

Written evidence submitted by Professor Cheryl Thomas (PRE0029)

This written submission is in two parts.

Part One: Background information

This part of the submission includes information on the evidence base for this written submission and covers:

- The intention behind the use of pre-recorded cross examination;
- Phased introduction of section 28 in the Crown Court;
- The dataset underpinning the analysis of section 28 cases;
- How the analysis of section 28 data was conducted;
- Previous assessments of pre-recorded cross examination.

Part Two: Responses to Justice Select Committee questions

This part of the submission provides answers based on the analysis of the section 28 dataset to the following questions posed by the Justice Select Committee in its call for written evidence:

1. The level of use of section 28 before and since its roll-out;
2. The effect of the use of section 28 on the number of cases brought to trial,
3. The effect of the use of section 28 on the outcome of cases;
4. The effect of the use of section 28 on the experience of juries;
5. How to improve the data available on the use of section 28;
6. How the operation of section 28 could be improved and reformed.

Part 1: Background information

1.1 The intentions behind pre-recorded cross examination

The Youth Justice and Criminal Evidence Act 1999 (YJCEA) established the legal basis for a range of “special measures” for certain witnesses when giving evidence in criminal trials, including the use of pre-recorded cross examination. Some of the special measures allow a witness to give evidence live in court but via protective/assistive measures: behind a screen (section 23), in private (section 25), with judge and counsel removing wigs and gowns (section 26). Other special measures allow a witness to give evidence live but from a remote location (section 24), to pre-record their evidence in chief (section 27) and their cross examination (section 28). Any of these measures may also involve the witness giving evidence with the assistance of an intermediary (section 29) or other communication aids (section 30).

Witness eligibility is based on two grounds: age or incapacity (section 16, referred to generally as “vulnerable” witnesses) or fear or distress about testifying (section 17, referred

to generally as “intimidated” witnesses). *Speaking Up for Justice*, the 1998 consultation paper issued prior to the passage of YJCEA, set out the official view that special measures would be beneficial because they would:

1. Encourage vulnerable witnesses to report offences and give evidence;
2. Reduce the stress of giving evidence for vulnerable and intimidated witnesses;
3. Help secure convictions.¹

1.2 Introduction of section 28 pre-recorded cross examination in the Crown Court

Over the 24 years since the YJCEA was passed, the full range of special measures were introduced incrementally in the Crown Court. The last of the special measures to be introduced was Section 28. This provides for the pre-recording of a witness’s cross-examination (and re-examination) where the witness’s evidence in chief has also been given by means of a video recording of a police interview (section 27²). The prosecution must apply to the court for a s28 special measures direction for cross-examination and re-examination of the witness to be pre-recorded and for that pre-recorded evidence to be admitted at trial. The introduction of the use of s28 pre-recorded cross-examination has occurred over an 8-year period via a series of pilots (at Liverpool, Leeds and Kingston upon Thames) and phased “roll outs” at other courts across the Crown Court. There were separate pilots and rollouts based on the YJCEA’s two categorisations of witnesses, with s28 first introduced for s16 vulnerable witnesses (in pilots from 2014 with full implementation from 2021³) followed by s17(a) intimidated witnesses (in pilots from 2019 with full implementation from 2022).

1.3 Evidence base for this written submission

This written submission provides some of the results of a detailed analysis of the use and impact of s28 in all cases in the Crown Court from June 2016 – June 2023⁴. This analysis is based on a dataset of all charges against all defendants in all cases in all Crown Court Centres in that time period where s28 pre-recorded cross examination recordings were made, and includes almost 29000 charges. HMCTS and the Ministry of Justice very helpfully provided the UCL Jury Project with this dataset⁵, which is drawn from the different Crown Court reporting systems used over the 7-year period⁶. This has enabled the analysis to track the outcome of every single charge against every defendant in cases where a s28 recording was made. The analysis in this written submission also has the benefit of the UCL Jury Project’s existing dataset and analysis of all charges against all defendants in *all cases* in the Crown Court in the same time period⁷. This has enabled a direct comparison to be made

¹ Home Office (1998) *Speaking Up for Justice*, London: Home Office, p.1

² Pre-recorded evidence in chief under s27 is generally referred to as ABE (Achieving Best Evidence) evidence.

³ The initial pilots of s28 for vulnerable (s16) witnesses set the witness age limit as under 16 (not under 18 as specified in YJCEA) but was increased to under 18 when s28 was fully implemented for s16 witnesses.

⁴ A full analysis of this evaluation of s28 will be published in the *Criminal Law Review* in 2024.

⁵ Memorandum of Understanding between HMCTS, Secretary of State for Justice and Professor Cheryl Thomas (March 2020).

⁶ The datasets include CREST, Xhibit and Common Platform.

⁷ See C. Thomas, “Juries, Rape and Sexual Offences in the Crown Court 2007–211” [2023] *Criminal Law Review* Issue 3

between charges, pleas and jury verdicts in s28 cases and non-s28 cases in the same 7-year period.

1.4 Approach to the analysis of Section 28

The findings presented in this written submission to the Justice Select Committee are the result of a *charge-based* analysis of charges, pleas and jury verdicts in all s28 cases. This examines what happens to each charge against each defendant in each case from 2016-2023 when s28 evidence was recorded, and includes an analysis of pleas on all charges and the outcome of any not guilty pleas that a jury decided by deliberation. This charge-based analysis enables a direct comparison between jury conviction rates in the same time period for specific offences when s28 evidence was used and when it was not used.

A charge-based analysis is used because juries reach individual decisions (verdicts) on individual charges. Juries do not reach a single decision on a case or a defendant unless it is a single defendant charged with only one offence, and we know from the UCL Jury Project's previous analysis of all jury trials in England and Wales over a 15-year period that most jury trials are not single charge/single defendant cases. Therefore, a charge-based analysis will necessarily produce a more complete picture of what happens in the Crown Court, and it is required for understanding jury decision-making. In contrast, in a case-based analysis (used for instance by MoJ and CPS) the reality of jury decision-making can be lost. This occurs when case-based analyses categorise outcomes on a case level – for instance, recording a case as a “conviction” if there is a single guilty plea or if a jury reaches *any* guilty verdict on any charges regardless of how many not guilty or hung jury verdicts that same jury reaches in the same case⁸.

1.5 Previous published assessments of pre-recorded cross-examination

In 2016, the Ministry of Justice conducted a “process evaluation” of the use of s28 for vulnerable (s16) witnesses that were sent to the 3 pilot courts in the initial period of the pilot from 30 December 2013 – 31 October 2014⁹. This involved some analysis of data from 194 cases where s28 was used in the pilot courts as well as interviews with 40 practitioners and 16 witnesses. Some of the preliminary conclusions drawn from this evaluation were that trials where s28 evidence was used were shorter than similar cases where s28 evidence was not used, and that the use of s28 could therefore save court time¹⁰. The evaluation also indicated that there was a higher guilty plea rate in cases where s28 evidence was recorded compared with similar cases where it was not used¹¹.

