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Background

1. My work is on the recent extension of s. 28 to intimidated witnesses who are complainants in sex offence cases under s. 17(4) of the YJCEA 1999 (hereafter 'intimidated complainants'). My doctoral research investigated the implementation of the s. 28 pilot for intimidated complainants through court observation of sex offence cases at a s. 28 Pilot Crown Court and interviews with barristers working on cases observed. My fieldwork took place from the beginning of June 2019 (when the pilot began) until the end of November 2019, prior to the Covid-19 pandemic.

2. The purpose of my Fellowship at the Centre for Socio-Legal Studies is to disseminate my research findings on s. 28 to a range of interested parties. Hence, I am pleased to be able to assist the Justice Committee with this inquiry.

3. The evidence presented here is written with a focus on intimidated witnesses who are adult complainants in sex offence case. For further information, the full text of my thesis and a short briefing paper outlining my methodology and main findings on s. 28 and related special measures in sex offence cases are available at my project website.

Summary

4. The Committee will hear of complications with the implementation of s. 28, including points that I raise in my evidence. However, many of these issues are caused or exacerbated by systemic issues affecting the Criminal Justice System, e.g.: delays at the pre-trial stage; problems with disclosure due to the proliferation of electronic material and lack of specific regulation in this area; the backlog of cases because of lack of resources, underfunding and the Covid-19 Pandemic. Conditions for the expansion and roll-out of s. 28 were certainly problematic, but they should not be used as reasons to withhold, restrict or downgrade the s. 28 procedure – see my criticism of recent amendments to the Criminal Practice Directions (CrimPDs) below.[1] With investment, careful planning and design, issues with s. 28 can be addressed. Specialist courts may be an effective way of channelling resources where they are most needed in this regard.

5. In addition to practical difficulties with the piloting and roll-out of s. 28, there are conceptual problems with how law (and consequently the legal profession) frames access to s. 28 and 'related special measures' for intimidated complainants in sex offence cases. Related special measures are defined here as ground rules hearings (GRHs), written questions on cross-examination, and best practice on cross-examining vulnerable witnesses developed by the Court of Appeal.[2] GRHs and the requirement that defence counsel write out their proposed

[1] See CrimPDs 2015 (as amended No.12 [2022] EWCA Crim 367), in force from 23 March 2022. For a summary of the changes, see *Amendments to the Criminal Practice Directions March 2022: Summary Of Key Changes*, available at https://www.judiciary.uk/wp-content/uploads/2022/03/CrimPD-Amendment-12-Key-Changes.pdf.

[2] Powers of case management and rules of best practice were instigated by the Court of Appeal primarily for children and

questions prior to s. 28 hearings were instrumental in improving the quality of cross-examination and experiences of witnesses during the first s. 28 pilot.[3] The Committee is aware that the success of the first pilot was the rationale for extending s. 28 to complainants in sex offence cases.[4] However, my research suggests that GRHs and written questions were applied inconsistently or considered unnecessary by judges and barristers during the s. 28 pilot for intimidated complaints, since adult victims are not formally categorised as 'vulnerable' witnesses. Distinctions between some complainants as vulnerable and some complainants as intimidated under the YJCEA 1999 creates inconsistencies in the treatment and questioning of complainants in sex offence cases and is increasingly outmoded. Though I am not suggesting that adults and children should be treated in the same way, I argue that 'related special measures' should be utilised and adapted as part of the s. 28 process in sex offence cases. My research during the s. 28 pilot suggests that matters were sometimes unresolved by the time of s. 28 hearings because questioning was not properly scrutinised or explored at GRHs.

6. Lastly, though the production of s. 28 videos are an improvement on ABE interviews, there are a number of issues regarding the playback of video evidence in court, so that the overall effect looks "cobbled together and amateurish".[5] Judges and barristers are concerned that jurors may disconnect with video evidence or treat it like a "soap opera",[6] but I argue that the experience of viewing pre-recorded testimony should be more like TV, not less.

