Ministry of Justice

Process evaluation of Section 28

Evaluating the use of pre-recorded cross-examination (Section 28) for intimidated witnesses

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Glossary

ABE – Achieving Best Evidence interview

CJS – Criminal Justice System

CPS – Crown Prosecution Service

GRH – Ground Rules Hearing

HMCTS – His Majesty's Courts and Tribunals Service

ISVA – Independent Sexual Violence Advisors

MoJ – Ministry of Justice

PCCs – Police and Crime Commissioners

RASSO – Rape and Serious Sexual Offences

RI – Registered Intermediaries

s.16 – Section 16 of the Youth Justice and Criminal Evidence Act, vulnerable witnesses 1999, Witnesses eligible for assistance on grounds of age or incapacity

s.17(4) – Section 17, clause 4 of the Youth Justice and Criminal Evidence Act, intimidated cohort 1999, Witnesses eligible for assistance on grounds of fear or distress about testifying

s.27 – Section 27 of the Youth Justice and Criminal Evidence Act,1999

s.28 – Section 28 of the Youth Justice and Criminal Evidence Act, 1999, pre-recorded cross examination

SARC – Sexual Assault Referral Centres

SoS – Secretary of State

WCUs – Witness Care Units

YJCEA – Youth Justice and Criminal Evidence Act, 1999

Executive Summary

Section 28 (s.28) of the Youth Justice and Criminal Evidence Act (YJCEA) 1999 provides the option for vulnerable and/or intimidated witnesses in criminal cases to pre-record their cross-examination before the trial, so that the s.28 recording can be presented during trial without the witness needing to attend. The intentions of the provision are to reduce the burden on the witness and enhance the quality of their evidence, without undermining defendants' access to justice.

This report provides findings from a process evaluation of the implementation of s.28 for a subset of intimidated witnesses – adult complainants of sexual violence and/or modern slavery offences – based on interviews with criminal justice practitioners and witnesses with experience of s.28.

The aim of the research was to explore witness and practitioner views and experiences of s.28 to help understand whether the s.28 provision for s.17(4) intimidated witnesses, eligible for assistance on grounds of fear or distress about testifying, worked as intended. It also aimed to identify which parts of the process were working well and any improvement that could be made.

Methods

The process evaluation comprised two strands:

- Interviews with a sample of practitioners (*N* = 29): 10 police officers, 6 court staff, 6 independent sexual violence advisors (ISVAs), 4 Crown Prosecution Service (CPS) reviewing lawyers and 3 at-trial advocates.
- Interviews with a sample of intimidated witnesses (*N* = 13): 11 had used s.28 and 2 were intimidated witnesses but did not give evidence using s.28.[1]

[1] For one of these witnesses s.28 was not available in their region and for the other they were offered s.28, but later changed their mind about using it.

The research summarised the views and experiences of a small cross-section of practitioners and witnesses in a select few pilot areas, working at different stages of rollout. Therefore, the findings are not generalisable to other court sites and the wider population of practitioners and witnesses. The generalisability of findings is impacted further by the small sample sizes, with limited numbers for most practitioner groups (court staff, ISVAs, CPS lawyers and at-trial advocates) and the overall witness sample.

Key findings

Witness experience:

- Both practitioner and witness groups noted an improved experience for witnesses giving evidence via s.28, compared to cross-examination live at trial. A key factor in this was the physical separation from the defendant(s), but also that they were able to seek support/therapy at an earlier point in time. However, there was still some confusion for witnesses over when full therapy could be accessed.

- The cross-examination experience could still be unpleasant and stressful for witnesses, mostly due to the style of questioning by defence advocates. The wait to know the outcome of the trial could also be difficult, made worse by minimal contact from police. Additionally, some witnesses reflected that s.28 did not improve their experience or evidence, with reasons including perceived loss of impact and presence of the defendant at the court building.

- Although some practitioners suggested that delays were less likely in s.28 cases, there were witnesses who reported delays to their cross-examination, which were found to be unsettling. This was particularly true if the delay was short-notice and of a sufficient length to necessitate re-watching their Achieving Best Evidence (ABE) interview again.

Communication and provision of information about Section 28 process

- Witnesses were not always provided with timely, clear, and consistent information about the s.28 process. Key concerns included whether the defendant(s) would be present for the s.28 hearing and whether the witness could attend the trial.

- Witnesses spoke positively about communication from police during the investigation and through to the cross-examination, finding it helpful to be kept fully informed even when there were no new updates. There was a distinct shift in contact following the cross-examination, particularly communication about the trial and verdict.

Importance of an informed choice

- Practitioners raised concerns about whether witnesses were able to make an informed choice, with some suggestions that police may be influencing their decisions on what special measures to use or providing incorrect information.

- Although witnesses believed that they had made the decision themselves, there appeared to be limited discussion of alternatives and a lack of complete information, which suggests that their decision may not be fully informed.

Perceived impact on court services and resources:

- At-trial advocates and court staff believed s.28 to have a negative impact on scheduling and court listings due to the additional hearing, replaying the cross-examination at trial and a requirement for the same judge and advocates to be available at all hearings.

Perceived impact across justice outcomes:

- Most practitioners thought s.28 would have a minimal impact on the number of guilty pleas, because defendants in sexual offences tend not to plead guilty due to the shame/stigma of these crimes.

- There were mixed views on the impact of s.28 on witness attrition and engagement. Some practitioners suggested that witnesses tend to stay engaged once the suspect has been charged, whereas other practitioners gave examples where they felt the witness would not have given evidence without a s.28. Some witnesses corroborated the latter suggestion, stating that they would have likely dropped out or could not have survived if they had to wait for the trial.

- Most practitioners believed s.28 would have minimal impact on convictions and acquittals. Although some suggested that witnesses' testimony would be more

impactful when delivered live in court, most acknowledged it would be impossible to know whether this impacted juror decision-making or outcomes. Some witnesses suggested that, in retrospect, they would have chosen not to give evidence via s.28 for this reason.

- Most practitioners believed s.28 had a minimal impact on the time it took for the case to be resolved. Other than bringing the cross-examination forward and shortening it slightly, the length of time for a case to be resolved was said to be roughly the same.

Practitioner views on wider rollout of Section 28:

- Most practitioners – excluding at-trial advocates – were either positive or neutral about the wider rollout of s.28 for intimidated witnesses, citing potential benefits to the witnesses, but raising concerns about technology, scheduling, and courtroom availability.

Introduction

Background

Special measures were introduced in the Youth Justice and Criminal Evidence Act 1999 (YJCEA) to help witnesses who may have difficulties in attending court and giving evidence due to their age, personal characteristics, or specific needs. Where the witnesses are considered vulnerable or intimidated, application of special measures may be granted to improve their experience and help them to give their "best evidence".[2]

The special measures available to vulnerable and intimidated witnesses, with the agreement of the court, include: screens (s.23); live-link (s.24); evidence given in private (s.25); removal of wigs and gowns by judges and barristers (s.26); ABE recorded (s.27); and pre-recorded cross examination (s.28). There are two other special measures available only to vulnerable witnesses: cross-examination with an intermediary (s.29) and aids to communication, such as a communicator or interpreter (s.30). Special measures can also be combined if appropriate, for example, during the s.28 the recording can be screened to stop the defendant from seeing the witness.

Section 28 (s.28) of the Act is one of several special measures available to vulnerable and intimidated witnesses during the investigation of a crime, and when attending court and giving evidence. It allows eligible witnesses[3] to pre-record their cross-examination or re-examination before the trial so that the s.28 recording can be presented during the trial without the witness needing to attend. S.28 aims to reduce the burden on the witness and enhance the quality of their evidence by improving their ability to recall/recount events.

[2] Special Measures | The Crown Prosecution Service (cps.gov.uk)

[3] In order for witnesses to be eligible to have a s.28, they must first have their evidence-in-chief pre-recorded, which is also known as a section 27 (s.27) Achieving Best Evidence (ABE) interview.

Piloting Section 28[4]

S.28 was first piloted in 2014 with vulnerable witnesses (under Section 16 (s.16) YJCEA) before being rolled out for that cohort across all Crown Courts in England and Wales. Vulnerable witnesses are defined as all witnesses under the age of 18, and those whose evidence is likely to be diminished by either a mental disorder, significant impairment of intelligence or social functioning, or a significant physical disability or disorder. A process evaluation of this pilot was published by MoJ in 2016, including findings from practitioners and vulnerable witnesses involved in the pilot (Baverstock, 2016).

In 2019, piloting of s.28 for the s.17(4) intimidated cohort began in three early adopter courts: Leeds, Liverpool and Kingston-upon-Thames. In September 2021, the pilot was extended to four additional courts: Wood Green, Harrow, Isleworth and Durham. This process evaluation relates specifically to the s.17(4) intimidated cohort, that is, those witnesses eligible for assistance on grounds of fear or distress about testifying. This covers adult complainants testifying in sexual offences or modern slavery (slavery, servitude, forced or compulsory labour, and human trafficking) cases.[5]

Evaluating Section 28 and wider rollout

In the 2021 Rape Review Action Plan,[6] the government made a commitment to evaluate the use of s.28 for the s.17(4) intimidated cohort; this commitment was renewed in the subsequent Rape Review Progress updates.[7] They also agreed to work with criminal justice system (CJS) partners to make the operational changes needed to increase s.28 availability to all Crown Courts as soon as possible, although MoJ noted that s.28 provision would remain subject to judicial discretion, as outlined under Right 4 (4.12) in the Code of Practice for Victims of Crime (MoJ, 2021).

