will meet them will be on the day of trial. They will have either had to watch the earlier recorded evidence in chief the week before, or, as a worst-case scenario, at court—which is rare, but does sometimes happen—in order to know what they have said previously to be able to then answer questions.

Where all aspects of questioning are recorded, as practitioners I suppose we feel that it is that much more difficult for a jury to engage with somebody. That is their job as jurors. They are there to make an assessment of the witnesses in front of them, and that distance makes it a bit more difficult.

Also, there is a significant tension between the recording of vulnerable witnesses and the duty of the prosecution, because the Crown is under a legal duty at all times to keep the case under review up to and including trial, especially in relation to unused material, so what do you do if, in particular, an adult—I have had this myself—remembers something after they have had a section 28 hearing? There is no provision for having another one. What do you do with an adult who remembers something that is not only different but very important?



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Retrials are a real problem because in a case where the defendant was perhaps acquitted of some charges on the indictment but you are retrying some that the jury could not decide on, there is currently no mechanism for effective editing of the section 28 recording, which was recorded dealing with the case in the shape that it was in then. It may change completely by the time you get to the retrial. It is a really complicated, technical system to edit out the questions that were asked in anticipation of the whole indictment, but then you are dealing with an indictment with only certain offences, and the shape of it is different. There is no real mechanism for having a refresh.

**Q27 Maria Eagle:** I have two final points. Are witnesses being given all the information they need to make informed choices about the use of section 28? If it is making it harder for them to secure a conviction, they may choose to give evidence in the old-fashioned way, if they are aware of the downsides. What is your assessment of that? Are they getting all the relevant information to make informed choices, and does the use of section 28 therefore reduce witness attrition in your experience?

**John Riley:** The simple answer is that we do not do enough to prepare and inform witnesses. There has been a very long history within the profession, certainly when I started and probably when the Chair started, that you were taught that you do not talk to witnesses outside of asking them questions. We have moved on a very long way from that. We have pre-trial witness discussions between prosecution counsel and witnesses—if that can be arranged. At the moment, most of my colleagues and I are fully booked for a very long time, so getting a session in with a witness is quite difficult. The simple answer to your question is probably no, but there will come a time, when Professor Thomas's research is dealt with, when we may have a better idea.

**Professor Thomas:** On that point, it is clear that witnesses do not necessarily have all the information. For instance, it is widely reported that the conviction rate in rape cases is 1.6%. If I were to be a witness, I would be very reluctant to proceed with the case, but that is not actually the conviction rate if someone goes to trial and gives evidence in a case. If it is an adult female, it is up to 67%. If it is with children, the percentage is in the high 70s. There is very much a disconnect between the public discussion about conviction rates and what potential witnesses are actually told. That will be the case with section 28.

One thing that I hope becomes the norm is that, when we have the details about the impact of section 28 on convictions, that information is routinely shared with witnesses and they are able to make that decision. For some people, it will not make a difference what the conviction rate is; they will still feel that the only way they can give any evidence is prior to a pre-recorded cross-examination, and that is perfectly fair, but for others it may make a difference. It is extremely important that witnesses are much more routinely given the facts about conviction rates.

**Q28 Maria Eagle:** Mary Prior, do you have anything to add?



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**Mary Prior:** Yes. The case is the case for the witness. They should be front and centre of this process, and they have a right under the victims code to be kept informed right the way through it. But if you were to try to access any material that demonstrated the process from beginning to end, and the benefits and disadvantages of each of the different ways you can give evidence, you wouldn't find it. When we say to our complainants, "This case is about you," we need to start that process by giving them access to the information that should be easily available so that they can make informed choices. At the moment, we don't have a central point where that can happen. All the Victims' Commissioners and rape charities indicate that, to a large extent, complainants in these cases feel that they have no understanding, no rights and no comprehension of how a case proceeds and what they can do if there is a problem. If you have a disempowered witness, that is not a witness who is giving their best evidence.

- Q29 **James Daly:** Professor Thomas, I appreciate that section 28 in respect of RASSO cases in particular is a recent phenomenon, but the problem with conviction rates is that we are talking about a small percentage of the small percentage of matters that are charged, in terms of the wider figure of matters reported to the police. I always feel that when we are talking about these things within the courts, we should not forget the 98%—or whatever it is—of people who seem to be ignored by the system. In his very helpful note, Mr Riley says that video-recorded examination in chief has been effective for a very long time. If you are a complainant in a matter of rape, whether the matter gets to charge or not, would you go through the same procedure? Would you have that video-recorded examination in chief come what may, no matter the circumstances?

**Professor Thomas:** My answer, as an academic researcher, is that I want to have the evidence. I would be asking the question: what difference will it make? We don't have the answer to that at the moment.

**James Daly:** That seems to me to be a phenomenally important question.

**Professor Thomas:** It is a phenomenally important question.

- Q30 **James Daly:** This gets to the heart of why the vast majority of cases are not being charged. There may be problems in terms of the police training, but I get the feeling—Mr Riley, I may be wrong on this—that that procedure isn't in place for every single complainant who makes an allegation to the police. Am I wrong? I am talking about from now.