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those with cognitive or communication difficulties, i.e., witnesses classed as vulnerable under s. 16 of the YJCEA 1999, e.g.: *R v PMH* [2018] EWCA Crim 2452; *R v RK* [2018] EWCA Crim 603; *R v Dinc* [2017] EWCA Crim 1206; *R v Lubemba* and *R v JP* [2014] EWCA Crim 2064; [2015] 1 Cr App R 12; *R v Wills* [2011] EWCA Crim 1983; *R v Edwards* [2011] EWCA Crim 3028; *R v Barker* [2010] EWCA Crim 4. These principles are now enshrined in judgments, toolkits, CrimPDs and advocacy and the vulnerable training for barristers and requires that advocates must adapt to the witness, not the other way round, and avoid tag questions; sarcastic or threatening tones to imply an answer; complex language; putting several questions at once; repetitive questioning; restricted choice questions; and assertions of facts, e.g., "I put it to you…". Instead, advocates should appropriately structure and signpost their questions, limiting the issues to those that are strictly relevant; keep questions short and grammatically simple; focus on one idea at a time and give witnesses time to think before they answer; be prepared to re-phrase the question, and change the line of questioning or suggest a break where the witness is distressed, since a distressed witness may give unreliable evidence.

[3] Baverstock J (2016) Process Evaluation of Pre-recorded Cross-examination Pilot (Section 28)', 15 September, Ministry of Justice, available at: https://www.gov.uk/government/publications/process-evaluationof-pre-recorded-cross-examination-pilot-section-28.

[4] Justice Committee (2023) Oral evidence: Evidence in sexual offence cases. HC 1436, 10 July, House of Commons.

[5] Email DB1, Case 25 (s. 28, 'vulnerable' complainant), Ct F.

[6] Trial Judge, Case Observation, Case 9 (s. 28, intimidated complainants) Ct F.

Points of submission

- *Every aspect of the practical operation of section 28, including the role of the police, the Crown Prosecution Service, legal representatives and the judiciary;*
- *What effect the use of section 28 has had on listing, capacity and delays in the Crown Court;*
- *The availability of barristers to act in cases where section 28 is used;*

Listings and availability of experienced advocates

7. Section 28 cases are more difficult to list because there is meant to be a ground rules hearing and a s. 28 hearing to schedule, in addition to trial. In cases involving multiple eligible witnesses, there can be more than one GRH and s. 28 hearing which make listings more complicated and consistency of oversight and representation less likely.

8. When s. 28 was first available for children and some vulnerable adults, it was thought to be more manageable because cross-examination of a child lasted around 20 minutes and could be conducted at 9:30am before the normal business of the court began at 10:00/10:30am. GRHs were also scheduled for children at 9:30am.

9. However, s. 28 hearings for intimidated complainants in sex offence cases tend to be longer because they are adults and there are few restrictions on cross-examination. Hence, the judiciary decided that these s. 28 hearings should be conducted during the normal court day. (There was also a view that children should take priority on the morning slots.) This listings policy is unpopular with barristers concerned about the knock-on effect on other cases, e.g., where s. 28 hearings are scheduled in the middle of a part-heard trial. Therefore, although it increases sitting time for judges, it may be preferable to stick to early morning time slots for intimidated complainants as well as children, since s. 28 hearings can overrun and cause delays to other hearings whatever time they are listed.

10. Listing s. 28 hearings at 9:30am for children was also designed to catch the specialist barristers with busy diaries, so scheduling GRHs and s. 28 hearings for intimidated complainants during the court day could lead to less experienced advocates taking on returned cases at short notice, undermining continuity of representation in s. 28 cases. For more information on this issue, please see pp 111-114 of my thesis. My research already identifies problems and loopholes in the expertise and training of defence barristers instructed to cross-examine intimidated complainants – see pp 105-108 of my thesis. For example, defence barristers are not presently held to the same standards as RASSO Level 4 Prosecutors, yet they have the responsibility of cross-examining complainants.