4 For extra information on s.28, refer to Plotnikoff and Woolfson's (2016) article 'Worth waiting for: The benefits of section 28 pre-trial cross-examination'.

5 As part of the Domestic Abuse Act (2021), the intimidated witness cohort (s.17) now includes domestic abuse victims. However, s.28 has not yet been extended to these complainants due to the extension being under review. Domestic abuse victims are therefore not included in this evaluation.

6 The end-to-end Rape Review report on findings and actions (publishing.service.gov.uk).

7 Rape Review progress update June 2022 (publishing.service.gov.uk) and Rape Review progress update December 2022 (publishing.service.gov.uk)

In December 2021, the Secretary of State (SoS) announced his intention to rollout s.28 nationally for the s.17(4) intimidated cohort and soon after commenced a phased rollout. The seventh and final phase of the national rollout was completed in September 2022, with s.28 being made available across all Crown Courts in England and Wales for complainants in sexual offences or modern slavery cases.

Process evaluation

This process evaluation was conducted to help understand whether the s.28 provision for s.17(4) intimidated witnesses worked as intended and to highlight what parts of the process were working well and whether any improvements were required.

The process evaluation comprised two elements: interviews with criminal justice practitioners and interviews with intimidated witnesses. The practitioner interviews were conducted by Government Social Researchers in the MoJ Data and Analysis Directorate, while the witness interviews were commissioned to independent researchers, Ipsos UK, specialised in sensitive interviewing. This evaluation explored the process rather than the impact of the provision and issues of cost effectiveness were not addressed as part of this study.

Members of the judiciary were not interviewed for this research. The Judicial Office declined to participate in the interviews, referring to increased listing pressures due to Covid-19 pandemic related closures and research fatigue due to an excessive amount of judicial interview requests from several different initiatives. The Judicial Office provided a collated written summary of their views in April 2022 (Annex A).

The process evaluation research objectives were to:

- Explore practitioner views and experiences of s.28, including opinions on wider rollout.
- Explore practitioner perceptions of the impact of s.28 across justice outcomes on witness experience, and on court services and resources.
- Explore witnesses' views and experiences of s.28.
- Explore the potential for s.28 to improve the ability of witnesses to recall/recount events.

- Explore the potential for s.28 to make the overall trial process less traumatic for intimidated witnesses.

Methodology

Interviews

In-depth, semi-structured interviews were conducted with practitioners and witnesses, mainly carried out online using Microsoft Teams technology, however some witness interviews took place over telephone (*N=4*). See Annex B and C for an example of the practitioner and witness interview questions, respectively.

Interviews are methodologically strong because the researcher can interact with the interviewee and pose follow-up questions or ask probing questions. The findings can be easier to understand than statistical data and provide narrative around insights as to data trends. It is important to note, however, that the insights gathered are not statistically representative of the wider population of s.28 witnesses and practitioners. Rather, they represent the views of a small cross-section of practitioners and witnesses in a select few pilot areas, working at different stages of rollout. It is also important not to use comments or observations out of context as they may not be representative of the wider group, nor the population as a whole, and can be misconstrued.

The qualitative findings have been presented to avoid assigning specific proportions or prevalence to the findings. The terms ‘many’ and ‘most’ are used to mean that a view was widespread; ‘a few’ indicates that a finding applied to a small handful; and ‘some’ or ‘several’ are used to indicate a middle ground. This should, however, be considered indicative.

Analysis

All practitioner interviews were recorded, and most of the witness interviews were recorded, excluding a few witnesses (*N* = 2) who preferred not to be, where hand-written notes were taken instead.[8] The interview recordings were transcribed for the purposes of thematic analysis. Both the practitioner and witness transcripts/hand-written notes were

[8] Handwritten notes were made as accurately as possible during the interview and gaps in the concurrent writing were completed after interview.

then thematically coded and analysed. A combination of deductive and inductive coding was utilised; a thematic framework was developed before analysis based on the research questions, topic guide and existing knowledge, but codes were iterated or added as they emerged during analysis.

Practitioner interviews

Interviewee details

Twenty-nine interviews were conducted between January and February 2022. The breakdown across professions is presented in Table 1.

Table 1: Practitioner profession break down

Professional group	Number of interviews	Regional breakdown
At-trial advocates	3	London (3)
Court staff	6	Liverpool (2); London (4)
Crime Prosecution Service (CPS) reviewing lawyers	4	Leeds (2); Liverpool (2)
Independent Sexual Violence Advisers (ISVA)	6	Leeds (2); Liverpool (3); London (1)
Police officers	10	Leeds (1); Liverpool (3); London (6); Nottingham (1)
Total	**29**	

Sampling

A purposive sampling method was used, where participants were selected because they had the specific characteristics necessary for the research (i.e., experience of s.28). Practitioners were recruited with help from: MoJ and His Majesty's Courts and Tribunals Service (HMCTS) policy and operational leads; s.28 and Rape and Serious Sexual Offences (RASSO) leads across the relevant pilot regions; LimeCulture; CPS; police; Police and Crime Commissioners (PCCs); and barristers' chambers in the relevant pilot regions. Practitioners with relevant experience who were suggested were contacted by MoJ researchers to see if they would be willing to take part.

Participants reflected a range of experience in the use of s.28[9] for the s.17(4) intimidated cohort and were recruited from across regions involved in the pilot as far as possible, as outlined in Table 1. Interviewees were asked to have direct experience of s.28 process for witnesses in sexual offences and/or modern slavery cases, however, it was acknowledged that some witnesses may be 'double-flagged' as being both intimidated and vulnerable, and practitioners experience in these cases was also considered valuable.[10] The range of experience in using s.28, both regionally and within professional group, has implications for the generalisability of findings to other courts and should be kept in mind when interpreting the findings.

Witness interviews

Interviewee details

Thirteen interviews were conducted between September and October 2022: eleven witnesses had given their evidence using s.28 in the pilot, while two were intimidated witnesses who did not use s.28 (one who would have been eligible for s.28 but was not in a pilot area and one who was eligible but changed their mind about using s.28).

Sampling

A purposive sampling method was used for the witness interviews, with the target population being witnesses in sexual violence or modern slavery cases who had given evidence via s.28. MoJ liaised with HMCTS to arrange recruitment of eligible witnesses via Witness Care Units (WCUs) serving pilot courts,[11] specifically Metropolitan and Merseyside police WCUs.[12] Ipsos and MoJ also liaised with specialist modern slavery and sexual violence support organisations, who acted as gatekeepers to inform witnesses about the opportunity to take part in the evaluation.

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9 CPS reviewing lawyers, ISVAs and court staff generally had extensive experience of the use of s.28 for the specific cohort, while at-trial advocates and police officers typically had completed less than ten s.28 cases.

10 A small number of practitioners described witnesses with some vulnerabilities and did not know if the s.28 application in their cases was completed under s.16 or s.17(4) provision. These interviewees described the s.28 process as it applied to their cases and gave general observations of s.28 process when used in s.17(4) cases.

11 Data protection arrangements for sharing the sample of s.28 recipients were agreed between HMCTS and respective police forces, overseen by MoJ.

12 Only the Met and Merseyside WCUs were involved as other WCUs did not have resource available to support due to staff absences and involvement in other pilots/evaluations.

The achieved sample of interviews[13] included participants who had additional support needs (but who could give consent in their own right), those with support from an ISVA or RI (Registered Intermediary) and those who had English as an additional language. As above, this sample included some 'double-flagged' witnesses, but their involvement in the evaluation focused on the intimidation.

The input from the two witnesses who did not use s.28 was analysed alongside that from all s.28 witnesses but used to inform the report to different degrees. Input from the witness who would have been eligible but was outside the pilot area was drawn on less in the reporting, as their experience was ostensibly different at every stage. Their experiences provided an indication of what the baseline or comparator situation would be without s.28 and was used as occasional contrast (as this was not part of the study design). The witness who was 'on track' to have s.28 but effectively opted out at the later stage by not attending their pre-recorded cross-examination had their input used more in the reporting, as their input was more directly relevant, but direct quotes were not used as it was assumed few s.28 witnesses in the pilot withdrew from s.28.

Ethics

Informed consent was sought from all interviewees before the interview commenced. Both the practitioner and witness group received an information sheet and consent form, with the witness group also receiving a privacy notice outlining how their data would be stored. The information sheet provided background to the research and explained why and how it was being conducted. It also emphasised that participation was voluntary and could be withdrawn at any point (with details on how to do this) and that any information provided would be confidential and anonymised in the report.

Ethical approval was sought and approved for the witness interviews, undertaken by Ipsos internally. The project plan, recruitment strategy, approach materials and the topic guide were submitted to the Ipsos Public Affairs Ethics Group, with a completed form highlighting the ethical considerations inherent in the project and outlining the approaches taken to

[13] The composition of the witness sample is in Appendix D, broken down by participant characteristics (table D.1) and participant criminal justice journey characteristics (table D.2).

address them and mitigate any associated risk. The project passed the ethical review on its first submission.