**John Riley:** Most complainants in rape cases will be interviewed by the police and that will be their evidence in chief.

**Professor Thomas:** It is routine.

**John Riley:** It is, yes. It has been going on for a very long time.

- Q31 **James Daly:** I do not have the figure in front of me, but for the 90-whatever per cent. of cases that do not make it to a charge, is your evidence that every single potential victim who makes a rape complaint



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to the police is treated in the same way in terms of the process carried out by the police for this video-recorded evidential interview? That might have to be clarified within certain timeframes.

**John Riley:** Yes.

**James Daly:** That has answered the question. Thank you very much.

**John Riley:** It is rare, but sometimes a statement will be taken. That does happen. But it is rare not to have a recorded interview as the evidence in chief.

Q32 **James Daly:** That being the case, it seems extraordinary that we have so few charges compared with the numbers of allegations made to the police per year. But you are not here to discuss that.

Mr Riley, in a past life I was a criminal practitioner. I was involved in purely defence work; I was a solicitor, so I wasn't in the position of either yourself or Mary. To put what I think you have said into language that I understand, there was a real issue a number of years ago that people like me—legal professionals—would go into court and be very robust in our questioning of alleged victims in cases of serious sexual offending, and it was felt at the time that that was not an appropriate way for defence advocates to conduct themselves, and there was a real risk that it would impact the quality of evidence. Is that the background as to how we have got here with section 28?

**John Riley:** Essentially, yes. The real background, as I say, was the report many years ago from Sir Thomas Pigot, who suggested a better way for vulnerable witnesses to be able to give their evidence.

Q33 **James Daly:** This is a really important point—this is the heart of the debate. There are no easy answers in this. We all want witnesses to give their best evidence, but I am sure that the end they would want, if they are telling the truth, is for a conviction to happen. It is all very well giving evidence in a way that make you feel comfortable, and that is what we should aim to do, but if that leads in certain circumstances, as you have outlined, to potential deficiencies in the court process, which in turn will lead to a conviction being less likely, that is a concern.

I will put a question to Mary. There is no easy answer here. When I was in court and I was cross-examining whatever the case might have been, the nuances of a person and how they gave evidence in court, the way they answered questions, the way they looked, including at the jury, and the way they interacted with people in the court was fundamental to many convictions, or non-convictions, that I was involved with.

What I see as a problem here is that, to a certain extent, that element is taken out of the process, especially with the very recent developments. I have real concerns that, although we are doing this for the best of intentions, in some sense we are making the job harder for victims, in terms of that thing that we all want, which is a conviction at the end of the day. Do you think that is a fair point of view?



**Mary Prior:** Yes, I think it is, because at the end of the day this is a person who is put into a room, facing a television and speaking to a television without any experience of doing face-to-camera work. Whether prosecuting or defending, you cannot see all those non-verbal cues that help you in determining truth or lies. It is impossible over a screen to pick all that up, unless one exaggerates movements—if I smile, you cannot see the extent of me smiling—and 99% of the time a complainant in a case will not have been taught to look over the top of the camera or to make sure they speak slowly, clearly and loudly. They are not engaging with anyone because there is no one who they are talking back to, because the advocate themselves has no training in face-to-camera work.

- Q34 **James Daly:** What potentially flows from that, I fear, is that—each case is different, so generalisation is a dangerous thing with what we are talking about here—it gives an advantage to a defendant, because a defendant is then essentially given that opportunity in a court to establish their presence, to say essentially whatever is appropriate to say within a court, and you essentially have the jury being able to take an approach to that witness that is very different from their approach to the complainant. I feel this system we have created creates disadvantages for some of the most vulnerable people who are bravely giving evidence, and gives an advantage to some other people. Obviously, the court process has to be fair, but it seems to be weighted too far in one way. I don't know whether I am right or wrong in respect of that, but that is my feeling.

**Mary Prior:** From my perspective, if I am prosecuting a case I would like a complainant to feel that they have a person within the system who is being an advocate on their behalf and with whom they have the opportunity to build up some kind of rapport before they begin a questioning process. This is all very, very distanced from that—we are in a very different scenario—and the reality of the situation is that people are disengaged when giving evidence. Nine times out of 10, you cannot even speak to them afterwards.

If we are going to use this method—and for the most vulnerable witnesses and children it is right and proper that they do not go into a courtroom—it is really important that we mic these people up, so that they can be heard. We need to have them as close to a screen as I am now. We need to have camera technology that can zoom out if they want to demonstrate something and then zoom back in. We also need a sound quality that enables them to be heard. If you have someone at a distance, hardly audible and not engaging in the process, that cannot be what Parliament thought would happen with this process.

- Q35 **James Daly:** Mary, you have answered my next question before I asked it. My next question was, "Do the courts have the technology required to use section 28 effectively?" You have answered that as articulately as ever, so I won't dwell on that point. Professor Thomas?

