Supplementary written evidence submitted by Dr Natalie Kyneswood (PRE0037)

Response to Submission PRE0029[1]: YJCEA 1999 Section 28 and Conviction Rates

Introduction

1. In this response, I outline reservations about the strength of claims that data presented in submission PRE0029 shows "such a strong and consistent correlation between the use of Section 28 evidence and lower jury conviction rates".[2] It is concerning how preliminary data on s. 28 and conviction rates has been interpreted and reported thus far. For example, the BBC article, "Rape complainants warned pre-recording evidence could backfire - BBC News," quoted the "20%" decrease in conviction rate in adult rape cases where s. 28 was used but was thin on detail and alternative opinion. The Lady Chief Justice has also recommended the Government "pause the roll-out"[3] after commenting that data submitted to the Committee "shows very clearly that there is a significant impact on guilty verdicts".[4]

2. Firstly, I make initial observations about data relied on in submission PRE0029, acknowledging that it "provides some of the results of a detailed analysis of the use and impact of s28" and that a "full analysis" will published in due course (see 1.3 of PRE0029). Secondly, I consider wider issues that the submission raises. In conclusion, I disagree that evidence provided in submission PRE0029 provides a "full" evaluation of the effects of s. 28 (see 1.6).

3. The observations I make here are rooted in my research into the operation of the YJCEA 1999 and experience of observing s. 28 hearings and s. 28 trials involving intimidated witnesses who are complainants in sex offence cases under s. 17**(4)** of the YJCEA 1999 – hereafter 'intimidated complainants'. Note that references in submission PRE0029 to intimidated witnesses under YJCEA 1999, s. 17**(a)** are incorrect - no such provision exists.[5]

4. For the avoidance of doubt, intimidated complainants are eligible for s. 28 under s. 17(4) of the YJCEA 1999 by virtue of being 18 years of age or over and the complainant in a sex offence case.[6] The category "intimidated witness" comprises a diverse range of witnesses but *complainants in sex offence cases or modern slavery are currently the only categories of intimidated witness under s. 17 who may access s. 28*.[7] Plans to pilot s. 28 for other categories of intimidated witnesses, namely complainants of domestic violence,[8] are currently on hold.

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[1] See committees.parliament.uk/writtenevidence/126988/pdf/.
[2] Ellison, C. 'Rape complainants warned pre-recording evidence could backfire', BBC News, 11 January 2024: https://www.bbc.co.uk/news/uk-67940103.
[3] LCJ-Transcript-Press-edited-1.docx (live.com) p. 22.
[4] *Ibid.*
[5] The researcher may have meant YJCEA 1999, s. 17(2)(a) but the relevant provision, for the purposes of s. 28, is s. 17(4).
[6] For the definition of sexual offence in this context, see s. 62 of the YJCEA 1999.
[7] Offences under ss. 1 or 2 of the Modern Slavery Act 2015.
[8] See s. 17(4A)(c).

5. As the Committee will be aware, qualifying for s. 28 under s. 17(4) is distinct from qualifying as a "vulnerable" witness under s. 16 of the YJCEA 1999.[9] However, complainants in sex offence cases can be *either* "vulnerable" (if they are a child under 18 years of age or an adult with a physical or mental disorder/disability) *or* intimidated (if they do not qualify as a "vulnerable" witness but are eligible simply because of the nature of the offence). This distinction causes much confusion in the literature and in practice. I mention this because problems identifying who is "vulnerable" as opposed to "intimidated" is also evident in the Crown Court datasets used in submission PRE0029 (see my commentary at paras. 8 and 13 below). However, the distinction is critical when determining datasets and evaluating outcomes for intimidated complainants in s. 28 cases, since fewer cases/charges are brought in respect of this cohort.