In 2018, the Scottish Government published an “evidence review”¹² of the impact of the use of pre-recorded evidence on juror decision-making. This was a literature review of mostly

⁸ The UCL Jury Project has also conducted a nuanced case-based analysis of s28 cases, the results of which will be published in 2024 along with a more comprehensive presentation of the charge-based analysis.

⁹ John Baverstock, Process evaluation of pre-recorded cross-examination pilot (Section 28), Ministry of Justice Analytical Series (2016)

¹⁰ Ibid, p.8

¹¹ Ibid, p.9

experimental studies in different jurisdictions almost all of which were not conducted with real jurors. This review concluded that there was “no compelling evidence of an impact from the use of pre-recorded evidence, whether by child or adult witnesses, that translates reliably into an effect on verdict outcomes in criminal trials.”¹³ The review also made a specific claim in relation to rape cases that “the use of pre-recorded evidence, at least by female rape complainers, does not significantly effect juror evaluations.”¹⁴

In April 2023, the Ministry of Justice published a further “process evaluation” of the use of s28 in for adult “intimidated” witnesses (under s17(a))¹⁵. This report covered the views and experiences of a small number of practitioners and witnesses in a few pilot areas. It did not include any analysis of data covering charges, pleas and outcomes in s28 cases involving adult witnesses under s17(a) of YJCE Act. Interviews were conducted with 11 witnesses who had used s28, 3 counsel and 26 other practitioners (10 police, 6 court staff, 6 ISVAs, 4 CPS reviewing officers) but no judges or jurors. This evaluation reported the following views from the interviews conducted: that s28 would have a minimal impact on the time it took for the case to be resolved¹⁶, that s.28 would have a minimal impact on convictions and acquittals¹⁷, and that it would be impossible to know whether s28 impacted juror decision-making or outcomes¹⁸.

1.6 A full independent evaluation of the effects of s28

The 2023 MoJ “process evaluation” included a submission from the judiciary, which raised the concern that “Despite these lengthy pilots, there is no reliable information to understand the impact of Section 28 evidence on guilty pleas, conviction or attrition rates.”¹⁹ The judiciary called for “a full independent evaluation of the effect of Section 28”²⁰ that would address the question: “whether Section 28 prerecording of cross examination results in more convictions, more pleas, and or more acquittals at trial.”²¹ The evidence provided in this written submission provides the first full independent evaluation of the effect of Section 28, and provides detailed findings on whether Section 28 pre-recording of cross examination results in more guilty pleas prior to trial and more convictions or more acquittals at trial.

¹² Vanessa Munro, *The Impact of the Use of Pre-recorded Evidence on Juror Decision-Making: An Evidence Review* (Scottish Government 2018)

¹³ *Ibid*, p.31

¹⁴ *Ibid*, p.31

¹⁵ Daisy Ward, Irina Pehkonen and Molly Murray (MoJ), Caroline Paskell, Jessica Pace, Rachel Worsley and Sulaiman Nasiri (Ipsos UK), *Process evaluation of Section 28: Evaluating the use of pre-recorded cross-examination (Section 28) for intimidated witnesses*, Ministry of Justice Analytical series (2023)

¹⁶ *Ibid*, p.4

¹⁷ *Ibid*, p.3

¹⁸ *Ibid*, p.4

¹⁹ *Ibid*, Annex A: Judiciary response, p.63

²⁰ *Ibid*, p.64

²¹ *Ibid*, p.64

Part 2: Responses to Justice Select Committee questions on Section 28

This part of the written submission provides detailed information from the analysis of the section 28 dataset for the period June 2016 - June 2023 in response to the following questions posed by the Justice Selection Committee:

1. The level of use of section 28 before and since its roll-out;
2. The effect of the use of section 28 on the number of cases brought to trial,
3. The effect of the use of section 28 on the outcome of cases;
4. The effect of the use of section 28 on the experience of juries;
5. How to improve the data available on the use of section 28;
6. How the operation of section 28 could be improved and reformed.

Question 1: The level of use of section 28 before and since its roll-out

2.1 Use of pre-recorded cross examination in the Crown Court 2016-2023

In the 7-year period June 2016-June 2023, s28 recordings were used in 4392 cases, involving 4645 defendants and 28793 charges. As Table 1 below shows, the use of s28 was limited in the years 2016- 2020 but increased substantially from 2021 following the implementation of s28 for child and other vulnerable witnesses in all courts and the piloting, roll out and implementation of s28 for adult witnesses.

Table 1: Charges, defendants and cases with s28 recordings 2016 -2023

	S16	S17(a)	Charges	Defendants	Cases
June- Dec 2016	Pilot		201	14	13
2017	Pilot		867	166	161
2018	Pilot		673	132	116
2019	Roll out	Pilot	872	136	131
2020	Roll out	Pilot	2520	382	361
2021	All courts	Roll out	9191	1431	1344
2022	All courts	All courts	8619	1381	1322
Jan - June 2023	All courts	All courts	5850	1003	944
		total	28793	4645	4392

Table 2 shows those courts where there were at least 100 cases where a s28 was recorded and where there were at least 50 cases where juries deliberated on charges where s28 evidence was used from June 2016 – June 2023.

Table 2: Courts with most section 28 cases and jury verdicts (June 2016 - June 2023)

CROWN COURT CENTRE	Total number of s28 cases	Total number of s28 cases where jury deliberated	Total number of charges in s28 cases	Total number of jury verdicts by deliberation in s28 cases
LIVERPOOL (pilot court)	548	364	4466	1899
LEEDS (pilot court)	470	326	2967	1455
BRADFORD	156	63	961	246
KINGSTON (pilot court)	151	101	759	415
SHEFFIELD	146	84	943	415
CHESTER	140	72	1028	418
NEWCASTLE	121	56	762	170
DURHAM	119	55	633	337
SNARESBROOK	108	56	597	288
TEESSIDE	102	44	624	226
PRESTON	101	55	627	231

In the period June 2016-June 2023, the overwhelming majority of charges where s28 was used involved child witnesses (73%). This is not surprising given that the use of s28 under s16 (for children and other vulnerable witnesses) has been in operation for much longer than the use of s28 with adult witnesses. The use of s28 evidence for adults under s17(a) “intimidated” provisions of the YJCEA was only rolled out across all the Crown Courts from September 2022. The legal basis for the use of s28 under the YJCE Act (ie, s16 or s17) was not recorded in the Crown Court dataset, and therefore It was not always possible to identify the category of s28 witness for all charges. This is discussed further in section 2.12 below “Need for improved data collection in the Crown Court”.