**Professor Thomas:** On the technology, there is another aspect to it. I agree with everything that Mary said, but there is also how the jury actually sees both the section 27 and the section 28 evidence. There are



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some requirements for the size of screens in courtrooms—I am sure many of you have had trips to courtrooms—but it varies enormously. Sometimes there will be a screen as large as the one here, right in front of the jury. That will obviously be much more impactful for someone watching it. In other instances, the screen is all the way across the courtroom, possibly to the side of the jury, so the way that the jury receives that evidence is lessened, not just because of the sound quality but because of the distance at which they are watching it. There have been discussions about having juries with iPads to receive evidence, maybe sharing one between two—you can just imagine the size of a very small person on a very small screen. All those factors need to be assessed in terms of the ultimate impact of section 28 and section 27.

I also want to remind us—this is where we started—of why we have this. There were three objectives to all the special measures that were enacted in the Youth Justice and Criminal Evidence Act: to encourage vulnerable witnesses to report offences and give evidence; to reduce the stress of giving evidence; and to help to secure convictions. What we are looking at is an awful lot of unintended consequences that may have flowed from some very good intentions.

- Q36 **James Daly:** It is a few years since I was in the courts, but there have always been delays in the court system. It is a very fair point that there are a lot of challenges in the court system regarding the backlog, but I don't think we should ever say there was a panacea five, 10 or 15 years ago, because there were delays for all sorts of different reasons.

My last question is to Mr Riley. What effect does the use of section 28 have on the timeliness of cases? In a nutshell—I know you have touched on this already—we politicians want an efficient criminal justice system that serves all parties as soon as possible, but I think it is fair to say that section 28 is not helping in terms of the timeliness of cases. Or am I wrong?

**John Riley:** No, it is not helping in terms of timeliness of the end of the case—in other words, the trial outcome—but it is undoubtedly helping with the capture of the entirety of the evidence of a particular vulnerable witness. Don't get me wrong: we are not blaming list officers for this. They have an impossible job. They have to fit in everything else, from thefts to drug cases. The simple answer to your question is that it does not appear to be making the determination of the issue quicker.

- Q37 **Chair:** We have talked about delays, and the availability of counsel was raised. You made the point, and Ms Prior agreed, that counsels who specialise in these cases and have the relevant accreditation to prosecute, or have the level of experience to be instructed to defend, are heavily booked up anyway. Ms Prior, you might be able to help on this. The Government have recently introduced a new fee for section 28 hearings: a £670 uplift from February this year. You have to prepare the section 28 as if it was for a trial anyway, because you have to be on top of everything to be able to ask the right questions. If you return the case, somebody else has to do the same thing all over again. Among your



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members, is that £670-odd uplift making any difference to availability?

**Mary Prior:** No. It might have done if the other things we were promised in relation to section 28 went alongside it. Ownership of a case is vital for a complainant. They need to have the right to have the same advocate dealing with their case. As we understood it when the section 28 procedure was coming into place, judges were going to release us to enable us to complete section 28 hearings, but they don't always do so. Cases were going to be listed when the counsel who had been involved in the case was available, but they are not. They are often listed now as floaters and backers. If you do the section 28 and do not then do the trial, you have put in huge amounts of work for a very small fee, and someone else then has to pick up your work, which is not necessarily the way they would have dealt with it. The other thing that I should stay is that currently you get paid more to defend in one of these cases than you do to prosecute one.

Q38 **Chair:** That is helpful to know. How much is the disparity?

**Mary Prior:** It depends on when your legal aid order was in place. I am pretty sure that the prosecution fee is £1,944 and the defence fee is £2,252.

Q39 **Chair:** Does that include the £670?

**Mary Prior:** Add that on. That would be a bolt-on.

Q40 **Chair:** Does the uplift apply to both?

**Mary Prior:** Yes.

Q41 **Chair:** But there is still that disparity in the starting point.

**Mary Prior:** Yes. There should not be any disparity between what one is paid to prosecute and to defend in any criminal case, in my view, but particularly a case like this, because the workload for prosecuting cases of rape and serious sexual offences—I do a wide variety of work now—is phenomenal, to do it well.

**Chair:** Understood completely.

Q42 **Edward Timpson:** Can I return briefly to the impact of a section 28 video interview? I am particularly interested in the differentiation, should it exist, between children and adults, and whether, as has been indicated in some of the evaluation through the Ministry of Justice, while jurors tend to understand why children may be giving evidence via a video, that is not always the case with adults, even if they are entitled to because of their vulnerability. Have you come across that as practitioners?

**John Riley:** It is very difficult to say, because in a sense it is speculation. The only jury-based research that I think has ever been done is that by Professor Thomas in relation to her most recent work and what she is doing now. Jurors follow directions from judges, and judges give very clear directions as to why certain departures from the norm are there. I have set out the whole area of special measures in paragraph 1, which lists all



the different measures that can be used to assist a witness. For my part, I do not think jurors necessarily make a differentiation. If they are told that somebody has had the benefit of special measures, and why, in order to allow them to give their best evidence in court, for whatever reasons, I think they accept that.