Additional measures were put in place to ensure care for witnesses due to their vulnerability:

- Witnesses were reminded throughout the research process that participation was voluntary and that they could withdraw at any point without explanation. Ways to withdraw were reiterated at the conclusion of the interview.
- Witnesses received a screening call to check eligibility and to ensure that they fully understood the information provided about the study.
- The timing, pace and content of the interview were all in the witnesses' control, with the option to take a break, as well as to skip questions or end at any time. The interviewer would pause, break, or change focus where they felt it might be needed.
- Witnesses were given a list of support and advice services that they could contact if they wanted to discuss anything after the interview. Interviews were not booked on Fridays to ensure that participants would be able to access formal support if needed.

Limitations

- The process evaluation, by nature, did not provide evidence of impact, it aimed to aid policy by understanding how s.28 has been implemented. The qualitative findings presented were solely the perceptions of participants and may not reflect or be consistent with other evidence on s.28, particularly evidence on impact from a larger cohort of cases.
- Non-random sampling was used for both strands of the research, so the sample is not representative of the target population. Additionally, witnesses were recruited for the research via WCUs, so there is a risk of sample bias with those witnesses who have a better relationship with WCUs being more likely to agree to participate. However, this is not confirmed.

- The practitioner sample had a range of experience in using s.28, both regionally and within professional groups, which has implications for the generalisability of findings to other courts and practitioners and should be kept in mind when interpreting the findings.
- Some practitioner samples were smaller than others and for most practitioner groups the number of participants were limited, so the responses will not be representative of the wider population of s.28 practitioners. Extra caution should be taken with at-trial advocates (*N* = 3) and CPS reviewing lawyers (*N* = 4), as these groups had the smallest sample sizes.
- The witness sample is small and so was not representative of all witnesses who gave evidence using s.28 within the pilot. Because of the small sample size, the findings were not analysed to compare the experience of those who only received s.28 and those who had s.28 in combination with other support, such as ISVAs. Additionally, there was no comparison group, so the research focused only on understanding witnesses' experiences of s.28.
- The issue of witnesses being 'double-flagged' as intimidated and vulnerable meant the sample was not specifically intimidated witnesses, although both strands of the research focused on the intimidation side and the inclusion of double-flagged reflects the reality of s.28 intimidated witnesses in the wider population.
- Covid-19 may have had an impact on the s.28 pilot and the experiences of the witnesses and practitioners, meaning the findings may not be representative of the experiences post-Covid-19.

Practitioner interview findings

Perceived witness experience – benefits of Section 28

Most practitioners interviewed believed that s.28 improved the witness experience, and several benefits of s.28 were identified, including bringing the cross-examination forward, an improved cross-examination experience, less waiting around at court to give evidence and improved memory recall.

Earlier cross-examination

Many practitioner groups believed that bringing the cross-examination forward via s.28 improved the witness experience by allowing them to "get their bit out of the way". Court staff also noted that, unless the witness is recalled to give their evidence again, the witness only needs to give their evidence once, even if there is a re-trial. Several ISVAs made the point that witnesses can access full therapy (as opposed to just pre-trial therapy) at an earlier point in s.28 cases.

> It doesn't take everything away because obviously they've still got to wait for an outcome, but they can't commence any kind of proper counselling and things like that until after they've given their evidence. So, if you've done your Section 28 and that's been recorded and saved, then you can get on with getting better and getting everything in place to proceed, whereas if you've to wait until the trial, you can't really start any proper counselling and things, because all that could be then requested by the defence to any counselling notes and things to be used against you. – (ISVA)

Improved cross-examination experience

Many practitioners described a calmer, less intimidating cross-examination experience for witnesses in s.28 cases, compared to traditional cross-examination in a trial. A key factor to this was that topics in a s.28 cross-examination are approved by the judge at the Ground Rules Hearing (GRH), so any "improper" or "vague" questions are removed. Several practitioners believed this made the cross-examination less confrontational. Some practitioners noted that the cross-examination was still unpleasant for witnesses; as one

ISVA pointed out, “if you’re getting cross-examined, you’re getting cross-examined” – but s.28 was thought to be a better experience than a regular cross-examination. One police officer described cross-examination at trial in a non-s.28 case:

> I’ve sat and watched the complainant giving evidence and I really felt for that person because they’ve just been pulled apart and in that horrible, hostile courtroom environment which I wouldn’t wish on anyone. – (Police officer)

Less waiting at court

Several practitioners interviewed, including ISVAs, at-trial advocates and police, highlighted the benefit of the witness knowing the exact date and time that they will give evidence in a s.28 case, compared to traditional cross-examination where the witness often has to “sit in a court building for days on end waiting to give their evidence”. One ISVA gave an example in a non-s.28 case where the witness attended court for three days before finally giving their evidence on the fourth day. Some practitioners suggested this made it easier for the witness to plan around other commitments, such as work and childcare, and also reduced stress and upset for the witness.

Improved recall

Several practitioners reasoned that shortening the length of time between the alleged offence and the cross-examination would improve witnesses’ memory recall, and one court staff pointed out the importance of this due to court backlogs:

> Particularly during the pandemic it’s been very important I think because cases are going off to a much greater distance in the future, and I think to capture those witnesses much earlier on to give their evidence when it’s still fresh in their mind I think is absolutely crucial. – (Court staff)

This was suggested to be more acute for vulnerable witnesses, particularly children, whose recollection was thought to be more at risk of impairment while waiting for trial. Some advocates questioned whether this was as important for intimidated witnesses, particularly as they have to re-watch their Achieving Best Evidence (ABE) interview before the cross-examination. One advocate also pointed out that in historical sexual abuse cases, a significant amount of time has already passed between the offence and

cross-examination – as such, they saw "absolutely no advantage" of having the cross-examination earlier.

Perceived witness experience – disadvantages of Section 28

The practitioners interviewed identified parts of the process that they thought may have a negative impact on the witnesses' experience, including not having an informed choice about giving evidence, having to attend court for the s.28 cross-examination and the delay between the cross-examination and trial. They also identified elements that may affect the quality of the evidence in a s.28 case, including the quality of the recording and potential impact on disclosure.[14]

Importance of an informed choice

Several practitioners, including ISVAs and CPS lawyers, emphasised the importance of enabling witnesses to make an informed choice about how they give their evidence. However, some practitioners described situations where the police had either made the decision on behalf of the witness, influenced their decision based on their own opinion, or gave incorrect information. One ISVA gave an example where the police officer assured the witness that the defendant would not be at the court for the s.28 cross-examination, but later found out that they had been watching the recording the whole time from a different room in the court building. This was corroborated by one police officer who explained that they were also unclear that the defendant would be present:

> We're not told, and I think this is something the victim should be aware of, that the suspect has the right to be at the Section 28 hearing… You're not told stuff like that and I don't think a lot of people like myself would automatically think that he's going to be there. – (Police officer)

Attending court for cross-examination

Several practitioners, including ISVAs and at-trial advocates, said that having to attend the court building for the s.28 cross-examination was intimidating for witnesses, particularly because of the risk of running into the defendant at court. However, ISVAs also praised

[14] Further detail on potential impact on disclosure is located in a later section, under the heading 'Impact on disclosure'

court staff for doing everything they could to prevent this from happening, such as taking witnesses through separate entrances.

Delay between cross-examination and trial

Some practitioners thought that the length of time between the s.28 cross-examination and later trial minimised the benefits of having a s.28, because the witness still has to wait for the outcome. In fact, a few practitioners were concerned that it could legitimise the long wait for a trial or mean that listing officers give s.28 trials less of a priority because the evidence has already been secured.

> …although you have dealt with a victim earlier in the process than you otherwise would've done, the victim doesn't know the outcome of the trial any earlier because the trial is always afterwards so … In a sense, it's pointless because the victim doesn't know whether they've been believed or not by a jury until a year later, and it must be hanging over their head on some level. – (CPS reviewing lawyer)

Achieving Best Evidence interview and Section 28 cross-examination[15]

One advocate raised concerns that the pre-requisite s.27 ABE interview does not present as the best evidence for the witness and therefore places them at a disadvantage. They said that in ABE interviews the police ask too many questions in a non-chronological order and focus on irrelevant details. In addition, poor quality recordings and bad camera angles in ABEs and s.28 cross-examinations prevent jurors from being able to read witnesses' facial expressions, which was a problem because:

> …sometimes it's not so much the answer to a question, but the shock and surprise at the question which tells you as much of the story as the answer itself. – (At-trial advocate)

Impact on disclosure

Another concern cited by several practitioners, including police, CPS and at-trial advocates, was that the expedited disclosure timeframes in a s.28 case could result in

[15] The police receive special training on how to conduct ABE interviews with vulnerable and intimated witnesses.

critical evidence being missed or arriving late, which may then lead to the witness being recalled to give their evidence again. Some ISVAs mentioned that the risk of being recalled was worrying for witnesses.