Table 4: Charges in s28 cases by category of witness (June 2016-June 2023)

Category of witness	Charges	
	number	%
S16 Vulnerable (Children under 18 or witness otherwise vulnerable)	21063	73.2%
S17(a) Intimidated (Adults in sexual offences and modern slavery cases)	3621	12.6%
Not possible to be certain from data	4109	14.2%
	28793	

2.2 Charging and s28 cases

ANALYSIS: The following analysis examines the type and variety of offences where s28 is used. It covers how many individual unique offences defendants in s28 cases have been charged with, the type of offences (sexual offences or non-sexual offence) and the number of charges in s28 cases for each type of offence.

FINDING: There were 503 different individual offences charged in cases where s28 evidence was recorded. These were almost evenly divided between sexual offences and non-sexual offences. However, when the volume of charges is examined where s28 evidence was recorded, it is clear that the overwhelming volume of charges in cases where s28 evidence is used are sexual offences (88%).

Table 6: Individual offences and individual charges in s28 cases by offence type

Offence type	Individual offences in s28 cases		Charges in s28 cases	
	no	%	no	%
Sexual offences	232	46.1%	25453	88.4%
Non-sexual offences	271	53.9%	3340	11.6%
	503		28793	

Table 6A: Number of sexual and non-sexual offences in s28 cases by witness category

Individual offences in s28 cases: Offence type	Witness category			totals
	s16	s17(a)	Unknown	
Sexual offences	188	19	25	232
Non-sexual offences	19	2	250	271
	207	21	275	503

FINDING: Of the most numerous charges where s28 evidence was recorded (Table 7 showing offences where there have been at least 500 charges in the 7-year period):

- 10 of the 14 offences are sexual offences specific to children;
- 1 offence is a non-sexual offence specific to a child (assault/ill-treat/neglect a child);
- 2 offences are sexual offences specific to adults (sexual assault on a female; rape of a female over 16); and
- 1 offence is a non-sexual offence not specific to either a child or adult witness (ABH).

Table 7: Most numerous charges in s28 cases

Most numerous offences charged with s28 evidence	Number of charges	Witness status (s16)	Witness status (s17(a))
Assault a girl under 13 by touching	4024	Vulnerable	
Sexual assault on a female	1663		Intimidated
Rape a girl under 13	1429	Vulnerable	
Rape a woman 16 years of age or over	1353		Intimidated
Assault girl under 13 by penetration with part of body/thing	1247	Vulnerable	
Indecent assault on a girl under the age of 14 years	1070	Vulnerable	
Offender 18 or over engage in non-penetrative sexual activity with girl 13 to 15	987	Vulnerable	
Rape a girl aged 13/14/15	865	Vulnerable	
Offender 18 or over engage in penetrative sexual activity with a girl 13 to 15	845	Vulnerable	
Cause/incite a girl under 13 to engage in sexual activity - no penetration	842	Vulnerable	
Assault a female 13 and over by penetration with part of body/a thing	816	Vulnerable	
Assault/ill-treat/neglect/abandon a child/young person to cause unnecessary suffering /injury	741	Vulnerable	
Assault a boy under 13 by touching	534	Vulnerable	
Assault Occasioning Actual Bodily Harm (ABH)	530	Either s16 or s17(a)	

2.3 Section 28 and pleas

ANALYSIS: The dataset was analysed by examining all pleas on all charges in cases where s28 evidence was recorded. Pleas were entered for almost all charges in s28 cases (93%). The following shows the split between guilty and not guilty pleas for all of these charges where pleas were taken in s28 cases.

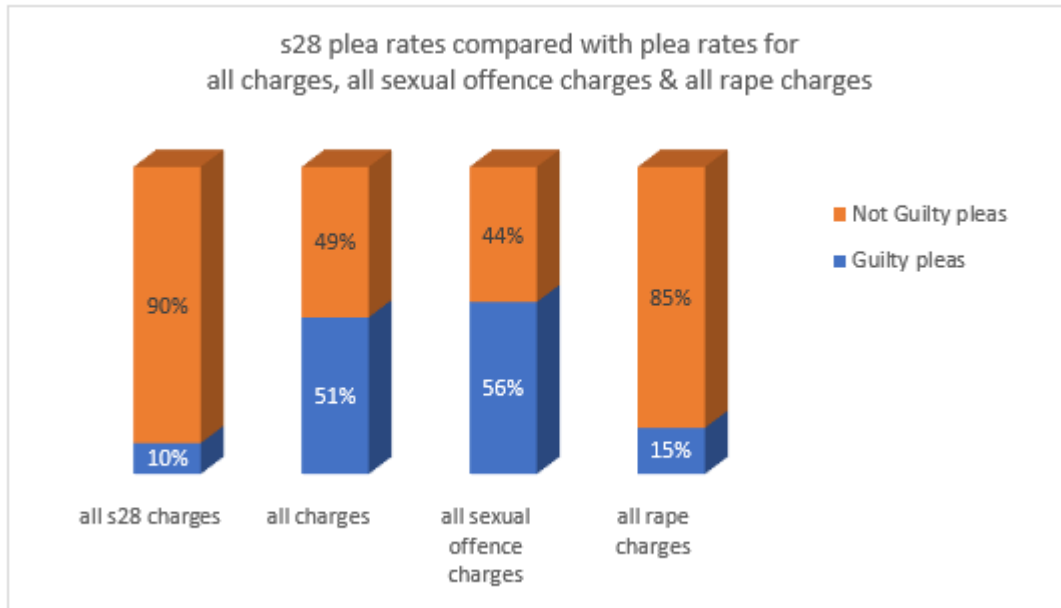
FINDING: Contrary to suggestions made early on in the piloting of s28, the existence of a s28 recording **does not** lead to more guilty pleas. In fact a s28 recording is associated with **fewer** guilty pleas. The guilty plea rate in s28 cases in 2016-2023 was 10%. This represents the percentage of guilty pleas on all charges in all s28 cases, and is the lowest guilty plea rate in the Crown Court.

Table 8: Outcome of pleas on all s28 charges where plea taken (June 2016-June 2023)

Pleas in all s28 cases 2016-2023		number		%
Guilty pleas	Change Plea: Not Guilty to Guilty - No Jury Sworn	1046	2537	10.1%
	Change Plea: Not Guilty to Guilty - After Jury Sworn	203		
	Change Plea: Not Guilty to Guilty (time unknown)	2		
	Guilty	1266		
	Guilty to Alternative Offence	3		
	Guilty to Lesser Offence	17		
Not Guilty pleas	Not Guilty	22795	22796	89.9%
	Change Plea: Guilty to Not Guilty	1		
total		25333	25333	

FINDING: The guilty plea rate in s28 cases is five times lower than the guilty plea rate for all charges on all offences in the same time period (51%) (Figure 9).