**Q43 Edward Timpson:** Mary, would you agree with that?

**Mary Prior:** I think they accept the direction. I think they may often not quite hear what a complainant has said—they will not always have heard everything—and it is, in my view, still easier to focus on people who are present than those who are not, when they are adults.

I also think that the section 28 procedure for a vulnerable adult should be considered for tweaking, because if you have a long, windy ABE interview, there should not be any reason why a complainant with vulnerability, with a specialist prosecutor, could not give a clear, coherent, chronological account, with proper questioning, which would improve the quality dramatically. But is impossible to say, accept anecdotally, without peer-reviewed research.

**Q44 Edward Timpson:** Section 28 is here to stay and going through a period of expansion, so we need to make sure that the practical implications of that are well understood, not only through an evaluation but from those on the frontline who are trying to ensure that the system really is functioning, and with those original three objectives in mind. You have already alluded to the dual functionality of the achieving best evidence interview and the potential for disaggregating that out, with one being done by an experienced counsel who deals with the evidence in chief for vulnerable witnesses. Are there any other suggested changes or tweaks that you think could be done relatively quickly to try to ensure that the process starts to improve and that the experience for witnesses, as well as the potential for sound convictions, is something we can have more confidence in?

**John Riley:** In our RASSO group, we have concluded that a long way can be gone by having a much better and much more nuanced preparation of the primary Crown witness. As I say, there has been an apocryphal view about that, but that is changing. Clearly, you cannot tell a witness what to say—you cannot coach them—but you can prepare them in the same way that you can prepare your client when you are defending, and I said before that there is a disjoint between the two capacities. I think we would favour a much clearer guide, agreement or practice agreement, whereby the vulnerable witness is prepared better.

There have already been some unintended moves forward. I do not want to get into the whole area of section 41, which is about previous sexual history questions. When you have a hearing in regard to those, the witness is told the nature of the questions—not necessarily the questions themselves, but the nature of the defence—so that they understand what is coming and what they are going to be asked about. Otherwise, there is a statutory bar on questions about previous sexual history, other than



section 41 dealing with it. There is already a move to be able to talk to witnesses and to tell vulnerable witnesses what is going on; we just need a much better, much more nuanced and much clearer pathway for them to understand what is going on. What is helpful is that a number of former complainants have approached us on the RASSO group completely independently and said, "Can we talk to you about our experience?", and we are in the process of talking to them.

**Edward Timpson:** Anyone else?

**Professor Thomas:** I am going to switch it slightly to say that, because I am dealing with trying to analyse what the impact is, we need much, much better data collection in relation to section 28. I have actually been quite concerned by looking at some of the data, particularly data that has recently been drawn from CPP and not from the previous court data system.

Most of these cases involve a single defendant with multiple charges. I will give the example of a case where there are family historical sexual abuse allegations and also some contemporary sexual abuse allegations. You are likely to have a vulnerable adult giving evidence in relation to the historical charge, but a child giving evidence in relation to the contemporary charge. In the data, I cannot see whether both of them gave a section 28. I will absolutely assume that the child did, but that is very, very basic information that we need in order to make really clear assessments about what is happening with guilty pleas, convictions and so on. It feels like section 28, particularly on the intimidated—the adult—side, has been rolled out without adequate thought put into how data is to be collected in order to evaluate it.

**Edward Timpson:** Mary, did you want a final word on that?

**Mary Prior:** Yes. We have to make section 28 rooms within court buildings accessible to the disabled. I am afraid quite a few are not, and people therefore have to give evidence from a courtroom, which is often the courtroom next to the person they accuse of perpetrating a criminal offence upon them. So we need to ensure that any room that is being used for section 28 has full disabled access.

**Chair:** If Members have no other questions, I thank our panel very much indeed. This been very helpful, and there is quite a lot to cover. I thank you for your time and your evidence. We are very much obliged. We will move now to our next witness.

## Examination of witness

Witness: Professor Penney Lewis.

**Chair:** Good afternoon, Professor Lewis. It is nice to see you again. Thanks for coming to give evidence to us. Would you like to introduce yourself for the record?



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**Professor Lewis:** I am Professor Penney Lewis, and I am the commissioner for criminal law at the Law Commission of England and Wales.

**Chair:** You are also professor of criminal law at King's College, aren't you?

**Professor Lewis:** I am on secondment from that role.

**Chair:** The Law Commission is keeping you busy enough, I expect.

**Professor Lewis:** It is.

Q45 **Chair:** Great.

The Law Commission launched its consultation on evidence in sexual offence prosecutions in May. I gather that that is something you were asked to do by the Government in consequence of the end-to-end rape review. Is that right?

**Professor Lewis:** Yes, that is absolutely right. As I think you know, the Government, in its end-to-end rape review, was looking at the decline in conviction rates since 2016. As part of its report published in 2021, it asked us to examine the law, guidance, practice and procedure in sexual offences. That is what we have been doing since the end of 2021, when we agreed terms of reference. We then published a background paper in February 2022 and the consultation paper in May 2023.