I. Issues regarding data presented on s.28 and convictions

Timing of data-collection precedes the nationwide roll-out to intimidated complainants

6. It is important to underscore that charges attributed to intimidated complainants in s. 28 cases were collected by Crown Courts prior to and at the onset of the nationwide roll-out. Note that when evaluating "the effect of the use of s. 28 on the outcome of cases" (from 2.6 onwards) the period between 2016-*2022* is analysed. Yet, the s. 28 pilot for intimidated complainants did not begin until June 2019 and was operating at only three Crown Courts for two years until September 2021.[10] It was subsequently rolled-out to four further Crown Courts between September 2021 and March 2022.[11] After March 2022, the roll-out began in earnest but was not complete until the end of September 2022. This, consequently, will have had a bearing on the size and reliability of the dataset.

Number of charges pertaining to intimidated complainants – see 2.1

7. At 2.1, Table 4 shows "charges in s. 28 cases by category of witness ("June 2016-June 2023"). Note that the dataset presented in respect of intimidated complainants here (N=3621) is markedly smaller than the dataset involving children and other "vulnerable" witnesses (N=21063). Of the total number of 28793 charges analysed in s. 28 cases, 12.6% (N=3621) are attributed to intimidated complainants.

8. It is to be expected that charges in intimidated s. 28 cases are lower because s. 28 was introduced later for this group and fewer cases are prosecuted involving intimidated complainants than "vulnerable" witnesses. However, Crown Court datasets used in submission PRE0029 did not record the legal basis for complainants' eligibility for s. 28. Therefore, "it was not always possible to identify the category of s. 28 witness for all charges" (2.1). In fact, **there are more unidentified charges (N=4109) than there are charges pertaining to intimidated complaints (N=3621).**

[9] Vulnerable witnesses qualify for s. 28 if they are (i) children (under 18 years of age), or (ii) are adults with an existing mental disorder or cognitive or physical disability.
[10] Kingston-upon-Thames Crown Court; Leeds Crown Court; and Liverpool Crown Court – see the Youth Justice and Criminal Evidence Act 1999 (Commencement No. 16) Order 2019/947.
[11] Durham Crown Court; Harrow Crown Court; Isleworth Crown Court; and Wood Green Crown Court – see the Youth Justice and Criminal Evidence Act 1999 (Commencement No. 22) Order 2021/1036.

9. Furthermore, claims regarding the "evidence base" at the outset of the submission are misleading (see 1.3) because when evaluating "the effect of the use of s. 28 on the outcome of cases" (from 2.6 onwards), the period 2016-*2022* is used, rather than "June 2016-*June 2023*", which contains fewer charges (see 2.1, Table 1).

Problems comparing s. 28 cases with all non-s. 28 cases – see 2.6

10. At 2.6, Table 10 seeks to compare conviction rates for charges across all s. 28 cases with conviction rates for charges across all non-s. 28 cases. However, there are problems in doing so because the vast majority of charges in s. 28 cases are sexual offences (88.4% according to Table 6 at 2.2). Therefore, sexual offences are disproportionately represented in the sample of s. 28 cases during the period 2016-2022 and so comparing s. 28 cases with all non-s. 28 cases is not comparing like with like. The dataset for all non-s. 28 cases is also three times bigger as well containing a wider range of offences.

Reporting raw numbers is essential when comparing datasets – see 2.7

11. At 2.7, Table 11 "shows the jury conviction rates for [sex] offences against children and other vulnerable witnesses where s.28 evidence is used and when it is not used". However, it is difficult to appraise the reliability of data presented here because the raw number of verdicts contained in non-s. 28 datasets are not provided. Only percentages are given in the penultimate column ("Jury conviction rate for the same offence 2016-22 without s.28").

Conviction rates for rape in s. 28 cases may be inaccurate – see 2.7 and 2.8

12. At 2.7, Table 12 shows "conviction rates by offence with and without s.28 for intimidated witnesses". Again, it is difficult to appraise the reliability of datasets compared because raw numbers of charges and verdicts in non-s. 28 cases are not specified. Only percentages are given in the penultimate column ("Jury conviction rate 2016-2022 for this offence without s. 28").