Figure 9: Plea rates on s28 charges compared with other types of charges



To some extent the low guilty plea rate might be thought to reflect the fact that there are a large proportion of sexual offences charges in s28 cases (88%), and it is already known that sexual offences (especially rape) tend to have lower than average guilty plea rates²². However, the guilty plea rate in s28 cases (10%) is more than five times lower than the guilty plea rate for all sexual offence (56%). While the s28 guilty plea rate is closest to the guilty plea rate for rape charges, the overall s28 guilty plea rate is even lower than the guilty plea rate for all rape offences (15%), and rape charges make up only a small proportion (17%) of all charges in s28 cases.

²² See C. Thomas, "Juries, Rape and Sexual Offences in the Crown Court 2007–211" [2023] Criminal Law Review Issue 3.

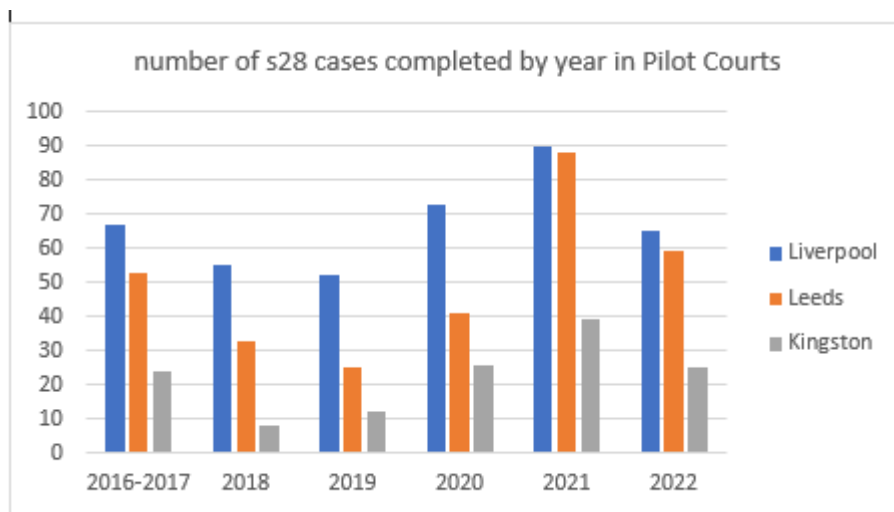
Question 2: The effect of the use of section 28 on the number of cases brought to trial

2.4 Number of cases brought to trial

ANALYSIS: The analysis provides results for the number of cases with s28 evidence that went to trial and were completed in the period 2016-2022, looking at any differences in Pilot Courts from 2016 (when the first pilot was evaluated) as well as the number of cases completed using s28 evidence in all other courts in the same time period.

FINDING: Of the 3 Pilot Courts, Liverpool completed the largest number of s28 cases each year, although Leeds completed a comparable number of cases to Liverpool in 2021 and 2022. Kingston consistently completed a much lower number of s28 cases than either Liverpool or Leeds each year. Each of the 3 Pilot Courts reached a peak of case completion with s28 evidence in 2021, with case numbers falling in 2022 (Figure 1).

Figure 1: Cases completed in Pilot Courts (June 2016-December 2022)



FINDING: By 2021 the volume of cases completed using s28 in all other courts surpassed the number of cases completed using s28 evidence in the Pilot Courts for the first time (Figure 2 and Table 3).

Figure 2: Cases completed with s28 evidence June 2016- June 2023

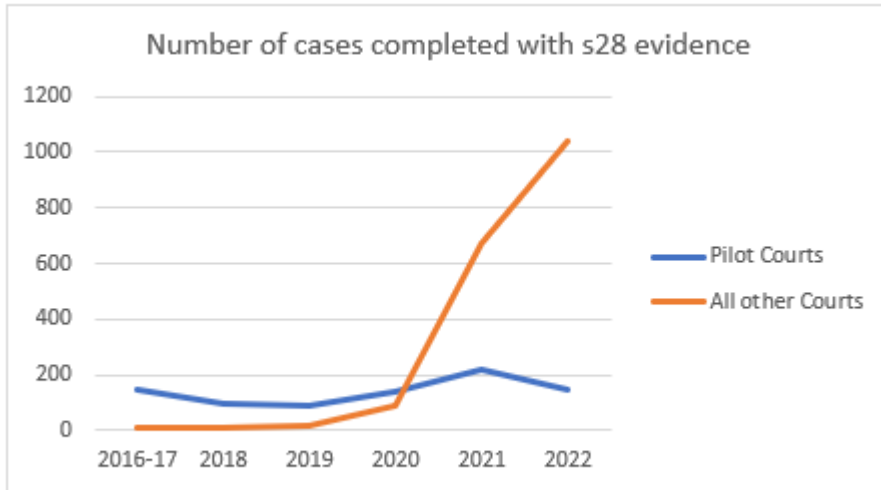


Table 3: Number of cases completed with s28 evidence June 2016-December 2022

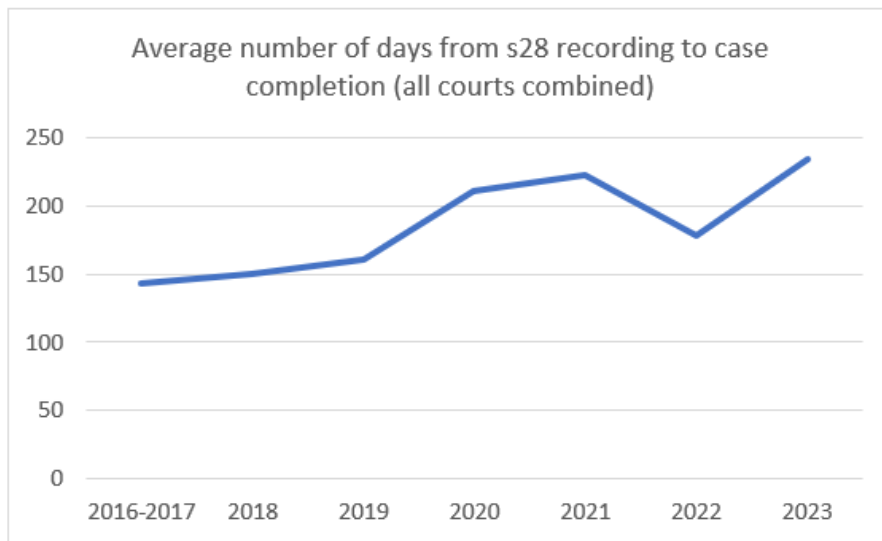
	2016-17	2018	2019	2020	2021	2022
3 Pilot Courts	144	96	89	140	217	149
All other Courts	8	6	20	87	673	1038

2.5 Time to completion of cases using Section 28 evidence

ANALYSIS: This looks at the **average** length of time in days between s28 recordings and case completion, and it examines whether this has changed from the pilot court stage to full roll outs in recent years.