Q46 **Chair:** The terms of reference were agreed between the Government and yourselves.

**Professor Lewis:** Yes, absolutely. Fortunately for us, we agreed them, as we always try to do, in an inclusive fashion, because what we find is that we think we have unearthed all of the issues, and then, as the process goes on, we discover some more.

Q47 **Chair:** In headline terms, what is in and what is out?

**Professor Lewis:** To summarise the terms of reference quickly, we were asked to look at how to counter juror misconceptions, or rape myths, looking at judicial directions that are already used to deal with rape myths. We were also asked to look at whether the prosecution should be permitted to rely on expert evidence in relation to myths and at other means of improving juror education.

We were asked to look at section 41, which the previous panel mentioned right at the end—the provisions on sexual history evidence or, as we call them in the paper, sexual behaviour evidence. We were also asked to look at disclosure and admission at trial of complainants' medical and counselling records. We expanded that to include all personal records as the project proceeded.

We were asked to look at the admissibility of character evidence in relation to both the defendant and the complainant and at any judicial directions about that. Finally, and most pertinently for the previous panel, we were

asked to review the legislative framework governing special measures—so the overall framework, rather than the roll-out of individual measures.

In terms of what we added, we have also looked at compensation—the use that is made of the fact that the complainant may have applied for compensation. In the terms of reference, we had some reference to the possibility of the complainant being heard in relation to sexual behaviour evidence and personal records. We have actually expanded that to look at a right to participate in those kinds of decisions and a right to independent legal advice and independent legal representation, and we have a chapter on that.

We have also looked at the conduct of the trial. Then, as I think you know, at the end of the consultation paper we look at some more radical options for reform.

Q48 **Chair:** But those are not ones you were asked to do by the Government.

**Professor Lewis:** No, they are not ones we were asked to do by the Government, but I think it is fair to say that some of the stakeholders we spoke to during the pre-consultation period were concerned at the idea of there being yet another review in this space.

Q49 **Chair:** Yes, we have review fatigue.

**Professor Lewis:** Exactly. One of the things we did was compile a table of all of the reviews, which is in appendix 1 of the consultation paper. It is quite chastening reading. I think we thought—and certainly there is this feeling from stakeholders and in the academic literature—that it is worth looking at more radical options. That does not necessarily mean that we will go down that road in terms of recommendations, but it would have been remiss of us not to look at them.

Also, other, similar reviews in Scotland and Northern Ireland have looked at more radical options recently. I think you probably all know that the Scottish review, the Lady Dorrian review, recommended a pilot of juryless trials, which is currently before the Scottish Parliament. In those circumstances, and given that the Northern Ireland review also looked at more radical options, we thought that we had an obligation to do so as well.

Q50 **Chair:** And you are not put off by the mixed reaction and the serious questions that are raised about the Scottish pilot.

**Professor Lewis:** No, I do not think so. Obviously there are a lot of reasons why the right to a jury trial is a fundamental part of our criminal justice system, and we canvass those in the paper. One thing to say about the radical options is that we are not making any provisional proposals in that chapter; we have simply set out what we think might be potential more radical options, and we tried to be objective in setting out their advantages and disadvantages.

**Chair:** And that is something that is a bit different, perhaps.



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- Q51 James Daly:** You are undertaking a very interesting and important piece of work in respect of where we are. I agree with you: I am not sure whether never-ending reviews, even if they are done by the best people and in the best circumstances, are the best idea. Can I ask you about some of the solutions, consequences and outcomes that might perhaps improve the situation?

**Professor Lewis:** Our provisional proposals for reform?

**James Daly:** Yes.

**Professor Lewis:** Absolutely. We have made provisional proposals across a wide range of the topics that we cover. For example, we have proposed a bespoke regime for dealing with personal records, which would involve greater judicial oversight and a higher threshold for the production of such records, disclosure of such records and their admission at trial. We have also proposed a replacement regime for section 41, rather than an approach based on categories of evidence. We think, again, that a structured discretion, with the judge looking at factors to guide that discretion, would be a better model.

Those particular types of evidence are ones that are prone to introducing myths and misconceptions into the trial, and so as part of looking at how to combat myths and misconceptions, we have proposed a new approach for personal records and sexual behaviour evidence and have proposed using that approach to sexual behaviour evidence for evidence of compensation claims, which is sometimes used to discredit complainants, as I am sure you know.

Then, we have asked about whether expert evidence to explain behavioural responses to sexual violence should be admissible, because at the moment in this jurisdiction it is not. We have also looked at improving judicial directions: we have asked questions about whether there should be a presumption that directions are given in relation to certain myths, as there is in Scotland.

- Q52 James Daly:** In some sense, I hesitate to use this phrase, but do you think that there are rape myths and misconceptions, and do you think that they impact the criminal justice process in England and Wales?