13. Out of the 3213 charges attributed to intimidated complainants in Table 12, only 1554 of those relate to verdicts by jury deliberation, and only 677 jury verdicts in respect of *rape charges* (see second row). Furthermore, the actual number of verdicts relating to rape may be less still. This is because "Rape a woman 16 years of age or over (SOA 2003)" may include complainants who were *under* 18 years of age and so would not fall under the definition of intimidated complainants under the YJCEA 1999, s. 17(4).[12] Hence, Table 12 illustrates the "deficiencies in the data" (2.12) when relying on the offence as the only means of determining which category of complainant charges relate to – i.e., whether a charge concerns a child/vulnerable adult or an intimidated complainant.[13] See also the miscalculation in the percentage point difference in the last column of row two, Table 12.

[12] For the purposes of applying for special measures, the complainant would be defined as an intimidated complainant if they were 18 years or older *at the time of the hearing to determine the special measures application* – typically at the pre-trial preparation hearing for s. 28 (see YJCEA 1999, s. 16(3).

[13] "For most cases involving sexual offences charges… 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" (2.12).

14. At 2.8, the bar graph Figure 5 shows "conviction rates for adult rape with and without s. 28". The first pair of bars shows conviction rates as a percentage for "Rape of a woman 16 years of age or over – SOA 2003", which appears to correlate with figures and percentages presented in the second row of Table 12 (at 2.7). **However, there is no raw information about numbers of charges or verdicts, with or without s. 28, underpinning percentages in the second and third pairs of bars**, namely: "Rape of a male aged 16 years or over - SOA 2003" and "Rape of a female aged 16 or over - SOA 1956". It may be that these charges and verdicts do not feature in Table 12 because there were less than "100 jury verdicts by deliberation" (see 2.7).

15. Similarly, the same issues are apparent with the presentation of data at 2.8 Figure 6 - a bar graph with six pairs of bars showing "conviction rates for child rape with & without s. 28". Again, note that the offences listed in Figure 6 do not accord with those set out at Table 11. **Therefore, there is no raw information about the number of charges or verdicts, with or without s. 28, pertaining to any of the percentages for child rape presented in Figure 6.** It may be that the offences in Figure 6 do not feature in Table 11 because there were less than "100 jury verdicts by deliberation" and therefore too small for inclusion (see 2.7). For example, the researcher recognises that for "rape of a male under 16" in Figure 6, the "numbers of any charges/verdicts for this offence were extremely small and make the analysis less reliable" (2.8).

16. Moreover, while the percentage point difference in convictions for child rape in Table 11 is between 5.5%-14.4%,[14] this fluctuates between 1-21% once verdicts are broken down into smaller datasets in Figure 6, according to child age, sex and whether charges were brought under SOA 2003 or SOA 1956.

17. **Failing to provide raw numbers relating to both s. 28 and non-s. 28 verdicts in rape cases is a significant omission because there is a lack of transparency behind data represented in Figures 5 and 6, <u>yet these percentages are arguably the most controversial and are the basis for the submission's central claim that:</u>**

> "…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…."

Other issues with counting charges

18. Focusing on convictions per charge does not produce a "complete picture" of what is happening in the context of specific cases and masks the experiences of individual complainants and defendants. As pointed out in submission PRE0029, "most jury trials are not single charge/single defendant cases" (at 1.4). Given the complexity of sex offence cases, the reality of juror decision-making is actually lost when extracting

[14] Table 11 shows "conviction rates by offence with and without s. 28 for vulnerable witnesses". The second, sixth and 14th row are the only rows containing rape offences against children. They indicate that the difference between s. 28 and non-s. 28 conviction rates for "Rape a girl under 13" is -8.9%; "Rape a girl aged 13/15/15" is -14.4%; and "Rape a female under 16" is -5.5%.

individual charges and viewing them in isolation across multiple cases. When analysis is confined to cases rather than charges, the numbers are less inflated (see Table 1 at 2.1) and discrepancies in conviction rates are likely to be less pronounced.