FINDING: As the volume of s28 cases increased first in the Pilot Courts and then in all other courts, the average number of days from the s28 recording to case completion has increased from fewer than 150 days on average in 2016-17 to almost 250 days on average in 2023.

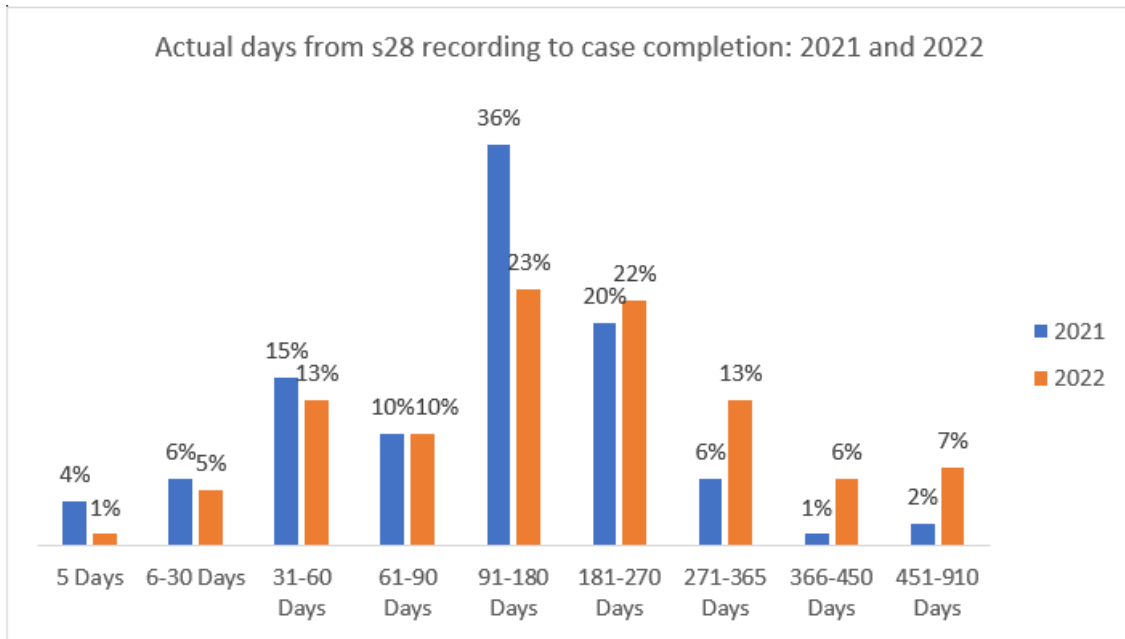
Figure 3: Average days from s28 recording to case completion



FINDING: Figure 4 below shows the distribution in 2021 and 2022 of the actual number of days from a s28 recording to case completion. It is clear that as the implementation of s28 for all vulnerable and intimidated witness expanded from 2021 to 22, the cases taking longer to complete increased substantially.

- In 2021, only 3% of s28 cases were taking 2 to 3 years to complete, but by 2022 this had grown to 13%.
- In 2021, only a quarter of s28 cases (26%) were taking over 6 months to a year to complete, but by 2022 this had grown to a third of all s28 cases (35%).
- In 2021, almost three-quarters (71%) of s28 cases took under 6 months to complete, but by 2022 this had fallen to only half (52%).

Figure 4: Actual days from s28 recording to case completion (2021 & 2022)



Question 3: The effect of the use of section 28 on the outcome of cases

ANALYSIS: The following analysis looks first at all jury verdicts by deliberation where s28 evidence was used in the period 2016-2022 for **all offences combined** and compares it with the jury conviction rate for all offences in the same period where s28 was not used. It then examines all jury verdicts by deliberation **for each individual offence** where s28 evidence was used and compares that jury conviction rate with the jury conviction rate for that specific offence in the same time period when s28 evidence was not used. This analysis demonstrates that the view expressed in the 2023 MoJ s28 Process Evaluation that it would be impossible to know whether s28 evidence impacted juror decision-making or outcomes is incorrect.

2.6 Jury conviction rates with and without s28 (all verdicts combined)

FINDING: The overall jury conviction rate on charges where s28 evidence was used is 61%. This shows that juries convict more often than acquit when s28 evidence is used.

Figure 9: Jury verdicts by deliberation in all s.28 cases (all courts combined)

Jury verdicts by deliberation	All s28 jury verdicts 2016-22				
	no	%		no	%
Guilty	7203	61.1%	All Guilty jury verdicts	7271	61.6%
Guilty to Alternative Offence	13	0.1%			
Guilty to Lesser Offence	13	0.1%			
Retrial Guilty	42	0.4%			
Jury Unable to Agree	274	2.3%	All hung juries	274	2.3%
Not Guilty	4252	36.0%	All Not Guilty jury verdicts	4253	36.1%
Retrial Not Guilty	1	0.01%			
Total number of charges decided by jury deliberation	11798			11798	

FINDING: However, as Table 10 shows, for the same period 2016-2022, the jury conviction rate was almost 10 percentage points lower when s28 evidence was used (61%) compared to when it was not used (70%), and the hung jury rate was 3 times higher with s28 (2.3%) than without s28 (0.7%).

Table 10: Comparison of jury conviction rates with and without s28

	All s28 jury verdicts 2016-22		All non s28 jury verdicts 2016-22		% point difference between jury conviction rate with s28 & without s28
	no	%	no	%	
All Guilty jury verdicts	7271	61.6%	254218	70.2%	- 8.6
All hung juries	274	2.3%	2557	0.7%	+1.6
All Not Guilty jury verdicts	4253	36.1%	105602	29.1%	+6.9
	11798	100%	362377	100%	

2.7 Section 28 and jury conviction rates by offence

In the next analysis the jury conviction rate has been calculated for the most numerous offences when s28 was used and compares the jury conviction rate for the same offences in the same period when s28 was not used. For reliability of results, the analysis looks at the largest volume of offences in s28 cases involving both vulnerable witnesses (s16) and intimidated witnesses (s17(a)). In most instances, these are the offences where there were at least 100 jury verdicts by deliberation. This comprises the overwhelming majority of jury verdicts by deliberation in s28 cases: 8480 of the 11798 jury verdicts or 72% of all jury verdicts by deliberation in all s28 cases.