11. Court facilities may also be affecting Crown Court capacity to conduct s. 28 hearings. For example, at the s. 28 Pilot Crown Court I observed as part of my study there were two courtrooms equipped to record s. 28 hearings on the digital system but only one witness suite configured to do so which meant that only one recording could take place at any one time. This caused delays where two s. 28 hearings were scheduled on the same morning.

12. Accommodating longer s. 28 hearings for intimidated complainants during the court day would be less of an issue if there was less backlog, more judges sitting, more courts open, more witness suites and courtrooms enabled to record s. 28 hearings. Nonetheless, putting things into perspective, it must be remembered there are less offences that proceed to court involving adults in sex offence cases so the numbers of intimidated complainants accessing/applying for s. 28 under s. 17(4) of the YJCEA 1999 are still less than vulnerable witnesses, i.e., children and adults with mental/learning disabilities across a range of cases under s. 16 of the YJCEA 1999.

13. Designated sex offence courts may ease the pressure placed on listings by removing s. 28 hearings from the general list, preventing s. 28 hearings from impacting on other offence types. A specialist court with a separate list and better equipment could more readily prioritise certain times or allocate specific courtrooms to record s. 28 hearings.

Timeliness

14. My research at the time of the second s. 28 pilot found that s. 28 hearings tended to be scheduled two or three months prior to trial – this was the same in cases involving vulnerable child complainants as well as intimidated complainants in sex offence cases (see pp 179-181 of my thesis).

15. While it is important that s. 28 hearings take place as soon as practicable for a number of reasons, barristers interviewed believed that the *main* point of s. 28 for intimidated complainants was to expedite the process of testifying. For this reason, some barristers considered that s. 28 would be defunct if trials were brought on sooner. Consequently, during some s. 28 applications, barristers submitted to the court that s. 28 was less desirable where the s. 28 hearing was scheduled close to trial, though this was no fault of the complainant, or in historic cases, i.e., because the offence occurred years before charge and therefore there was no longer any imperative to capture the evidence quickly.

16. Unfortunately, this view is now echoed in the 12th Amendment to the CrimPDs 2015 which now require judges to "pay careful regard" to whether s. 28 will "materially advance" the date of cross-examination when determining s. 28 applications, which means intimidated complainants may be denied s. 28 because of "a lack of resources", e.g., the "waiting list to use the recording equipment…the availability of the judge, the advocates…and a suitable courtroom".[7]

17. Evaluating s. 28 predominantly in terms of its proximity to the trial is reductive, since there are numerous advantages of s. 28 in sex offence cases for aiding participation and procedural justice for complainants and reducing inconsistencies in the event of a re-trial (e.g., see pp 137-140, pp 179-180, and pp 265-267 of my thesis). It is, however, symptomatic of how the s. 28 procedure is seen as less valid or viable for intimidated complainants in sex offence cases compared to children categorised as vulnerable witnesses under the YJCEA 1999 – see pp 115-118 of my thesis.

18. It may also be misleading to focus on the time between the s. 28 hearing and the trial as a way of evaluating the measure's effectiveness. At the time of my research, most of the delay in sex offence cases was caused at the pre-trial stage, due to the cautious approach adopted by the

[7] See CrimPDs 2015 (as amended No.12 [2022] EWCA Crim 367), 18E.19-21.

CPS to charging decisions. The reason for the relatively short gap between s. 28 hearings and s. 28 trial was because cases progressed reasonably quickly once they entered the court system. Therefore, more emphasis should be placed on reducing the time between the initial pre-recorded ABE interview and the s. 28 hearing – see pp 179-180 of my thesis.

19. However, since the effects of the Pandemic on the backlog, there is evidence that pre-recorded cross-examination may be resulting in s. 28 trials taking longer, for example, that judges are prioritising the welfare of witnesses waiting to give live evidence and listing trials with live witnesses ahead of s. 28 trials. (Relatedly, see also my research on whether s. 28 prevents or encourages re-trials at pp 263-265 of my thesis.) This is understandable given the backlog, though certainly not ideal, but it is symptomatic of wider problems affecting the Criminal Justice System.