**Professor Lewis:** I think the evidence that there are rape myths is fairly incontrovertible. Perhaps it is helpful to define what we mean by rape myths.

- Q53 James Daly:** I read that there. I mean rape prejudices. This problem may well exist across the whole criminal justice system. Are societal views a problem—or an added complicating factor—in this area?

**Professor Lewis:** I think that is right. If we think about a definition, we are looking at beliefs that, although genuinely and sincerely held, are none the less factually incorrect and may be derived from stereotypes. Examples include the idea that rape will always involve physical force and injury, that rape will always be resisted and that rape will always be



reported promptly. We know from rape myth acceptance studies that these myths exist in the general population in most societies.

The question that is more contested is the extent to which they affect jurors. In the paper, we look at the entire evidence base in that regard. We look at the mock jury studies, we look at Professor Thomas's study with real jurors and we look at a recent study in New Zealand with real jurors where they are allowed to ask many more questions of jurors. They are allowed to ask about their deliberations, which Professor Thomas was not permitted to do.

- Q54 **James Daly:** Professor Lewis, please forgive me; I have to ask you this question even though it is not necessarily directly related to what we are talking about. We are talking here about the trial process in terms of rape cases in particular, which involves a very small number of the total number of complaints that are made to the police over a 12-month period. Perhaps this is very unfair, as you have been asked to carry out a study in respect of something else, but do you feel that we need just as much review, research and academic assessment of why so many people are not being charged—or why the charge rate is not higher, if I can put it that way? Do you think that is an undervalued area of academic research?

**Professor Lewis:** That is a really good question. We were asked to review the trial process and, as you know, others are looking at charging practices and prosecutorial decision making. I think it is fair to say that because the police and prosecutors make decisions about the investigation and building the case using their knowledge of what will eventually be admissible evidence at trial, that any changes one makes to the trial process will have an effect upstream—hopefully, a positive effect. I do not think you can divorce those, but you are absolutely right that there needs to be work independently on the investigation and charging and building the prosecution case. Operation Soteria, about which I am sure you have heard, and the “Police-CPS Joint National Rape Action Plan” are both looking at those issues. There was also the joint inspection by the inspectorate of constabulary and the inspectorate of the CPS, which looked in detail at the whole process from investigation to trial.

- Q55 **James Daly:** These are very brief questions. I am not comfortable with the phrase, “rape myths and misconceptions”, but I will use it because it is here. I think that when we talk about those rape myths and misconceptions, it is a question—I am not going to say what my view is; it would have to be that—that is perhaps just as potent in terms of the investigation process, bearing in mind the massive number of cases that are not even referred to the Crown Prosecution Service. We are looking at what happens at the trial process for a very small number of people, but perhaps there is a bigger question as to whether these myths persist in our law enforcement agencies to a certain extent. Do you think that that is an important question to come to?

**Professor Lewis:** I think you are absolutely right. In a footnote in the paper—obviously, it is not the central focus, but we can certainly point you



to it—we quote quite a lot of evidence about rape myth acceptance among police officers in the UK. There absolutely is evidence of that. We know that the CPS has done a lot of work to try to educate its prosecutors to combat rape myths that prosecutors may subscribe to, but also to train them in how to respond to rape myths when they are raised in a trial situation. The CPS has really great guidance on its website that is aimed at that. I think you are right, and I think that is one of the things that Operation Soteria is taking forward in terms of the police. They are moving back towards a model of specialised policing with training that will deal with rape myths.

- Q56 James Daly:** In an idealised version of the world and the criminal justice system, we would clearly want a conviction rate that was as close to 100% as it possibly could be. I am talking about rape and serious sexual offending specifically here. My question is about the research project you are involved in. In terms of the number of cases going through the court system—just putting to one side the delays and perhaps what counsel feel about it, and all the other things—in line with historical data, should we be very concerned today regarding the conviction rate for rape and serious sexual offending in court? I am saying that whatever it may be, is that so out of kilter with historical factors that it is now becoming a real problem?

**Professor Lewis:** Let me start with one of the premises, and then I will come back to the end question. I am not sure about aiming for a 100% conviction rate. With this project, we have been very clear from the beginning that although it came out of the rape review, our aim is not to increase conviction rates. That cannot be the aim of a law reform project. Our aim, as with all Law Commission projects, is to make the law simple, fair, modern and cost-effective. In particular, in relation to this project, we are trying to prevent the contamination of the trial by rape myths and ensure that complainants are treated better, their privacy is better respected and defendants are tried fairly. I think your question about how we can improve conviction rates—

- Q57 James Daly:** It is not really that, it is—sorry, I am taking too much time. My only point was that when an organisation such as yours carries out a report on the terms that it is carried out and does that excellently, obviously politicians will see it and look at it on its own terms. From my perspective, I would at least want to know that these factors potentially create a better justice system, which potentially creates a higher conviction rate, if that is appropriate. That was the only point I was making—if it is an unfair question, forgive me.