> I don't know that sufficient account is always taken of, for example, a really complex case because … often it's precisely the sort of witnesses who will qualify under section 28 for whom there is an awful lot of disclosure… if something crops up too late then the whole purpose of it is defeated if you have to apply to have the witness recalled. – (At-trial advocate)

Reasons for and against take-up

The practitioners interviewed identified several reasons for and against take-up of s.28, although some noted that it was a very individual choice:

> You've got people who will either go in the box and they'll be fantastic and you've got people who… wouldn't be in court unless they could do the Section 28. I think it just depends on the type of person it is. – (Police officer)

Reasons for take-up

All practitioner groups reported that most witnesses do tend to take-up the offer of having a s.28. The reasons for take-up included witnesses wanting to get their evidence out of the way and not wanting to attend the trial. Some police officers said the definite time and date of cross-examination was appealing to witnesses, and one gave an example of a witness flying in from Sweden who would have issues being on stand-by for a trial.

Another reason cited by several practitioners was that s.28 felt like a safer and less stressful option for the witness, because they would not be watched by the jury or be in the same room as the defendant when giving their evidence. One ISVA also suggested that younger witnesses are more likely to take-up the offer of a s.28 than older witnesses because they are more familiar with the technology.[16]

[16] Witnesses did not highlight this issue in their interviews.

Reasons against take-up

Most practitioners were aware of witnesses' refusing the offer of a s.28 and reasons included witnesses wanting to "have their day in court", to face the defendant, and to not appear as if they are hiding away or scared. One ISVA said witnesses also feel disadvantaged by the fact that the defendant hears their evidence months in advance of the trial and therefore has time to come up with a rebuttal.[17] Several practitioners also said that the wait to know the outcome of the case was too anxiety-inducing, so witnesses prefer to find out the result shortly after giving their evidence.

Some witnesses were said to opt for different special measures, such as screens, instead of s.28 because they did not want the defendant or anyone sitting in the public gallery to see them. This was thought to be particularly important for witnesses testifying in historical sexual abuse cases, where their appearance had changed since the offence.

Some practitioners, including ISVAs and court staff, believed that the police were influencing witnesses' decisions about special measures based on their own opinion of the best way to give evidence or secure a conviction.[18]

> …there are also some old school police officer views about giving evidence via a link and that going into a court room is much more powerful … we have had incidents where officers have influenced a witness' decision on the special measures. – (Court staff)

Perceived impact on criminal justice system practitioner workloads

There were mixed views amongst the practitioners interviewed over the impact of s.28 on their workload. ISVAs observed a positive impact, CPS lawyers and police noted an increase in workload at the earlier stages of the case, while court staff and at-trial advocates described an overall negative impact on their workload.

Most ISVAs perceived there to be a positive impact because there was less waiting around at court for the witness to give their evidence and they did not have to attend the trial. This

[17] At-trial advocates and CPS reviewing lawyers did not highlight this issue in their interviews.
[18] Witnesses did not highlight this issue in their interviews

meant that they did not have to block out as much time in their diaries for s.28 cases compared to non-s.28 cases.

Police officers had mixed feelings over whether their workload had increased due to s.28, with some describing an increase and others believing it had stayed the same. Some police officers said that, although the amount of work they did was the same, it had to be completed at an earlier point than in non-s.28 cases because of the earlier cross-examination:

> It's the same work, it's exactly the same work that needs to be done for the trial, it's just that instead of being trial-ready the day before trial, you've got to be trial-ready, in theory, months before trial, and our workload at the moment is very high … things can get missed and things do get missed, and the issues then can arise. – (Police officer)

The CPS lawyers also cited an increase in their workload, but this was again primarily at the start of the process when preparing the case for the earlier cross-examination, particularly ensuring that disclosure is completed in time. There was a sense that this was more intensive but manageable with current case levels, although there were concerns that an expansion of s.28 could cause greater difficulties in getting the case preparation completed in time.

Most court staff described an increase in their workload with s.28 cases, although some thought this was manageable with careful prioritisation. They reported an increase in administrative tasks such as scheduling hearings, booking court rooms and recording slots and editing the s.28 recording for trial.[19] The system and process to do these tasks was described as labour intensive and at times problematic. They also pointed out that the playback of the s.28 recording at trial was a duplication of time for judges and counsel.

Most at-trial advocates were concerned about the impact of s.28 on their workload. A key difficulty cited was the requirement to attend all the hearings in a s.28 case, including the GRH, the s.28 cross-examination and the later trial. They also said there was additional

[19] The s.28 recording can be edited before playback at trial, with approval from the judge. At-trial advocates review the recording and will flag where it should be edited and the editing itself is performed by court staff.

work editing the s.28 cross-examination for playback at trial, which was exacerbated by the fact that they had to chase up the recordings and the system for editing often crashed. They described a growing reluctance amongst advocates to take on s.28 cases for these reasons.

Perceived impact on court resources

Several practitioners, but particularly at-trial advocates and court staff, were concerned about the impact of s.28 on court resources and non-s.28 cases.

At-trial advocates and court staff highlighted problems scheduling the hearings in a s.28 case, particularly given the requirement for the same judge and counsel to attend all the hearings. In addition, advocates were told to prioritise the s.28 cross-examination over their non-s.28 cases, which meant that they could be released in the middle of a trial to conduct a s.28 cross-examination; if the s.28 cross-examination was being held in at a different court, this caused greater problems.

> I think it's going to be really, really difficult. So it's all very well saying you get released but that just ignores what the practical effect is on whatever you're being released from and how many people that might involve. So you're inconveniencing other jurors, clients, other counsel. – (At-trial advocate.)

> It's kind of manageable with a small number of cases, but if you're doing that with lots of cases, you're going to have barristers running around all over the place… Having cross-examinations here, there and everywhere and being released, that's going to have an impact on list officers and planning. It's also going to have an impact on trials because you're losing half a day. – (Court staff)

Other practitioner groups, including ISVAs and CPS lawyers, also acknowledged the potential difficulties in scheduling the additional hearings in s.28 cases and noted that finding a date and time for the same counsel to attend all of the hearings would be a "logistical nightmare" for the courts. One CPS lawyer described how the current availability of counsel was contributing to this:

> …the availability of counsel is a huge problem at the moment and I know that's nationwide, but we have to have the same advocate for the section 28 and the trial, if one of those goes off it then affects who we have, it affects who's available, it then affects the rest of the timetabling, I think that's a real headache for everybody. – (CPS reviewing lawyer)

Court staff interviewed explained that, when listing cases, priority is given first to cases where the defendant is in custody, followed by s.28 cases. However, one practitioner pointed out that these types of cases (child sexual offences, rape) would be prioritised regardless of whether there was a s.28. Most court staff felt s.28 made listing cases and maximising the usage of courtrooms more difficult to manage.

Perceived impact across justice outcomes

Generally, s.28 was thought to have minimal impact across justice outcomes, including guilty pleas, overall case timeliness, juror decision-making, and witness attrition and engagement.

Guilty pleas

Most practitioners either believed s.28 cases did not increase guilty pleas or said they did not know enough to comment. However, one police officer gave an example where they felt that s.28 had influenced the defendant(s) to plead guilty after they saw the witnesses' cross-examination:

> I think the final nail in the coffin was that this lad had actually given evidence in court, came across really well, obviously the defendants were in court to hear his cross-examination and if that had been played in front of a jury… It had been quite impactful and I think it did push them into guilty pleas in the end. – (Police officer)

CPS lawyers and at-trial advocates pointed out that it is rare for a defendant accused of a sexual offence to plead guilty due to the shame and stigma of these offences, preferring to take their chances at trial.

> Again, we deal with a very specific sort of case and the offences I deal with are not cases where people are anxious to plead guilty … A defendant in our sorts of

> cases would sometimes regardless of the evidence rather be found guilty by a jury … because they can then say to their family, well I'm not guilty I was just stitched up by the system. – (CPS reviewing lawyer)

Timeliness and delays

Some practitioners suggested that s.28 cross-examination was slightly shorter than cross-examination live at trial. This was thought to be because the general topics for intimidated witnesses had already been agreed at the GRH, which made the cross-examination "more compact". However, several practitioners noted that the cross-examination was still longer for intimidated witnesses compared to vulnerable witnesses, where the exact questions, rather than just topics, are agreed beforehand.

Some practitioners did suggest that time was saved at trial in a s.28 case because it avoid small practicalities, such as swearing in the witness. Court staff also suggested that s.28 trials can be more effective because any issues can be resolved in the earlier hearings.

Most practitioners, including at-trial advocates and CPS lawyers, did not think s.28 had an impact on overall case timeliness because they are only conducting a small part of the trial earlier and, unless the defendant pleads guilty, the subsequent trial still follows.

> All you're doing is doing part of the case early but the rest of the case you're doing at the same time, as it would have been done anyway… if you want to achieve speed of resolution then the 28 process is pointless, subject to bringing the trial dates forward. – (CPS reviewing lawyer)

Some practitioners also suggested that there could be additional delays in s.28 cases because of the requirement to have the same counsel at each s.28 hearing. One advocate gave an example of a case where this happened:

> When they were ready to relist it, it had to be counsel who had already done the section 28… so of course she was overrunning in another case and she was able to say to the court, "I'm very sorry. I know you wanted this trial to be in July of 2021 but I'm overrunning. Can you please, please move it?" … Once you've locked in your barristers, that can then create delays. – (At-trial advocate)

Juror decision-making

Most practitioners interviewed were aware of the belief that video-recorded evidence may be less impactful than 'live' evidence because it appears "more clinical" and "less emotive" to the jury. Some practitioners interviewed held this belief themselves, with one defence advocate stating that they were "more than happy" for all prosecution witnesses to have a s.28 for this reason.