Consistency of oversight and representation

20. Due to the nature of additional hearings in s. 28 cases, the requirement for consistency of defence counsel at GRHs, s. 28 hearings and trial and continuity of judges at GRHs and s. 28 hearings were key standards built into the CrimPDs.[8] The Court of Appeal have held that "it is essential that the ground rules hearing and the s. 28 YJCEA 1999 hearing are before the same judge" and that "continuity (of advocate) at trial is obligatory except in exceptional circumstances".[9]

21. By the time of the s. 28 pilot for intimidated complainants, consistency of judges and counsel appeared to have broken down because of difficulties with diaries and listings. This resulted in other judges and barristers stepping in to cover hearings and relaying hand-written notes in some cases, see further pp 184-187 of my thesis. Judges who stand in to cover s. 28 hearings are less likely to have a grasp of what was agreed or discussed at GRHs. By the time of some s. 28 trials, a new judge and trial counsel had been allocated to the case and so the jury watched a different judge, prosecutor and defence counsel on s. 28 videos.

22. Note that the 12th Amendment to the CrimPDs has now removed the requirement for the same judge or advocates to be present at the GRH and s. 28 hearing, or for the same barrister to represent the defendant at the s. 28 hearing as well as trial.[10]

Lack of an official transcript of the s. 28 recording

23. Problems with consistency of oversight and representation are made worse by the fact that official transcripts of s. 28 hearings are not routinely produced, in contrast to ABE police interviews, so a new trial judge, prosecutor or defence counsel may not be fully appraised of the contents of the s. 28 video. While it is possible to watch the s. 28 video, it can be difficult to access s. 28 recordings that are securely stored on the Cloud rather than recorded on the old system (which produces a physical DVD).

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[8] See CrimPDs 2015 (Consolidated with Amendment No 11 [2020] EWCA Crim 1347), 18E.59.
[9] *R v PMH* [2018] EWCA Crim 2452, [17].
[10] "Although continuity of representation is to be encouraged, it is not mandatory for the advocate who conducted the section 28 cross-examination to represent the defendant at trial" (18E.61-63).

- *The level of use of section 28 before and since its roll-out, and the extent of up-take for cases which are eligible;*
- *The process used to decide whether to use section 28 in a particular case;*

Use of s. 28 for intimidated complainants during the pilot for intimidated complainants

24. Observation and interviews suggest that the second s. 28 pilot for intimidated complainants was adversely affected by a dearth of information about the extension of s. 28 for intimidated complainants. Barristers were unaware it had commenced and judges needed to adjourn pre-trial preparation hearings (PTPHs) in order to prompt prosecution counsel to go back to the police to ask the complainant if they wanted to apply for s. 28 (see pp 114-115 and pp 129-130 of my thesis).

25. There was also confusion regarding the applicable law. Barristers did not use the terms 'intimidated witness' or 'intimidated complainant' or associate them with eligibility for special measures. Some barristers argued, erroneously, at PTPHs or GRHs that intimidated complainants were ineligible for s. 28 (see pp 94-102 and pp 132-133 of my thesis).

26. Although interim guidance was produced for the purpose of the pilot for intimidated complainants, it was silent on key issues. Judges and barristers were unsure about whether best practice developed during the pilot for vulnerable witnesses applied to intimidated complainants, e.g., removal of wigs and gowns and meeting the witness in person prior to the s. 28 hearing. This was left to judges' discretion and resulted in the inconsistent treatment of intimidated complainants – see pp 168-174 of my thesis.