KEY FINDING: Jury conviction rates for every single offence are lower when s28 evidence is used then when it is not used. This is regardless of

- (1) whether the s28 witness is a child/vulnerable or an adult/intimidated,**
- (2) whether the s28 witness is female or male or**
- (3) whether the offence is a sexual offence or a non-sexual offence.**

Tables 11, 12 and 13 below show that for every single offence, whether a sexual offence or non-sexual offence and whether an offence against a child or an adult, the jury conviction rate for that offence is always lower when s28 evidence is used compared to when it is not used. **Such a strong and consistent correlation between the use of s28 evidence and lower jury conviction rates regardless of the type of offence or witness indicates that s28 evidence can have an impact on jury decision-making.**

FINDING: Table 11 shows the jury conviction rates for offences against children and other vulnerable witnesses where s28 evidence is used and when it is not used. The results are presented according to the most numerous offences where pre-recorded cross examination was used for witnesses eligible under s16 of the YJCE Act. For every single offence involving a child or other vulnerable witness, the jury conviction rate is lower when s28 pre-recorded cross examination is used compared to when s28 is not used. The variations range from 1%-14% points lower with s28 than without s28.

Table 11: Jury conviction rates by offence with and without s28 for vulnerable witnesses

Offences against children or other vulnerable witness (s16)	s28 2016-2022			Jury conviction rate for the same offence 2016-22 without s28	% point difference between s28 & non-28 jury conviction rate
	Charges	Jury verdicts by deliberation	Jury conviction rate		
Assault a girl under 13 by touching (SOA 2003)	4024	1917	61.7%	64.5%	-2.8
Rape a girl under 13	1429	670	68.3%	77.2%	-8.9
Assault a girl under 13 by penetration with a part of your body/a thing (SOA 2003)	1247	589	65.5%	75.2%	-9.7
Indecent assault on a girl under the age of 14 years	1070	492	63.4%	70.0%	-6.6
Offender 18 or over engage in non-penetrative sexual activity with girl 13 to 15 (SOA 2003)	987	402	60.4%	64.1%	-3.1
Rape a girl aged 13/14/15	865	439	60.4%	74.8%	-14.4
Offender 18 or over engage in penetrative sexual activity with a girl 13 to 15 (SOA 2003)	845	349	67.3%	72.9%	-5.6
Cause/incite a girl under 13 to engage in sexual activity - no penetration	842	412	66.7%	69.4%	-2.7
Assault a female 13 and over by penetration with part of body/a thing (SOA 2003)	816	368	57.3%	60.5%	-3.2
Assault/ill-treat/neglect/abandon a child/young person to cause unnecessary suffering/injury	741	323	67.8%	71.1%	-3.3
Assault a boy under 13 by touching (SOA 2003)	534	267	59.2%	71.1%	-11.9
Indecent assault on a girl under the age of 16 years	454	180	73.3%	73.9%	-0.6
Make indecent photograph / pseudo-photograph of a child	405	77	92.2%	94.3%	-2.1
Rape a female under 16	340	147	62.8%	68.3%	-5.5

FINDING: Table 12 below shows that the jury conviction rate when s28 is used with offences that fall within the s17(a) adult intimidated witness category are markedly lower than the jury conviction rate for the same offence in the same time period but where s28 evidence is not used. The variations in the jury conviction rates with and without s28 are more substantial with adult witnesses than child or other vulnerable witnesses, ranging from 11-18 percentage points.

Table 12: Jury conviction rates by offence with and without s28 for intimidated witnesses

Offences against Adult Intimidated witnesses (s17(a))	s28 2016-2022			Jury conviction rate 2016-22 for this offence without s28	% point difference between s28 & non-s28 jury conviction rate
	Charges	Jury verdicts by deliberation	Jury conviction rate		
Sexual assault on a female	1663	782	52.8%	64.1%	-11.3
Rape a woman 16 years of age or over (SOA 2003)	1353	677	41.1%	69.2%	-18.1
Sexual assault on a male	197	95	50.5%	63.6%	-13.1

FINDING: Table 13 also shows that the jury conviction rate is markedly lower when s28 is used with non-sexual offences, this time ranging from 8-23 percentage points.

Table 13: Jury conviction rates with & without s28 for offences unrelated to witness age/sex

Offences not related to age or sex of witness and where offence is not a sexual offence	s28 2016-2022			Jury conviction rate 2016-22 for this offence without s28	% point difference between s28 & non-s28 jury conviction rate
	Charges	Jury verdicts by deliberation	Jury conviction rate		
Assault a person thereby occasioning them actual bodily harm	530	175	53.7%	66.6%	-12.9
Assault by beating	234	55	49.1%	57.3%	-8.2
Engage in controlling/coercive behaviour in an intimate/family relationship	196	64	53.1%	69.8%	-16.7
Exposure (SOA 2003)	128	56	42.8%	66.4%	-23.6

2.8 Jury decision making on rape charges with s28 evidence

ANALYSIS: The following analysis compares the jury conviction rate in the period 2019-2022 for each type of rape offence with and without s28 evidence. The rape offences are analysed by the age and sex of the complainant and whether they were charged under the 2003 or 1956 Sexual Offences Act. The time period of the analysis is 2019-2022 because this is the time period when most s28 cases were completed and when s28 was introduced for both child and adults witnesses.

FINDING: Jury conviction rates when s28 evidence is used in rape cases are substantially lower for all types of rape offence, whether for adult rape offences or child rape offences. In most instances, the jury conviction rate for rape offences is 20 percentage points lower when the complainants' cross examination is pre-recorded compared to when the complainant's cross examination is not pre-recorded.