> There's nothing more impactive, as crazy as it might sound or as horrible as it might sound, as a victim standing in front of you – (Police officer)

> My only worry is whether all of our victims end up being a face on a screen rather than a real person – (CPS reviewing lawyer)

Despite this, most practitioners also recognised that this was just their perception and stated that they did not have the data or evidence to say whether this was actually the case, or indeed, whether it impacted on the jury's decision. As one ISVA pointed out, "unless you tried the same case in front of the same jurors but did it with the different types of special measures, how can you determine how that's affecting the jury's perception?".

One advocate thought that juries were able to receive and respond to video-recorded evidence, particularly following Covid-19, but believed that the problem was with poor quality recordings that "disengage" the jury:

> I think the correct position is that juries can receive evidence from all sorts of sources, but it needs to be jury friendly and that means the quality needs to be good, and if it's not good then it's not fair. – (At-trial advocate)

Other practitioners believed that, although video-recorded evidence may be less impactful, this must be balanced with the need to improve the witnesses' experience and secure their evidence; in some cases, a s.28 is the only way that the witness will testify. As one ISVA said, "you have to work with what you have to work with and it's getting the witness into the court, achieving the best evidence that they can in the best way they can".

Witness attrition and engagement

There were mixed views amongst the practitioners interviewed over whether s.28 would have an impact on witness attrition and engagement. Most ISVAs said that once a witness has decided to report the crime and the case has been charged, they tend to see it through to completion. Some CPS lawyers agreed that witness attrition post-charge tends to be lower in sexual crimes and so doubted whether there would be a significant improvement, but they could see how s.28 would improve witness attrition in other offences, particularly domestic abuse.

Some practitioners theorised that it would be easier to keep witnesses engaged in the process by shortening the length of time between the offence and cross-examination. This was thought to be particularly important for witnesses with a chaotic lifestyle or addiction problems. Some police officers gave examples where they believed that, without the s.28, the witness would not have attended the trial and their evidence would have been lost.

Practitioner views on wider rollout

Most practitioner groups were generally positive about the wider rollout of s.28 for intimidated witnesses (excluding at-trial advocates) but did have some caution over the practical implications.

All of the ISVAs interviewed were enthusiastic about the rollout, with one stating that “it can’t come soon enough”. They also thought that it was important that s.28 was available for all intimidated witnesses to prevent introducing a “postcode lottery” as to how the justice system treats witnesses.

> I think what is really difficult is when you’ve got someone… who says, “Well, I’ve got a friend that did this and she was allowed to do that,” and then you sort of have to go, “Well, actually that’s not an option for you,” so it’s that consistency of being able to say everyone has got the same opportunities. – (ISVA)

While most CPS lawyers were also positive about s.28 for intimidated witnesses, there was some concern around the practical impact on court resources and workload, particularly on the expedited timeframes for disclosure.

> I think it will be generally helpful … my main concern with that idea is the number of hearings that will be adjourned, collapse because we're not ready. If one of the aims of Section 28 is to ensure that complainants give evidence as early as possible and don't withdraw their support, having several adjourned Section 28 hearings where they've got to come back and come back again, that's going to exacerbate the problem not make it any better. – (CPS reviewing lawyer)

At-trial advocates did not support a wider rollout because, although they believed that s.28 was a good idea for children and a "tiny minority of cases", they were concerned about the practical implications. One advocate also thought that s.28 had not yet been sufficiently tested to know whether it was working as intended for witnesses.

Court staff interviewed were broadly positive about the benefits of s.28 for witnesses and thought it should be made available, but they cautioned that awareness of s.28 needed to improve. They also raised concerns about the capacity of existing technology in courtrooms and the cloud-based recording systems, as well as the availability of courtrooms and technical support in a wider rollout.

Most police officers were supportive of the wider rollout, although some raised potential issues around awareness and application of s.28 and the impact of a wider rollout on availability of courtrooms. The potential impact of wider rollout on ABE recording suites was also raised, with one police officer asking, "have we got the ABE facilities in the police estate to cope with that?".

Improvements suggested by practitioners

The practitioners interviewed made a number of suggestions that they thought would improve the s.28 process, including allowing witnesses to give evidence at remote sites, combining special measures, improved communication between agencies, further research on effectiveness of s.28, and better resources and training.

Remote sites for Section 28 cross-examination[20]

Several practitioners suggested that the witness should be able to do their s.28 cross-examination from specialist victim suites away from the court, such as Sexual Assault Referral Centres (SARC), which are designed to support the witness, have better accessibility, and prevent the risk of running into the defendant at the court site.

> if you are serious…about improving the rape conviction rate and looking after victims, then you have to demonstrate that by providing facilities and support networks which put them front and centre of the process, and that means thinking about from start to finish what it must be like to be intimidated and/or vulnerable and going through the court system. That will require money to be spent on specific training, specific buildings… and the camera facilities and everything else are state of the art, the best that we can provide, so that victims can be heard. – (At-trial advocate)

Increasing availability of special measures

Some court staff suggested that being able to screen witnesses during a s.28 and ensuring that the screens are re-applied in the trial may encourage more witnesses to use s.28. One ISVA thought that s.28 should also be available to family members of the witness if they are testifying in the same case, giving an example where a witness was cross-examined via s.28 but had to wait for her mother to give evidence at the trial; this meant they could not talk about their evidence or cross-examination experience for six months.

Improved communication

A few ISVAs suggested that a single point of contact or liaison person at the court to provide information, answer questions and confirm that s.28 requests had been authorised would improve transparency and prevent breakdowns in communication, which one ISVA said left them feeling “completely out of the loop”. The police also cited a need to improve the communication between all parties – police, CPS and the courts – involved in s.28 cases.

[20] Currently, remote s.28 is only available at 3 pilot sites operating under draft protocols, two are SARCs and one is NHS funded.

Peer-reviewed research

One advocate thought that there was a need for contemporary peer-reviewed scientific research exploring the effectiveness and impact of s.28, particularly on juror perceptions and outcomes. They believed that this was needed to ensure that the government are informed as to whether s.28 is making things better or worse for witnesses.

Improved resources and training

Several practitioners, including ISVA's, court staff and CPS lawyers, suggested that further training for the police would be beneficial and raised concerns about the level of knowledge or understanding of s.28 and its application. This was also reported by some police officers:

> There's no guidance with how it works at the court in relation to me or the police in general, or at least I've not had any guidance, so I've had to sort of stumble along in the dark to a certain degree, finding my way. – (Police officer)

Several CPS lawyers said that it was important that the police had the resources and training to obtain all the relevant disclosure materials in advance of the s.28 cross-examination. One CPS lawyer also suggested that police officers conducting the ABEs should receive additional training to improve their advocacy skills:

> The police should actually, I think, have to have mandatory training... if they don't already, they may well do, on conducting Section 27 [ABE] interviews. Because some officers are obviously very, very good, some... there is room for improvement with how they question witnesses. – (CPS reviewing lawyer)

Other practitioners discussed a more general need for training and guidance on s.28, with several reporting that they had not received formal training, although some acknowledged that they preferred to learn by doing instead. Suggestions on how this could be delivered included the use of detailed pamphlets, videos, court visits to observe s.28 in action and role-play exercises. Some court staff requested additional training on how to use the system for booking s.28 recording slots.

Witness interviews

Information and decision-making

Route to Section 28

Participants were involved in a cross-section of case types and had differing experiences of the CJS prior to s.28. For some, the offences were historical and typically prolonged, while for others they were recent, either a cluster of related offences or a single incident.

The length of time between reporting to the police and the date of s.28 cross-examination also varied between witnesses. For some, it was completed within months but for others it was conducted over a year after first report. Reasons for the delay included evidential issues[21] or involvement in ongoing court cases (including the family court). Thus, although the provision brings cross-examination forward, it may not make it 'early' in a general sense.

Information about giving evidence

Witnesses recalled only limited information from police or support organisations about the prospect of going to court and giving evidence. Where any information was provided by police, it was generic written information about being a witness, given after the charging decision was made. This was considered better than nothing – "nice to have the bare bones of what I could expect" – but may be viewed as inadequate given the availability of specialist information for witnesses in sexual offence or modern slavery cases, and the obligations under the Victims' Code.[22]

Having clear information about cross-examination was important to all participants, but having a careful explanation was crucial for those who had additional needs, such as mental health or learning disorders. One witness's experience provides an insight into

[21] Covid-19 could be a factor in these delays, but indications were that they related to underlying processes or issues concerning the defendant, defendant's team or the defendant's evidence or case

[22] Right 8 of The Victims' Code (Ministry of Justice, 2021) states that: All victims are to be given information about the trial, trial process and your role as a witness Code of Practice for Victims of Crime in England and Wales (Victim's Code) - GOV.UK (www.gov.uk)

challenges experienced by witnesses trying to understand what is involved – and the importance of clear information:

> I didn't have any victim support at all … there wasn't any support or information or anything like that provided. … I wanted to know what the process was start to finish. So it started with me just Googling quite simply, 'What's the process of a criminal trial?' And that led me to obviously just the government website which was incredibly helpful. – (s.28 witness)

Information about Section 28

Witnesses were told at different stages about the option of s.28, always by police and verbally in the first instance. Some witnesses were informed after reporting or during the police investigation, for others it was not until the case had been passed to the CPS or when informed it would be going to court. Witnesses valued being told about s.28 in the context of all other special measures and having the chance to talk through all the options in turn, but this was not routine.