27. 'Related special measures' associated with improving the quality of cross-examination and enhancing the experience of vulnerable witnesses during the first s. 28 pilot –[11] namely, GRHs, written questions and best practice on cross-examining vulnerable witnesses –[12] were considered unnecessary or thought not to apply in intimidated cases (see p 114-115 and pp 145-150 of my thesis). Though GRHs were held in most intimidated s. 28 cases observed, they tended to last under 10 minutes and did not routinely deal with evidential issues or the scope or structure of questions. At PTPHs, defence counsel were ordered to submit question topics in advance of GRHs, rather than written questions, but these were not discussed at GRHs and in one case they were submitted the night before the s. 28 hearing – see pp 150-163 of my thesis. This resulted in matters still outstanding or unresolved by the time of the s. 28 hearing in some cases – see pp 163-168 of my thesis.

[11] See Baverstock J (2016) Process Evaluation of Pre-recorded Cross-examination Pilot (Section 28)', 15 September, Ministry of Justice, available at: https://www.gov.uk/government/publications/process-evaluationof-pre-recorded-cross-examination-pilot-section-28.
[12] See fn 2, p 2, above.

Applications for s. 28 during the pilot for intimidated complainants

28. Intimidated complainants do not currently have access to special measures as of right – though see the Law Commission's draft proposals –[13] and there is no presumption that intimidated complainants' cross-examination should be pre-recorded, unlike complainants' evidence in chief/the ABE police interview.[14]

29. However, the procedure for applying for s. 28 at the PTPH is markedly more formal than applications made for special measures at trial, i.e., screens or live link. An application form and a signed witness statement from the complainant was necessary to evidence their fear and distress and how the measure was likely to improve the quality of their evidence given.[15] Although there is a formal application process to apply for *all* special measures, this was not generally enforced in relation to special measures used at trial. In some cases, s. 28 applications were adjourned by the judge for insufficient evidence, so that a second witness statement could be obtained from the complainant for this purpose – see pp 130-132 and 133-137 of my thesis. In cases observed, there seemed to be a "higher"[16] evidential threshold required for s. 28, though no such enhanced requirement exists under statute.

30. In summary, there are too many variables and procedural obstacles associated with access to s. 28 for intimidated complainants. There are incentives for courts, judges, and barristers to try to limit the number of s. 28 hearings for intimidated complainants because of the reduction in court sitting days, the fact that s. 28 hearings for adults are more difficult to organise, and the bias towards in-court testimony. The eligibility criteria for complainants in sex offence cases also perpetuates uncertainty around access to special measures and encourages hierarchies between vulnerable and intimated complainants in sex offence cases, see further pp 140-142 of my thesis.

Other factors affecting take-up

31. In addition to the matters raised above, other factors affecting access to s. 28 and take-up among complainants included: access to accurate and impartial information about s. 28; influence from prosecutors or police; and the fear of being seen on court monitors during s. 28 hearings and at s. 28 trial, and relatedly, the availability of combined special measures (i.e., screens in addition to s. 28). See further pp 118-127 of my thesis.

Pre-recorded cross-examination for intimidated witnesses who are complainants of domestic violence

32. Section 28 was extended to complainants of domestic abuse under the Domestic Abuse Act (DAA) 2021, s. 62(1)-(2)(a). This was achieved by inserting s. 17(4A) into the YJCEA 1999, which expands the range of offences eligible for special measures under the YJCEA 1999, s. 17(4) (and therefore pre-recorded cross-examination) to include domestic abuse. However, plans to commence s. 28 for complainants in domestic violence cases appear to have stalled.

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[13] Law Commission (2023) Evidence in sexual offences prosecutions: A consultation paper. Consultation paper 259, 23 May.
[14] See YJCEA 1999, s. 22A.
[15] Although complainants are supposed to be presumed intimidated – i.e., in "fear or distress" in connection with testifying – the court must still be satisfied that the second stage of the test is satisfied, i.e., that the measure is likely to improve the quality of their evidence (see s. 17 of the YJCEA 1999).
[16] Interview DB2, Case 25 (s. 28, 'vulnerable' complainant), Ct F.