Summary

19. In this part, I highlighted issues with the reliability of data presented thus far which purports to show that juror conviction rates are "substantially lower for all offences when s28 evidence is used" (2.9). I would urge the Committee to regard evidence presented in submission PRE0029 as *preliminary* rather than a "detailed analysis" (see 2.9), and would encourage greater transparency in the reporting of data in the preparation and publishing of future studies.

20. Some of the issues with data and its presentation in submission PRE0029 exemplifies why it is difficult to produce definitive research on conviction rates in sex offence cases involving different types of measures and categories of witness. As I have written elsewhere, it is important to adopt a cautious approach because:

> "…it is complex to disentangle the impact of s. 28 from other variables which may have a bearing on the verdict in intimidated cases. Even if these factors could be controlled for, it would be necessary to compare other modes of testimony…because the choice of live link, screens, or no special measures may also affect the findings. …Even if it were possible to clearly distinguish between intimidated and 'vulnerable' complainants for statistical purposes, it would require a large and detailed data set in this regard… However, since barristers report that outcomes in sex offence cases are unpredictable, …attempting to prove a relationship between s. 28 and conviction rates may be elusive."[15]

21. Complainants should be informed about the possible impact of s. 28 on conviction rates, but **it may be premature to rely on data collected thus far and it is certainly problematic to rely on the percentages contained in Figures 5 and 6 without more.**

II. Wider issues

Any impact of s. 28 on convictions must be appraised in conjunction with its effect on attrition and intimidated complainants' experience

22. A major aim of the roll-out to intimidated complainants was to reduce attrition at all stages of the process, by giving complainants the "*confidence to come forward*" and encouraging them, thereafter, to "*persevere with the process"*.[16] Therefore, any impact on convictions must be viewed and evaluated in respect of the correlation between s. 28 and the number of allegations recorded, charged and prosecuted, since securing a conviction is dependent on all three. Presently, there is a lack of data on whether s. 28 affects attrition in intimidated cases.

[15] Kyneswood, N. (2022) 'The application of Section 28 and related measures in sex offence cases: is pre-recorded cross-examination achieving best evidence for intimidated complainants?' PhD thesis, University of Warwick, pp. 269-272, available at https://wrap.warwick.ac.uk/176755/.
[16] See Pre-recorded evidence improves rape victims' experience of court - GOV.UK (www.gov.uk).

23. Another goal of s. 28 was to reduce "trauma" associated with live cross-examination in adversarial proceedings for complainants in sex offence cases.[17] However, a wide-scale qualitative study on intimidated complainants' experience of s. 28 is yet to be conducted.

24. While improving complainants' experience of testifying is imperative, and not just a means to the end of securing more convictions, there is a cyclical relationship between complainants' experience and attrition, prosecution and conviction rates. Adverse experiences of the prosecution process are linked to decisions to report, attrition and so on. Hence public statements about s. 28 and its impact on outcomes must be considered, carefully worded and evidenced.

***Preliminary* data on the impact of s. 28 on convictions should not be used as a reason to restrict or withhold access to s. 28 for intimidated complainants**

25. In my earlier submission to the Committee (see PRE0025),[18] I raised the prospect that the process of applying for s. 28 for intimidated complainants is more bureaucratic than other special measures and may be more difficult to access. My concern, therefore, is that judges, barristers, the CPS and police may be unduly influenced by preliminary data contained in submission PRE0029 and that this may adversely impact on applications for s. 28 in cases involving intimidated complainants.

26. This is particularly so given that my research suggests that pre-recorded cross-examination for intimidated complainants is already unpopular with some judges and barristers because: (i) s. 28 hearings may be more difficult to arrange and accommodate in court listings than s. 28 hearings for children; and (ii) some judges and barristers do not see the value of s. 28 for intimidated complainants in the same way they do for children.