What and how much witnesses were told about s.28 varied, but all were told that s.28 would involve being cross-examined by video-link[23] so they would not be in the court room. It was not clear if witnesses were routinely told whether the defendant(s) could see them during cross-examination or during the video replay in the trial. Some participants remained unsure whether or not the defendant had been present at all, whereas others had been highly distressed to find out only at the pre-recording that the defendant was observing the cross-examination.

Witnesses were also given different information about the conditions under which s.28 would operate. None recalled being told that they could combine s.28 with other special measures, such as removal of wigs and gowns or use of a screen. Some were told they could not attend the trial itself – one recalled being told they would be arrested if they did –

[23] 'Video link' refers to the approved use of any secure audio-visual technology link for live communication between the courtroom and another site. In s.28 the other site is a room elsewhere in the court set aside for the defendant to view during the cross examination. The video link is also recorded to be played back at the future trial. For clarity, it will be referred to as 'Pre-recorded' hereafter.

whereas others were clear that they could have attended, although none had opted to do so.[24]

Deciding to give evidence using Section 28

The physical separation of the witness from the courtroom and the defendant(s) during cross-examination was paramount for witnesses deciding to give evidence specifically using s.28, being described as the "deciding factor". Witnesses were reassured that they would not have to see or be in the same room as the defendant(s).

> I think if I'd have known I was in a room with them and having to answer the questions … and things you're talking about, I think I would have struggled to answer those and talk about those a lot more had I known they were in the room or I felt as though they were in the room staring at me or listening to me talk – (s.28 witness)

The fact that the cross-examination would be held in advance of the trial was not always understood by witnesses and, where it was known, it was a secondary consideration to the physical separation offered by s.28. Witnesses could see advantages to completing their evidence in advance, but there were questions as to whether or not they might be called back to give evidence in the trial or any appeal. One advantage of having the cross-examination as early as possible was that it meant full counselling could be started sooner, as witnesses said they could not access counselling fully or at all until their evidence was given.[25]

Witnesses' role in decision-making

Most witnesses described the decision to give evidence using s.28 as their own choice and explained clearly their specific reasons for choosing it. However, there appeared to be limited discussion of alternatives and a strong emphasis from professionals on s.28 being the best option or in the witness' best interests. Participants recounted conversations with police, specialist support workers and other professionals, each of which involved assurance that using s.28 would reduce the witness' stress.

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[24] There are no rules in place to prevent the witness from attending the trial.

[25] It was not clear that early access to counselling was part of decision-making on s.28; rather it was mentioned as a reflection on what s.28 had offered after it had been used

Although witnesses described these types of discussions as enabling them to prioritise their own interests and to stay the course despite their anxieties and doubts, they also highlighted a number of things they would have liked to know about s.28 that they didn't, including: timing of cross-examination in relation to the trial; who would attend the cross-examination; how pre-recorded evidence might be used in subsequent trials of the offences, or any appeal; how jurors might respond differently to pre-recorded evidence; and whether they could attend the trial and/or sentencing.

Most witnesses remained satisfied with their decision by the time of the interview, but some considered that they would have made a different decision – typically opting for live-link during the trial but also for 'facing [the defendant] in court' – if they had understood how s.28 operated. These reflections reiterate the importance of clear, comprehensive information on which witnesses can make their own decision and be fully prepared for what will be involved in giving evidence.

Preparing to give evidence

Support

Despite clear obligations under the Victims' Code[26] for police to tell victims about and refer them for support, participants reported low levels of involvement with support organisations and were frustrated by this. Some witnesses had support from specialist modern slavery or sexual violence organisations, including ISVAs, but others had requested this without response.[27] Where witnesses did have the support of specialist organisations, their role in relation to s.28 was mixed, and did not ensure that witnesses had all the information or guidance that would be expected.

> "I didn't have any victim support at all, so that only came into play following the trial. … I was going through quite a bad time mentally, struggling to cope with it, and we had requested a number of times. However, we were just told [by the

[26] Right 4 of The Victims' Code (Ministry of Justice, 2021) states that: All victims have the right to be referred to services that support victims and have services and support tailored to your needs. Code of Practice for Victims of Crime in England and Wales (Victim's Code) - GOV.UK (www.gov.uk)

[27] Covid-19 may have contributed to the delays in provision, but this was not communicated to those witnesses who had requested support.

> police] it wasn't available either at the time or it wasn't available for this particular case." – (s.28 witness)

Communication

A number of different agencies and staff can be involved in communication with witnesses, including the police, WCUs, Witness Service, CPS, court staff, RIs and specialist support organisations and advisors, such as ISVAs.

Police

Witnesses had been allocated at least one named detective and often a family liaison officer or police officer with whom they could communicate about the investigation. Witnesses shared a broad satisfaction at how police communicated and kept them updated from report to cross-examination, and particularly valued contact even if there was no new information.

> So with the no updates [from CPS] there wasn't anything for [the detective] to be in contact about but every so often he would try maybe and give me a call to say 'look I'm just letting you know you haven't been forgotten about, it's just with CPS and it's taking its time'… there could have been a few months but I knew at least. – (s.28 witness)

Participants also expressed high praise for police officers who went "above and beyond" to provide clarity and reassurance, recognising the particularly high anxiety levels for witnesses identified as intimidated:

> The investigating DC [Detective Constable] was brilliant. Every time I had a meltdown or a panic he was very calm, he explained everything to me, he was so patient... – (s.28 witness)

> They were amazing. They were in touch most days, to be honest, to check how I am and stuff. They did a really good job. – (s.28 witness with additional support needs)

Some witnesses recounted notable difficulties communicating with police before, during and after the trial.[28] Where communication was problematic, it undermined the witnesses' sense of significance. Thus, there appeared to be some inconsistency in individual police officers' communication with witnesses involved in s.28 – while some witnesses reported positive experiences, others encountered difficulties. There was also a notable difference in communication after the s.28 cross-examination had been completed, compared to before and during the s.28.

Witness Care Units / Witness Support

Participants made little reference to WCUs/Officers; either these roles were not known (or explained) or they were seen as interchangeable with police or court staff.[29] However, as witnesses came closer to cross-examination, 'Witness Support'[30] was referenced as having facilitated court visits or updated on court arrangements, and their role received more attention post-s.28.

CPS

Witnesses did not mention having had any direct engagement with or communication from the CPS over the lead-up to the cross-examination and there was a shared view that the CPS was disengaged from the witnesses.[31] Participants expressed varying levels of interest in being able to engage with the CPS before the day of cross-examination. Opinions ranged from seeing direct engagement with the CPS as crucial to the proper operation of justice, to wanting to have some additional or earlier contact so the witness was not 'just a name', to viewing it as impractical to add in any further engagement.

[28] More detail on this can be found in the "After the cross-examination section", under the subheading "Trial, verdict, and sentencing"

[29] A Witness Care Officer is a member of police staff who is part of the Witness Care Unit. They have a responsibility to keep victims (and witnesses) updated on case progress following charge, advising them of hearing outcomes and sentences.

[30] Witness Support' was a term participants used to refer to those who engaged with them as a witness, i.e., in connection to the court or trial, rather than the investigation.

[31] The CPS (2018) legal guidance on speaking to witnesses at court outlines how CPS should be communicating with witnesses https://www.cps.gov.uk/legal-guidance/speaking-witnesses-court

Preparation

General preparation

Asked what they had done to prepare for the cross-examination, some witnesses emphasised that they had had to think about it as little as possible to manage their anxiety. Others would have appreciated the chance to talk with witnesses who had been through a similar experience. There were limitations on what witnesses could discuss with their friends and family, especially where they were also witnesses, but these were identified as a key source of support throughout the lead-up to cross-examination. Lastly, police and support workers offered some guidance by emphasising the need for witnesses to focus on their evidence, tell their story and not to be distracted by how the defence barrister speaks to them.

> [the police] said that to a certain extent they might challenge what you've said and try and make you deny it all, try and call you a liar in a way … he said stick to your guns. – (s.28 witness with additional support needs)

Ground Rules Hearing

The interviews did not refer to GRHs, but a number of witnesses referenced having been given a clear number or set of questions in advance of the cross-examination that they had been able to agree, to some extent. It was not clear why some witnesses were given set questions and others just a number, nor was it clear how the questions had been developed, but the police were involved in passing them to the witness for review. It appeared that the questions had been outlined in advance to address heightened anxiety about cross-examination, although this did not mean they would be delivered as expected during cross-examination.