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

The audio-visual quality of recordings

33. I deal with this issue in detail at pp 247-256 of my thesis, so do not repeat the main points here.

Problems interrupting and affecting playback of video evidence at trial

34. I deal with this issue in detail at pp 256-258 of my thesis.

35. Specialist sex offence courts may be the most expedient way of directing resources to upgrade infrastructure where it is most needed, ensure greater consistency in standards of recording and playback quality and prevent delays caused by problems with technology. Barristers argued that "you would end up with the aims of s. 28 being achieved" by having specifically designed courtrooms for s. 28 trials with "more/better cameras… to record counsel" and "screens for each juror (or one between two)" so "that they can easily see what is happening".[17] See further pp 258-259 of my thesis for further detail.

Lack of a transcript or a list of written questions at s. 28 trials

36. Since written questions are not produced in advance of s. 28 hearings for intimidated complainants (see paragraph 27), it is more difficult for judges to take a note of the evidence during the s. 28 hearing or at trial. A lack of an official transcript or list of written questions may become a problem if, at trial, there is an issue with the audio quality of the evidence. The audio quality was observed to vary between s. 28 recordings, even in the same case.[18] In one case the judge asked defence counsel to repeat "one or two" of the complainant's answers at the conclusion of the s. 28 video for the benefit of the jury because the judge "didn't get the answer".[19] In this instance, defence counsel had to rely on their note of the s. 28 hearing to provide the answers. In another case, the trial judge was obliged to tell the jury the questions the complainant was being asked during the playback of s. 28 video because the recording kept pausing. Note that the trial judge was only able to do so because defence counsel had happened to provide written questions for the vulnerable complainants and the intimidated complainants in that case by default.

37. Lack of a transcript can also make editing the s. 28 video extremely difficult – see pp 219-222 of my thesis.

[17] Email DB1, Case 25 (s. 28, 'vulnerable' complainant), Ct F; Interview DB, Case 29 (s. 28, intimidated complainant), Ct F.
[18] Case Observation, Trial, Case 23 (s. 28, intimidated complainant and 'vulnerable' witnesses), Ct F; Case Observation, Trial, Case 32 (s. 28, intimidated and 'vulnerable' complainants), Ct F.
[19] Case Observation, Trial, Case 32 (s. 28, intimidated and 'vulnerable' complainants), Ct F.

- The effect of the use of section 28 on the experience of vulnerable *and* intimidated witnesses, victims, defendants and juries;

Intimidated witnesses who are complainants in sex offence cases

38. I did not consult intimidated complainants as part of my doctoral research and therefore cannot speak to the effect of s. 28 on the experience of intimidated witnesses. I can, however, make initial observations on the effect of the s. 28 procedure on advocacy style and questioning in cases I observed, since I compared defence advocates' approach to cross-examination in s. 28 cases and non-s. 28 cases involving intimidated complainants. I also attended s. 28 cases featuring vulnerable witnesses by way of contrast. In total, I attended: 11 cross-examinations of intimidated complainants in s. 28 cases at s. 28 hearings;[20] nine cross-examinations of intimidated complainants in non-s. 28 cases at trial; 14 cross-examinations of 'vulnerable' complainants in s. 28 cases at s. 28 hearings;[21] and two cross-examinations of 'vulnerable' complainants in non-s. 28 cases at trial.[22]

39. Observation and interviews suggest that the delivery of cross-examination was slower and calmer in s. 28 cases than at trial because of the need to capture the questioning on the recording, see pp 193-195 of my thesis. However, the s. 28 mindset or "gear"[23] that defence barristers had developed in respect of cross-examining vulnerable witnesses, was not adopted for intimidated complainants. The organisation, clarity and substance of questions did not materially change or improve because measures associated with s. 28, namely GRHs and written questions, were not fully utilised to screen questions in advance of s. 28 hearings and barristers considered that best practice developed on cross-examining vulnerable witnesses did not apply to intimidated complainants in sex offence cases: see pp 190-216 of my thesis.