Figure 5: Jury conviction rates for adult rape with & without s28

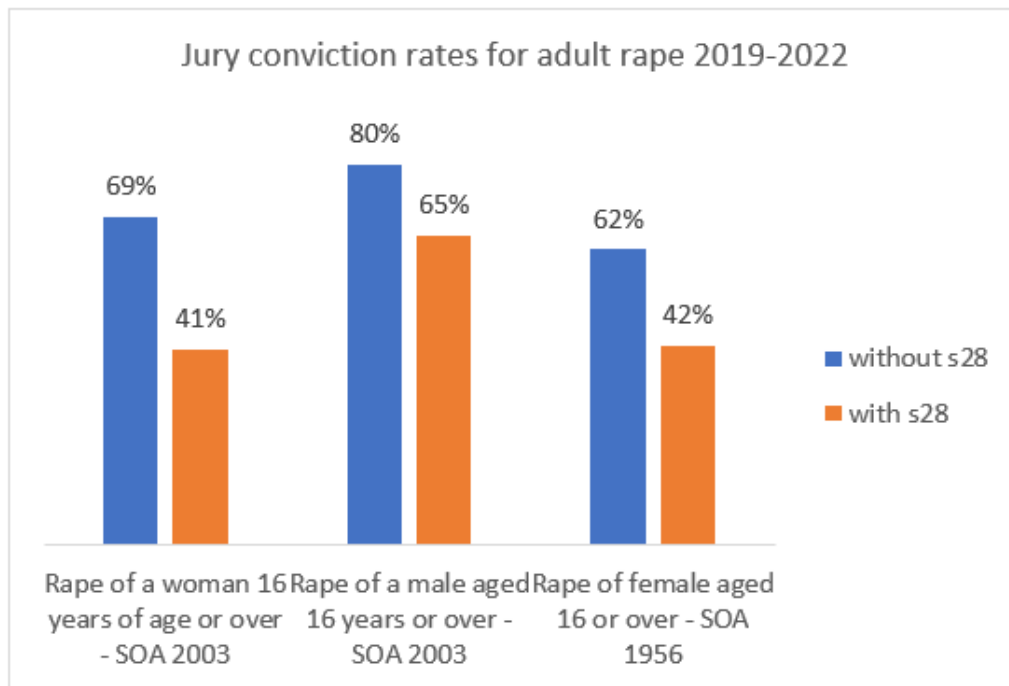
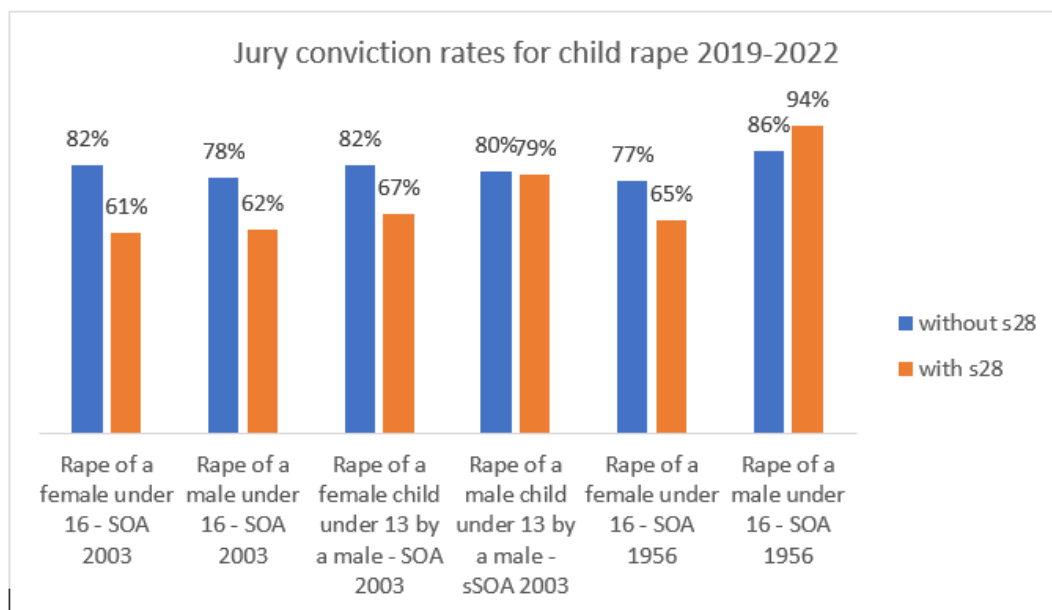


Figure 6: Jury conviction rates for child rape with & without s28



The only exception to this trend is the offence of rape of male under 16 as an historic offence under the 1956 Act (Figure 6); however, the numbers of any charges/verdicts for this offence were extremely small and make the analysis less reliable. The one rape offence not presented in Figure 5 above is rape of a male 16 or over under the Sexual Offences Act 1956 because there were no jury verdicts for offence where s28 evidence was used in this period.

Question 4: The effect of the use of section 28 on the experience of juries

2.9 The lower conviction effect of section 28

The findings that jury conviction rates are consistently and substantially lower for all offences when s28 evidence is used is very strong correlational evidence that juries experience pre-recorded cross examination differently than they do other forms of live cross examination. The lower jury conviction rates with s28 suggest an “inequality of arms” between the main prosecution witness and defence witnesses in cases with s28 pre-recorded cross examination. That is likely to be especially the case between the defendant and the main prosecution witness if the defendant chooses to give evidence live in a s28 case while all of the main witness’s evidence has been pre-recorded (evidence in chief recorded under s27 and cross-examination/re-examination pre-recorded under s28).

These findings that jury conviction rates are always lower when s28 is used run counter to many of the indications in the two MoJ process evaluations of s28 and contradict claims made in the 2018 Scottish Government review about the impact of pre-recorded evidence on juries. The MoJ process evaluations suggested that s28 would have minimal impact on jury conviction rates, and that it would be impossible to know how s28 affected jury verdicts. However, this first independent and detailed analysis of all s28 cases from June 2016-June 2023 has shown it is possible to know how s28 relates to jury conviction rates, and that jury conviction rates for all offences when s28 evidence is used are lower than

when pre-recorded cross examination is not used. This analysis has also shown that the claim made in the 2016 Scottish review - that pre-recorded evidence had no impact on jury decision-making, whether for a child or adult witness or in rape cases - is incorrect. It should be remembered that the Scottish review's claim was based on experimental studies from other jurisdictions not conducted with real juries, whereas the analysis presented in this submission is based on all actual jury verdicts in England and Wales over the last 7 years.

2.10 Factors that may be affecting jury conviction rates in s28 cases

It is possible that there is an *intrinsic difference* in how juries (or any judicial decision-makers) experience evidence presented as pre-recorded in comparison to evidence that is presented live (either in court with or without screens or via a remote link). This would not be surprising given evidence from psychological research that in-person interactions can create higher levels of empathy than interactions experienced on screen.

However, one point to bear in mind in considering this possibility is that this analysis compared jury conviction rates in cases where the jury saw *all* of the witness's evidence pre-recorded in contrast to cases where the jury saw *some* evidence live and *some* pre-recorded. This is because the overwhelming majority of offences being compared were sexual offences, and these will almost always involve the main witness's evidence in chief being pre-recorded (even if the cross examination is not).

Of course it could be that jury conviction rates would be even higher if *no* pre-recorded evidence was presented to the jury at all. But the fact that the jury conviction rate is consistently lower when pre-recorded evidence in chief is combined with pre-recorded cross examination compared with similar cases where only the evidence in chief is pre-recorded suggests that the difference lies in the *combined effect* of all of the witness's evidence being shown to the jury in two separate and very distinct pre-recorded films.