The claim that juries experience pre-recorded cross examination differently than they do other forms of live cross-examination

27. Fears about the impact or persuasiveness of pre-recorded evidence has long been documented in the literature. However, jurors are now very familiar with seeing people online or watching them on video.

28. Technology has the potential to enhance the presentation and reception of evidence at trial, if used effectively. Presently, observation of s. 28 trials suggests that pre-recorded evidence is not easily integrated into the existing trial format and is often difficult to see and hear. In short, the quality and presentation of pre-recorded evidence may be a key factor affecting jurors' assessment of the evidence in s. 28 cases.

29. Issues with the recording and playback of pre-recorded evidence is a particular problem in cases involving intimidated complainants because their testimony tends to be longer and the issues are more finely balanced since they often revolve around consent.

[17] See https://www.gov.uk/government/news/greater-protection-for-rape-victims-and-children-at-risk-of-grooming.
[18] See committees.parliament.uk/writtenevidence/126921/pdf/.

30. While s. 28 videos are generally an improvement on ABE video interviews, jurors do not necessarily discern the difference between different forms of pre-recorded evidence and the ABE video interview comprises an integral part of the whole. As I have written previously: "**if jurors cannot clearly see or hear the finer points of complainants' testimony – and this applies to both ABE and s. 28 videos – they may be inclined to give defendants the benefit of a reasonable doubt**".[19]

31. In submission PRE0029, reference is made to the Scottish Government Evidence Review of *The Impact of the Use of Pre-recorded Evidence on Juror Decision-Making*.[20] It should be stressed that **standards of recording and playback have not been directly tested in research with mock jurors**. It may be that one reason why no consistent or substantial impact of pre-recorded evidence on juror decision-making has been found in studies *to date* is because some trial simulations sought to optimise the audio-visual quality of pre-recorded evidence.

Automatic eligibility for s. 28 does not mean all complainants will opt for s. 28

32. Law Commission proposals for reform in sex offence cases include plans to introduce automatic eligibility for "standard special measures", including s. 28, for all complainants in sex offence cases.[21] This proposal is designed to address disparities between intimidated and vulnerable complainants' eligibility under the YJCEA 1999 and alleviate the uncertainty intimidated complainants face when applying for special measures.

33. Submission PRE0029 suggests that if "automatic entitlement to s. 28 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… and …20 percentage points for rape…". This is unlikely, since automatic entitlement is not the same as a presumption. Although automatic entitlement would simplify the current application process, intimidated complainants could still opt for screens, live link, s. 28 or no special measures, depending on their individual circumstances.

Conclusion

34. Rather than pausing the roll-out, as the Lady Chief Justice has recommended, or pausing "further changes" to the roll-out – as submission PRE0029 concludes (see 2.13) – improving the quality, consistency and presentation of pre-recorded evidence at trial should be prioritised as a matter of urgency. I understand that "new video technology"[22] is being piloted at Leeds, Newcastle and Snaresbrook, but what is really needed is a re-design of how pre-recorded evidence is produced, presented and viewed rather than simply upgrading existing facilities.

February 2024

[19] Kyneswood, N. (2022) 'The application of Section 28 and related measures in sex offence cases: is pre-recorded cross-examination achieving best evidence for intimidated complainants?' PhD thesis, University of Warwick, p. 272, available at https://wrap.warwick.ac.uk/176755/.
[20] Munro, V. (2018) 'The Impact of the Use of Pre-Recorded Evidence on Juror Decision Making: An Evidence Review', Scottish Government (Crime and Justice): Edinburgh.
[21] See https://s3-eu-west-2.amazonaws.com/cloud-platform-e218f50a4812967ba1215eaecede923f/uploads/sites/30/2023/05/ESOS-CP-latest-version-1-1.pdf.
[22] See https://www.gov.uk/government/news/new-pilots-to-boost-support-for-rape-victims-in-court.