40. In short, I found that there were missed opportunities to use the s. 28 process for greater consideration of the treatment and questioning of intimidated complainants in advance of cross-examination. Consequently, standards of cross-examination varied and the experience was still unpredictable and shocking for complainants in some cases. For example, at one s. 28 hearing, the complainant was visibly shaken, requested a break, and asked why she was being questioned about a previous complainant of rape made several years earlier because she was not warned that she would be cross-examined about her bad character or previous sexual history,[24] contrary to the *CPS Speaking to Witnesses Protocol*.[25] See pp 163-165 of my thesis.

41. Where clumsy questioning resulted in complainants inadvertently revealing their own previous sexual history, this was not always edited out of the s. 28 video effectively. This meant that the jury heard inadmissible evidence at trial in one case,[26] and in another case, two videos were

[20] While this number is relatively small, it represents the total number of intimidated complainants cross-examined via s. 28 at Pilot Court F in 2019 (June 2019-Dec 2019) according to data held by listings at Pilot Court F.
[21] All of these vulnerable witnesses were child complainants.
[22] These vulnerable witnesses were both adult complainants.
[23] Interview PB, Case 23 (s. 28, intimidated complainant and 'vulnerable' witnesses), Ct F.
[24] Case Observation, Trial, Case 9 (s. 28, intimidated complainants), Ct F.
[25] Complainants are supposed to be forewarned by prosecution counsel if they are to be cross-examined on bad character, sexual history or third-party materials under CPS Guidance Speaking to Witness at Court (CPS, 2018b).
[26] Case Observation, s. 28 hearing, Case 35 (s. 28, intimidated complainants), Ct F.

created of the s. 28 hearing (one with the evidence of sexual history and one without), in case the defence wanted to make a YJCEA 1999 s. 41 application to adduce it later at trial.[27] In the case of the latter, it was unclear whether the s. 28 video containing the complainant's sexual history would be used until the point of trial. See pp 222-224 of my thesis.

42. My research suggests that the editing function tended to be used to edit prejudicial material regarding the defendant while there was no discussion in open court about whether stereotypical or inappropriate questions asked of the complainant, such as what underwear she was wearing or whether she was on the pill, should be removed–[28] see 222-228 of my thesis.

43. For discussion of how the courts dealt with additional evidence or issues arising after the s. 28 hearing, see pp 233-240 of my thesis. I raise concerns about the use of admissions or agreed facts to put late disclosure before the jury in s. 28 cases involving intimidated complainants because it undermines the rule in *Browne v Dunn*.[29] Compared to children, intimidated complainants are clearly capable of dealing with third party material and ought to be given the opportunity to do so as a matter of "professional practice… and fair dealing with witnesses".[30]

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

44. Barristers were generally of the view that the poor quality of much pre-recorded evidence may result in more acquittals in sex offence cases, particularly since jurors may hear from and can see the defendant in person. It would require a large and detailed data set to make reliable claims in this regard because outcomes in sex offence cases are unpredictable and there are a number of variables which may have a bearing on the verdict in sex offence cases. It would also be helpful to compare other modes of testimony in non-s. 28 cases, e.g., live link, screens, or no special measures - see further pp 267 to 272 of my thesis. However, there are real concerns about the ability of jurors to follow and understand the nuance of pre-recorded testimony, particularly in sex offence cases where the issues are finely balanced, because of issues with the quality of the recording and playback of ABE and s. 28 videos.

45. Nevertheless, some complainants may fail to report, or may withdraw their support for the prosecution and be compelled to testify at court without the availability of s. 28. Therefore, appraisal of the impact of s. 28 on case outcomes should take into account its impact on attrition.

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[27] Case Observation, s. 28 hearing Case 23 (s. 28, s. 28, witnesses intimidated complainant and 'vulnerable' witnesses), Ct F.
[28] Case Observation, s. 28 hearing, Case 354(s. 28, intimidated complainant), Ct F.
[29] (1893) 6 R. 67, HL [70]: "if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses".
[30] *Ibid*.