Court visits

Despite the NPCC-CPS (2019) protocol[32] specifying that WCUs, in conjunction with the Witness Service, are responsible for arranging a court familiarisation visit for s.28 witnesses, not all were offered a court visit or even told of the option.

For those not told about the option, there were mixed views about whether this would be worth offering. Some thought it could be useful for familiarisation, so that the cross-

[32] S28 NPCC-CPS Protocol 2019

examination would not be their first time in court and they would have a sense of the lay-out, but others thought it was not important or could even increase anxiety.

Witnesses took the opportunity where they were offered a court visit and responses ranged from being 'quite clinical' – "This is where you're going to be, this is where that's going to be, that's it" – to reassuring – "… because you have the visit you will know what you can expect, which is quite good". It was not fully informative, however, as reportedly the s.28 recording room could not always be seen and not all information was provided, meaning that witnesses could still be surprised on the day.

Watching the Achieving Best Evidence interview with police

Despite efforts from the police to make the viewing more convenient,[33] such as by bringing the video into their home to watch or providing a link for them to view it from a convenient and secure location, witnesses described watching the ABE interview as upsetting or distressing.

Given the serious nature of the alleged offences, and the upset which witnesses experienced watching this original account of their victimisation, it was particularly important that the ABE interview was viewed close to the cross-examination and did not have to be viewed more than once.

Dates and delays

Date of cross-examination

Witnesses were instructed when to attend court for the cross-examination by letter, and sometimes by the police with whom they were in contact, or by their WC officer. There was little evidence of flexibility around arrangements, but this could be accepted by witnesses as part of the wider court process and the need to co-ordinate many professionals. Some preferred not having the pressure of selecting a date.

Witnesses described having sufficient notice of broadly when the cross-examination would be, although the specific date was not set far in advance. This allowed witnesses to plan around their travel, childcare, and work commitments, and provided some time to feel

[33] Shortly before having the cross-examination, witnesses are required to watch their ABE interview to refresh their memory of the evidence which forms the chief part of their testimony and on which they are going to be cross-examined

prepared, assuming that the date was confirmed in sufficient time to finalise the arrangements and did not change.

> I think if I didn't know what was going to happen and then had a phone call to say Section 28 next week, it would have been a lot more overwhelming and panicking. – (s.28 witness)

Delays to cross-examination[34]

Where cross-examinations were delayed, it was typically by a month or two, whereas subsequent trials could be delayed by many months. The delays could prove unsettling, with witnesses recounting having managed their anxiety ahead of the date, only to have to do so again a second or third time. Having to rearrange plans could be complicated if witnesses had booked time off work but hadn't explained why. Some witnesses whose cross-examinations were rearranged at short notice had to re-watch their ABE interview, because the delay was sufficiently long to require the witness' memory to be refreshed again.

> So, I watched it that day and then the morning after they were, 'Oh no, you're not coming in anymore.' And that was delayed another two months maybe. … It was really strange watching myself and obviously it's something that I was ramping myself up to do and then it had been delayed so I was like, 'All that was all really for nothing and I'm going to have to do it again in a couple of months.' So it was strange. – (s.28 witness)

Giving evidence

Practicalities on the day[35]

Getting to court

Witnesses did not mention particular challenges in getting to court on the day of the cross-examination, even those who lived abroad or some distance from the Crown Court where the s.28 was conducted.

[34] There are findings located in Annex E on Covid-19 and the implications it had on delays to the cross-examination.

[35] There are findings located in Annex E on Covid-19 regulations in the court, which relate to practicalities on the day.

Police played an active role for many participants, either arranging to meet them at the court or collecting them from home and driving them to court. This was appreciated by witnesses and could be seen as providing emotional as well as practical support. For those who were particularly anxious and had not arranged for anyone else to accompany them, this could be seen as making the difference to whether they attended at all.

For those who were travelling from abroad, the WCU could play a key role in arrangements, sending information on the closest hotels to the court, and providing an information pack on arrival with a map showing the court's location.

Participants were reassured that they were not going to see anyone from defendants' cluster of supporters or witnesses or, crucially, the defendant(s) themselves, when they arrived at court.

Waiting for the cross-examination

Length of wait

Witnesses and their supporters were the only occupants of the waiting room/area in each of the cases and typically waited between 15 and 60 minutes for the cross-examination. Some participants mentioned delays at this point, and the wait could be difficult given the pressure of the situation.

Meeting the barristers and judge

Despite an expectation set out in the CPS (2018) guidance[36] for prosecution advocates to meet with intimidated witnesses prior to the s.28 recording, witnesses in this study were not routinely informed in advance that they may be introduced to the prosecution barrister, defence barrister and/or judge.

There were witnesses who met their barrister, and sometimes the judge, in advance of the cross-examination, but some were not given a choice over who they would meet or were even notified of the possibility. Witnesses' views on the experiences varied, but participants had a number of shared reflections on how this aspect of s.28 could improve – not least, being told in advance and so prepared.

[36] The CPS (2018) legal guidance on speaking to witnesses at court outlines how CPS should be communicating with witnesses https://www.cps.gov.uk/legal-guidance/speaking-witnesses-court

> It was very overwhelming. I don't even remember anything they said, I was not paying attention whatsoever. I remember them all being very nice, very polite, they didn't really say anything much other than introducing themselves. The prosecution barrister did stay behind and had a brief chat with me… he was just reassuring me that I could stop when I needed to, that if he felt that the prosecution's questions needed clarification he would interject. – (s.28 witness)

Witnesses appreciated the prosecution barrister introducing themselves, which happened in most but not all instances, but there was a view that it would be better to meet them at an earlier stage or for longer, so the barrister could develop a sense of who the witness was. This was considered important for witnesses' sense of significance within the case and for the prosecuting barrister's ability to perform their role appropriately.

Witnesses varied in their view of whether it had been or would be advisable to meet the defence barrister. Opinions ranged from it having been "horrific, really really horrific ", to unsettling (having them be pleasant in the meeting and then unpleasant in the cross-examination), inadvisable (the defence barrister could 'size up' the witness and gauge how to frame their questions to unsettle them), irrelevant, through to advantageous (the witness could assess the defence barrister, show their determination and be less daunted by them).

> … he would knock me down and made me look bad and I don't know if I would have wanted to meet him beforehand and him be nice to my face and then have to go in and deal with it. – (s.28 witness)

Witnesses appreciated meeting the judge, who was seen as the overall authority, but this was not routine. Among those who had not met the judge, there was a sense that it would be welcome but irrelevant, not least as the judge managed the introductions at the start of the s.28 cross-examination.

Cross-examination arrangements

Expectations vs reality

Witnesses who had had a court visit were asked how the arrangements of the cross-examination fitted with their expectations from the visit. Witnesses who had not been able to see the s.28 recording room could be surprised at aspects of the set-up or look of it. The

most significant difference, however, was having evidence in the room (e.g., a log of physical evidence, photos of other evidence and transcripts) as this was not communicated to witnesses in advance. These were provided for the witnesses' reference if questioned on specific details, so their purpose was understood but not expected.

These physical records of key evidence were not present in all cross-examinations, but where they were their presence was described as unsettling. Because the witness had not been notified about this, it could feel like a substantial volume of information to process and could also prompt worries that there may be other unknown elements or aspects to giving evidence.

Usher

The role, and indeed job title, of the usher who accompanied witnesses into the s.28 recording room was not widely known. However, the witnesses understood that they could assist with practical matters such as setting up the s.28 recording, getting the witness a drink or tissues, or accompanying them if they needed to take a break outside the room. Witnesses found them quietly comforting when they were having difficulty and reassuring at the end of the cross-examination.

Section 28 recording room

The s.28 recording rooms varied substantially in scale, lay-out and feel, and these arrangements were commented on by witnesses as influencing how they felt during the cross-examination. Small rooms could be described as constraining, whereas larger rooms could seem cold. Two key features that witnesses commented on as positive were cleanliness and bright or soft colour schemes. Witnesses found dirty, worn, cold or old-fashioned rooms distracting or difficult to settle in.

Section 28 recording technology[37]

The technology was reported as being mostly reliable, with some glitches at the start of a recording – more often with sound than image – but nothing that the witnesses considered significant. However, witnesses were aware of reports of problems with playing or viewing the recordings at subsequent trials.

[37] There are findings located in Annex E on Covid-19 implications around the recording technology.

Cross-examination conduct

Defence barristers' questioning

The questioning was conducted almost exclusively by the defence barrister, with a minimal number and length of questions following from the prosecution barrister. While witnesses understood the defence barristers' role as needing to be fundamentally oppositional to promote the defendants' interests, they thought it was performed in unnecessarily negative and harmful ways, undermining the witness' ability to give their evidence.

Specific aspects of their questioning that witnesses found particularly negative or distressing or objected to in principle included: being called a liar; having their words "twisted" or questions being aimed at "catching them out"; irrelevant questions which witnesses saw as "unfair"; and repetitive questioning.

The accusation of being called a liar could also catalyse witnesses' defence of their evidence, but this phrase was still not seen as having any positive attributes or consequences. Furthermore, witnesses could worry about being seen as – or indeed be "told off" by the judge for – being aggressive rather than assertive.