**Professor Lewis:** The one thing I could say about conviction rates is that although Professor Thomas' research is really helpful and reassuring and reminds us that that figure of 1.6% is not the figure when one gets to trial—it is much higher—the one thing we noticed in Professor Thomas' data is that the conviction rate for adult females over the age of 16 is significantly lower than it is for all other groups of complainants. Because we are only looking at adult complainants, and most adult sexual offence

complainants are women—the vast majority—that is the group that is the particular concern of this project.

That information about conviction rates is one of the things that makes us worry about the effect of rape myths on these prosecutions. That is why throughout the project, we have tried to work out how we can improve the legal regimes that govern the use of particular types of evidence, improve the experience that complainants have and put complainants in a position where they can make better-informed decisions about how they give their evidence and what evidence is introduced in relation to them, so that we can attempt to make the system work better, as you say.

**James Daly:** Thank you very much, Professor Lewis.

**Q58 Maria Eagle:** I want to ask about some of the proposals you make. One of the issues that, anecdotally, is said to lead to attrition in witnesses and complainants is intrusion into privacy and personal records. There seems to be an awful lot more of gathering that kind of evidence done by defence and prosecution during trials these days than perhaps there used to be. Your consultation paper set out that for sexual offences, there should be a bespoke regime governing access, production, disclosure and admissibility of personal records held by third parties. Can you explain what the purpose of that proposal is?

**Professor Lewis:** Absolutely. As you mentioned, complainants often fear, with good reason, that even when their records are not relevant, none the less deeply personal information from them will be revealed and used against them at trial, which they may experience as traumatising and which—in some ways even more worryingly—may then secure an acquittal. As a result, we know that some complainants either drop out, as you say, or engage in therapy in a way that is compromised, because they feel that they cannot talk about the actual events that occurred, or delay therapy, sometimes for many years, given the delays in the court processes.

We proposed this bespoke regime for access disclosure and use of complainants' personal records, which would involve greater judicial oversight, particularly in relation to disclosure, where there is currently no judicial oversight—currently, it is the prosecution that decides whether to disclose material to the defence—as well as compelled production and admissibility, which are currently decided by judges.

The idea would be a heightened threshold, which we describe as an enhanced relevance approach, and a list of factors. The threshold for admissibility would be significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. Then there would be a list of factors that the judge considers when trying to decide whether the evidence meets that threshold. There would obviously be lower thresholds for deciding about production and disclosure, because you are not actually introducing the evidence at trial in those circumstances.



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- Q59 **Maria Eagle:** Do you have any sense of what difference that would make? I know that that is quite a difficult question to answer, but if you do have any sense from what you have collected, it would be nice to know about that.

**Professor Lewis:** I know the Government have already been working on this. The aim is that it will stop being routine to obtain sexual offence complainants' personal records, such as counselling notes. In the case of a complainant who was known to social services because they were in care, we know that social services records are often obtained, and school records are often obtained. We heard a lot during our pre-consultation engagement about a lie that someone told at school when they were 15 being used against them in the subsequent trial. Obviously, people who are known to social services are more likely to have very comprehensive school records than people who are not, so they are doubly victimised in that sense.

The aim of the proposals would be to ensure that complainants can, in so far as is possible, obtain timely mental health treatment. Disclosure will become a judicial responsibility rather than the prosecution's responsibility, so we think that there will be significantly less disclosure to the defence, but we have built in this safeguard so that there is no ban on any particular type of record. We can envision, and indeed describe in the paper, circumstances where there is information in the complainant's personal records that is necessary for the defendant to receive a fair trial. It is not a ban; it is a much more rigorous assessment with greater judicial oversight.

- Q60 **Maria Eagle:** The consultation also proposes that complainants in these cases should have access to independent legal advice in respect of requests and applications relating to these personal records and sexual behaviour evidence, and that they should have a right to be heard in proceedings concerning applications relating to the admission of those sorts of records and sexual behaviour evidence. Why have you supported that approach, and what would be the benefit of it?

**Professor Lewis:** These applications, which are either made pre-trial or sometimes, though not ideally, at trial but not in the presence of the jury, engage the complainant's right to respect for their private life, which is protected by article 8 of the European convention on human rights. Although prosecutors will oppose applications on behalf of the state, they do not represent the complainant and the complainant's interests, and it is not their job to try to do that. Sometimes their interests will converge, but sometimes they will diverge.

We heard from stakeholders about the real need to ensure that arguments about protecting the complainant's right to privacy are made in the hearing by someone whose only job is to represent the complainant, and who is legally qualified. It is not enough to give the complainant a right to be heard; they need to be able to have their own lawyer. We drew the line there, because that is where the issue of the complainant's right to privacy is most fully engaged—on issues such as sexual behaviour evidence, and



personal records. We felt that giving the complainant the right to be legally represented at trial in front of a jury posed a risk to the defendant's right to a fair trial—a risk that we did not think it was appropriate to take.