- How to improve the data available on the use of section 28;

46. The current distinction between vulnerable and intimidated witnesses is ambiguous which is why clearer, detailed and consistent records are needed in respect of s. 28 cases according to offence type as well as witness, e.g.: (i) children, (ii) vulnerable adults, and (iii) complainants in sex offence cases. Data should also be kept in respect of other special measures/no special measures used by way of comparison.

47. There is an assumption that, since the roll-out, s. 28 is now accessible to all complainants in sex offence cases. However, the issues I raise at paragraphs 28-30 above suggest that data is needed on the total number of s. 28 applications made for intimidated complainants and the numbers granted or rejected. The total number of eligible intimidated complainants who passed through the court system during the same period is also needed to determine what proportion are applying for and accessing s. 28.

48. More data is also needed on why some s. 28 hearings do not go ahead as planned (i.e., complainant decides to testify at trial, the prosecution offer no evidence, the defendant pleads guilty etc.); the different types/combination of measures used at s. 28 hearings and trial (i.e., whether screens were granted in addition to s. 28); the timeliness of the s. 28 hearing in relation to the initial charge, recording of the ABE interview, and subsequent trial; the relationship between s. 28 and retrials; and the degree to which s. 28 videos are edited to remove inadmissible or inappropriate content before being played to the jury – though see my thesis at pp 217-227.

49. Though the Ministry of Justice has provided a small, initial evaluation of intimidated complainants' experiences,[31] there is a paucity of data on intimidated complainants' expectations, understandings and views on the finer points of the procedure.

50. Data is also needed on whether the pilot of specialist courts has an impact on the s. 28 process and the treatment and questioning of complainants in sex offence cases.[32]

[31] Ward D, Pehkonen I, Murray M, Paskell C, Pace J, Worsley R and Nasiri S (2023) Process evaluation of section 28: Evaluating the use of pre-recorded cross-examination (Section 28) for intimidated witnesses. Ministry of Justice and Ipsos UK, Ministry of Justice Analytical Series.

[32] See New pilots to boost support for rape victims in court - GOV.UK (www.gov.uk).

- How the operation of section 28 could be improved and reformed;
- Whether changes should be made to the Criminal Procedure Rules and Criminal Practice Directions relating to the operation of section 28.

Specialist courts

51. Specialist courts, as recommended by the Justice Committee[33] and considered by the Law Commission,[34] could help improve the operation of s. 28, as I have suggested at paragraphs 13 and 35 above.

Procedural safeguards should be reinstated

52. Aspects of the s. 28 process that were weakened as a result of the 12th Amendment to the CrimPDs should be reinstated. For example, whether GRHs are held as part of the s. 28 process is now at the discretion of the judge for both vulnerable and intimidated witnesses and the requirement to hold GRHs at least one week in advance of the s. 28 hearing has been removed.[35] See also concerns raised at paragraphs 16 and 22 above.

Bespoke guidance on the operation of s. 28 in sex offence cases

53. To clarify the law and realise the potential of s. 28 in sex offence cases, detailed protocol is needed clarifying the rationale for the extension of s. 28 in sex offence cases and the remit of GRHs, written questions, and other best practice associated with vulnerable witnesses (e.g., the application of best practice on cross-examination, the removal of wigs and gowns, meeting the witness prior to the s. 28 hearing). A specific toolkit on the application of s. 28 and 'related special measures' to complainants in sex offence cases may also be helpful for the legal profession and for the purposes of developing training and best practice for defence counsel preparing to cross-examine complainants in sex offence cases.

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[33] See above.
[34] Law Commission (2023) Evidence in sexual offences prosecutions: A consultation paper. Consultation paper 259, 23 May.
[35] See CrimPDs 2015 (as amended No.12 [2022] EWCA Crim 367), 18E.24.