This means that **other factors** may be contributing to pre-recorded cross examination evidence combined with pre-recorded evidence in chief resulting in lower jury conviction rates. These other factors may include:

- 1 *No comparability between main prosecution witness and other witnesses including the defendant.* The s28 witness is likely to be the only witness in a case where no evidence is presented live to the jury (either in court with or without a screen or via a remote link).
- 2 *Timing of the main prosecution witness evidence.* The evidence of the main witness for the prosecution is presented first; it is the first evidence a jury will see/hear; it will all be presented by video playback (twice); all other witness are likely to appear in person and appear after the witness with all pre-recorded evidence.
- 3 *Evidence structured differently for s28 witnesses from any other witness.* This includes (1) the s27 ABE evidence in chief recording that has to serve a dual purpose of an investigative tool for police at the start of a case and evidence in chief to a jury at the end and (2) often more limited and formalised cross examination when s28 is used.
- 4 *Disjointed nature of evidence in chief and cross examination.* This may arise for several reasons: because the ABE is primarily recorded for police evidence gathering purposes and not specifically for trial evidence purposes; because the s28 style of presentation

and questioning is different from ABE and also different from other in-court cross examination of other witnesses; because the witness is likely to look and sound different in the s28 recording than in the s27 ABE recording given the differences in recording location, set up and time.

- 5 *Poor quality of pre-recorded evidence.* This may apply to both s27 ABE (evidence in chief) and s28 (cross-examination) evidence.
- 6 *Poor quality of playback equipment in court.* This can include poor audio (necessitating written transcripts for the jury and resulting in the jury looking at the transcript and not the witness), screens too far away, images too small within screens, etc., and may apply to either or both s27/ABE and s28 evidence.
- 7 *Inherently weaker cases use s28.* It is also a possibility that s28 is used in cases where the evidence needed for conviction is weaker than in cases that do not use s28, and this is what is producing lower jury conviction rates in s28 compared with non s28 cases.

2.11 Forthcoming research on factors affecting lower conviction rates in s28 cases

At present, there is no reliable evidence to indicate which if any of the above factors result in lower jury conviction rates across the board for all offences when section 28 pre-recorded cross examination is used. However, in 2024 the UCL Jury Project will conduct the final part of its research on the impact of special measures on jury decision-making. This research will be conducted with real juries at court in England and Wales and will involve a controlled testing of each of these possible factors to determine whether they are associated with differences in juror perceptions of evidence and jury verdicts when s28 evidence is used in trials. This Nuffield Foundation funded research is expected to be completed in autumn 2024. See: <https://www.nuffieldfoundation.org/project/juries-the-digital-courtroom-and-special-measures>

<i>Question 5: How to improve the data available on the use of section 28</i>
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2.12 Need for improved data collection in Crown Court cases

This analysis of Crown Court data on s28 cases from June 2016 – June 2023 has exposed deficiencies in the data collection in these cases. Some important information about s28 cases that would have aided the analysis was unfortunately either not collected at court or not available in the dataset from the Crown Court. The introduction of s28 in criminal trials in the Crown Court instituted a major change in the criminal trial process and was a high profile policy for the Government that has taken 24 years to be implemented. Given its significance and the number of years it took to prepare for the introduction s28 in Crown Court trials, it is surprising and concerning that more attention was not paid to the need for robust data collection in s28 cases.

The data available about s28 cases lack some key (and basic) elements. This has not prevented a reliable analysis of the relationship between the use of 28, charging, pleas and jury conviction rates. But in order to fully understand the implications of the introduction of

s28, data from all future s28 cases in the Crown Court need to provide more specific information.

For most cases involving sexual offences charges (which account for 88% of charges in s28 cases), whether the witness was classified as a child/other vulnerable witness or an adult/intimidated witness for purposes of s28 could be assessed by the offence. For instance, charges of rape of a girl or boy under 13 and decided prior to 2021 at a non-pilot court could be reliably presumed to involve a s28 recording authorised under s16 of the YJCEA. But it was not always possible to make such determinations. For instance, where a defendant was charged with multiple offences including a clearly identifiable offence against a child and other offences clearly related to an adult, it was not possible to know to which witness and which charge the s28 recording applied or whether there may have been multiple witnesses using s28 in the same case. It was also not possible to identify if any other special measures were used in s28 cases, for example intermediaries or aids to communication (the exception being s27 pre-recorded evidence in chief, which is a prerequisite for using s28).

To improve data collection on s28, cases the following information which is either not currently recorded or not available in the court data should in future be collected:

- Under which provision of YJCE Act 1999 the witness was eligible (s16 or s17(a));
- Identification of the specific charges where s28 evidence was used. This would ensure that in multiple charge cases it is possible to be certain which charges were covered directly by the s28 evidence.
- Whether more than one witness provided evidence via s28, and if so which charges were covered by each of the witness's s28 evidence;
- Age, sex and ethnicity of witness where s28 used;
- Whether any other special measures were used in the case; if so which ones, which charges did they relate to.

Question 6: How the operation of section 28 could be improved and reformed

2.13 Need to pause further changes

Section 28, like all special measures in the YJCEA, was designed to enable witnesses who would otherwise be unable to give evidence to do so and to increase conviction rates as a result of enabling those witnesses to give evidence. While there has been research on how well special measures in general have fulfilled the first intention of the Act, especially in relation to child witnesses, until now there has been no research with real juries in the UK on how special measures affect jury conviction rates. The UCL Jury Project analysis of how s28 evidence relates to jury conviction rates in England and Wales provides the first insight into how well s28 helps to achieve one of the Act's main intentions. The answer clearly is not very well, and this suggests that s28 may well need reform.

However, until the factors that are leading to lower jury conviction rates are identified, it would be advisable to pause any changes to s28. Further changes to the use of s28 prior to

our understanding of how and why s28 leads to lower convictions risk producing further unintended consequences.

2.14 Police and CPS to advise witnesses of lower conviction rates in s28 cases

In the meantime, it would be prudent for the police and CPS to routinely advise witnesses of the lower jury conviction rate when pre-recorded cross examination is used. That way witnesses, especially adult witnesses that would be capable of giving live evidence (either in court with or without screens or via live link), will be empowered to make their own informed decision about which if any special measures they require and wish to use in order to give their evidence.

2.15 Proposed automatic entitlement to pre-record evidence

The Law Commission is currently proposing that all complainants in sexual offences prosecutions be automatically entitled to pre-record their evidence, including evidence in chief, cross-examination and re-examination²³. At least a third of all charges decided by a jury in England and Wales are sexual offences. If automatic entitlement to s28 in all sexual offences cases is adopted, the evidence provided here indicates that conviction rates for all sexual offences are likely to fall by approximately 10 percentage points (the differential between any s28 and any non-s28 conviction rate) and approximately 20 percentage points for rape offences. In making any decision about automatic entitlement to s28 for all complainants in sexual offences, consideration should be given to the likely impact of instituting such a policy change before there is clarity around the reasons why jury conviction rates are lower when s28 is used.

December 2023

²³ Law Commission, Evidence in sexual offences prosecutions, Consultation paper 259, “Recorded evidence” paras.7.110 – 7.140 and Consultation Questions 47 and 48 (23 May 2023)