I add one tiny point, given that we were talking about special measures. The model that we propose includes independent legal advice from the point at which the complaint is made. That would include independent legal advice about special measures, though we propose changing the name to something more neutral. That way, there would be someone whose job it was to say to the complainant, "Here are the options for how you can give evidence. These are the advantages and disadvantages of the options. What do you want?" We propose that the complainant should have an entitlement to certain standard special measures, so that they can effectively choose from them, but with the benefit of independent legal advice.

- Q61 Edward Timpson:** Can I ask about another of your proposals, about complainants in sexual offences prosecutions being automatically entitled to pre-record their evidence? I do not know whether you heard the previous witnesses, and the concerns raised about the operation of section 28, but given those concerns, why did the Law Commission come out in favour of automatic entitlement?

**Professor Lewis:** We propose an automatic entitlement to a set of standard special measures, so the complainant could choose from them. The measures include pre-recording evidence, with one modification, which I will come to. It also includes the other standard options, which include giving evidence via live link or from behind a screen, and the removal of wigs and gowns—I am probably forgetting one. There are two more measures that we have added; one is access to a witness supporter while giving evidence. That could be an independent sexual violence adviser. The other is the ability to enter the courtroom by a separate entrance, so that the complainant is not in danger of meeting the defendant, or the defendant's family, when they come to court.

We think that is important, because at the moment, complainants have to satisfy the judge that the special measure that they would like is necessary in order for them to give their best evidence; it has to improve the quality of their evidence. Having said that, complainants almost always get what the prosecution requests, but because they do not know that, they are left in uncertainty, not knowing whether they will be permitted a screen, or a live link, or to pre-record. That seemed to us the worst of all possible worlds. If these orders are routinely agreed to when requested, but complainants cannot be assured that they will get what they want, you create anxiety unnecessarily.

We are well aware of the problems highlighted about the roll-out of section 28. When we took on this project, we knew that the Government intended this roll-out; it was made very clear that we would take an overarching look at the legislative framework—the legislative changes that you were talking about—and that the Government would work on rolling out section



28. We have not made any kind of attempt to look at the challenges identified in relation to section 28.

What we have done, though, is look at the concerns raised about the legislative framework that governs pre-recording cross-examination under section 28. One was the fact that you must have an ABE interview in order to use section 28, and a lot of ABE interviews are—to keep this short—not very good. We have provisionally proposed an alternative to that: if there is no ABE interview or if the ABE interview is not of sufficient quality, it should be possible to pre-record the examination in chief and the cross-examination at one hearing. That would go some way to avoiding some of the problems we heard about regarding the poor quality of the ABE interviews. Of course, it would be done not by a police officer, but by the prosecuting counsel.

- Q62 **Edward Timpson:** Did you also look at the scenario that we heard about today, where there is a retrial with a section 28, but at the moment there is the inability to reopen a recording to reflect the basis on which that retrial is taking place?

**Professor Lewis:** We did not, but this is a consultation paper. Part of what we are doing here is trying to gather evidence of additional problems that we did not identify early on. It is sort of understandable, because when we were drafting the paper, section 28 was only really being rolled out at that time. That is something that I found very interesting from the previous session. We will certainly take a look at that.

- Q63 **Edward Timpson:** Finally from me, one of the other proposals is on the terminology that is currently used, including “special measures”, and the fact that maybe this is an unfair way of trying to put across something that is rather more complex and sensitive. Schools get put into special measures when they fail, as do health trusts—some of us may have experience of that in our constituencies. There is a proposal to change that term to “measures to assist with giving evidence”. First, how did you come up with that new terminology? Secondly, what difference do you think it would make in practice?

**Professor Lewis:** This is one of the things that I had not anticipated when the project started, but a number of people raised it with us, so then we started looking at other jurisdictions to see what they called their special measures. The phrasing we found that seemed most useful to us was something more neutral. In New Zealand they use “alternative ways of giving evidence”. In Victoria in Australia, they use “alternative arrangements for giving evidence”. We thought that “measures” was probably worth retaining, because it gives us a connection back to the old name. That is how we came up with “measures to assist with giving evidence”.

- Q64 **Edward Timpson:** When I did an independent review for the Government into school exclusion, one of the things I did not anticipate looking, at but which I ended up doing, was the terminology of pupil referral unit, and the way it has become stigmatised by children and young people who go



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there. I ended up coming to the conclusion that that maybe needs to change too—I am still waiting for the Government to do that, Chair. Let's see what happens to your proposal.

**Q65 Chair:** Thank you very much. That is a very interesting point. Professor Lewis, your comments have been extremely helpful and very interesting for us. You have told us about the shape of the consultation, which is out now. Can you help us as to the timeline of the consultation and then the next steps for the project?

**Professor Lewis:** Absolutely. The consultation period is ongoing and continues until 29 September. We will then have a period of analysing the responses. We are also running consultation events during the consultation period, so we will look at the feedback we will get during those. The aim is to publish a final report with recommendations for reform in the autumn of 2024.

**Chair:** That is very helpful. Thank you very much indeed for your time and your evidence this afternoon. The session is concluded.