> Basically I felt like I was crumbling, because I knew what picture had been painted, but then when he started at me and raising his voice and telling me I'm a liar, and talking over me, I felt intimidated by it and then I thought, 'Hang on a minute, how can you stand there and tell me I was a liar?' So then I felt I got this fight back, and I thought, 'I'm not letting go of this.' So then I was firing back at him, and he didn't know what to say. But then I thought, 'Am I coming across like I'm being aggressive or arrogant?' – (s.28 witness)

One aspect of the cross-examination that cumulatively prompted witnesses to (in their own terms) "break down" or "fall apart" was defence barristers consistently re-presenting what they were saying in terms that they had not used or would not use, making links between points in their evidence which the witness said were unrelated, or going back to other factors entirely to show the witness in negative terms. There were instances where the judge did step in to instruct the defence barrister to change their line of questioning or their approach.

> …during the cross-examination, I will say I was surprised at what she was asking me or the conclusions that she drew from the evidence. A lot of the time, I just found myself saying, 'No, like, that's not true'. It was just very strange and, like, it was weird to think that legally, you could draw a line from what I said or what I did to what she said. – (s.28 witness)

> He was twisting my words. … And that's when I broke down. But, like, people have said to me, at the end of the day, it's his job to do that. – (s.28 witness with additional needs)

The inclusion of unexpected and apparently unrelated questions was also particularly difficult and distressing. This could include the defence barrister suddenly switching to ask about earlier life events, including traumatic events, which were seen as irrelevant and deliberately disorientating. In instances where a witness had been given an outline or list of questions in advance, this could prove especially unsettling.

Repetitive questioning was also highlighted as a problematic aspect of defence barristers' approach. It was not considered as upsetting as the other negative features but, along with defence barristers raising their voice and speaking across or interrupting the witness, it was seen as undermining witnesses' ability to respond and discuss their evidence.

Positive or acceptable aspects of defence barristers' questioning included the clarity and the overall number of questions, and the fact that the questioning did not extend far beyond an hour. Witnesses who had the support of an RI or other support worker appreciated having unclear questions explained or rephrased. Being able to turn back to earlier questions and add details or clarify something that had been said was also considered valuable, where witnesses mentioned doing this:

> There were things that maybe I didn't have in my head at the time. So 10 minutes later we were on a completely different topic, he had changed the direction of the questions and I remembered something to do with a question he said 10 minutes ago … [I said] 'You asked this question a while ago and I've remembered something, can I add to my answer?' [They said] 'That's fine.' I think the answer I remembered was actually vital further down the line and if I hadn't remembered then it might have changed things. – (s.28 witness)

The number of questions varied between witnesses but was not considered excessive – other than the repetitive nature of some lines of questioning. Some witnesses explained that the number of questions had been set in advance and found this reassuring as they could count down during the cross-examination. However, this could be undermined if the content of the questions was not as expected.

The overall length of questioning varied between 15–20 minutes and over 2 hours, with most witnesses considering that their cross-examination lasted 'around an hour'. The duration was not highlighted as a problem, and the process was considered exhausting however long it lasted.

Prosecution barristers' questioning

Witnesses saw the cross-examination as being primarily for defence barristers to challenge and question their evidence, with the prosecution barristers' role being to clarify details the questioning had obscured or misrepresented. There were mixed views among witnesses as to how well the prosecution barristers had performed their role, partly informed by how strongly they were identified as 'my barrister' by the witness.[38]

Witnesses who saw the barrister as being there to clarify witnesses' details as needed but not to promote the witness as such were broadly satisfied with the prosecution barristers' approach or offered no specific comment. Witnesses who saw the prosecution barrister's role as more active, to present the witness to the future jury as credible and to emphasise their position as the victim, tended to be disappointed in what they saw as minimal engagement from 'their barrister'. There could also be a sense that the prosecution barrister had failed to challenge negative or confused images of the witness created by the defence barrister's line of questioning, which witnesses felt could undermine them at trial.

> I was like, 'Why isn't the prosecution barrister … asking me any questions? Why can't I talk about that?' So when I met with him afterwards, I said, 'Why didn't you question me?' And he said, 'Because you had said everything that you needed to say'. And I said, 'But I didn't, you know, I didn't get a chance to answer back about

[38] The CPS are an independent prosecution authority, they do not represent the witnesses but instead represent the state.

> [the defence barrister] saying that [assertion about me], I didn't get to say any of those things. – (s.28 witness)

Judges' role

Judges were viewed positively by witnesses but could be seen as less effectual if they did not intervene to address defence barristers' line of questioning. Despite their authority, judges could be identified as one of the less daunting aspects of proceedings, and their manner or approach could prove reassuring: "the judge seemed quite nice, [they] was delicate with me, a friendly face".

However, there were instances where witnesses thought judges should have used their authority to constrain unduly negative or unfair lines of questioning and were disappointed that they had not. There were also examples where judges' interventions were seen as thoughtful but unnecessary, specifically when they offered witnesses a break, although other witnesses considered these to be helpful.

> I think the offer was good, but I think for me, now I was in that headspace and on that train of thought, I think I needed to stick with it, I don't think a break would have been helpful to me personally at those times. – (s.28 witness)

Specialist support

Witnesses who were supported in the cross-examination by RIs, their day-to-day support worker or by ISVAs found their presence helpful, either with specific communication challenges or with their emotions. Their role was considered to make a substantial difference to how fully witnesses were able to engage in the cross-examination, staying and answering questions – or taking a break and returning despite the sensation of being overwhelmed, upset or distressed and even re-traumatised by the experience. Having an RI was appreciated specifically for clarifying the terms used by barristers:

> … because I've got [named disorder], I had a woman in there with me. So, when his barrister was asking questions and I don't understand because of some terminology they use, they stopped, like, the recording or something and then she would explain to me. So that helped a bit, but it was still scary. – (s.28 witness with additional support needs)

Witnesses' evidence

The quantity of evidence covered in the cross-examinations could be influenced by decisions taken before the cross-examination on the number and format of questions and the overall length of the cross-examination. It could also be influenced by how witnesses responded to individual questions, with some predominantly answering 'yes' or 'no' and adding little detail, while others took the opportunity to talk at length about their experiences or other issues related to the question. Witnesses who spoke less included those who found the cross-examination particularly daunting and "just wanted it to be over", but also those who had decided this was their best approach overall and opted to add more detail as and when they wanted:

> I tried to keep my answers quite short. 'Yes's, 'No's. I feel like that was the easiest way to do it but when I did expand on things, I felt like I could. She left me enough time really to-, she'd answer a question and leave me space. I felt comfortable to be able to talk at length, really. She didn't really interrupt me or talk over me, which is good, so, I felt like I had enough space to talk about what I needed to, yes. – (s.28 witness)

The quality of evidence provided by witnesses under s.28 cross-examination could not be compared to that provided by non-s.28 witnesses, but participants did reflect on how well they felt they were able to give their evidence; this could be clustered into three sub-groups: s.28-dependent evidence; s.28-enhanced evidence; s.28-ambiguous evidence.

Witnesses in the s.28-dependent evidence sub-group believed that they would not have been able to give any evidence at all without this special measure due to their difficult psychological situation. This group included witnesses who said they would have disengaged or 'dropped out' altogether without the s.28 option, or who explained they might not have survived if they had been required to wait until the trial. It also included witnesses who may have stuck with the process under any circumstances, but whose testimony would have been so constrained without s.28 that it may have been of little use, in their opinion. There were no consistent demographic or case characteristics to this group, but witnesses had a heightened level of underlying trauma and stronger sense of intimidation.

Witnesses in the s.28-enhanced evidence sub-group believed s.28 amplified and extended the evidence they were able to give under cross-examination. This group included those who could imagine giving evidence in the court, but who were highly reluctant to do so and very anxious at the prospect, believing that they would not be able to say what they needed. It also included those who were relieved at having their cross-examination entirely separately from the trial – in terms of timing as well as being physically away from the courtroom. These witnesses described the s.28 cross-examination as being "in a bubble" or safe space which supported and enhanced their ability to respond to the questions.

> The raw court experience, the thought of going to court, maybe if I'd have had to go as a witness for something not serious, it would not have been that scary. But I knew that I would be intimidated, and it was really scary – so making it possible to go and pre-record it, I have no words to explain how much pressure it took from my shoulders. I feel safe and I felt like I don't have to meet anyone I don't want to meet. I felt protected, just safe environment to me. – (s.28 witness)

Witnesses in the s.28-ambiguous evidence sub-group felt that s.28 was neither the only nor an optimal way to give evidence. This group included those who valued the s.28 and considered that it made a significant difference to their evidence-giving, but who were unaware of or indifferent to the fact that s.28 was also pre-recorded. It also included witnesses who had resisted giving evidence despite the provision of s.28 and had to be all-but summonsed to court during the trial, and those who had s.28, but retrospectively would prefer not to have used it. Among the last cluster were witnesses who had changed their mind about s.28 after finding out that the defendant would be in the building, which had undermined the sense of safety they had ascribed to s.28, or after the trial, when they thought that their pre-recorded evidence had been less effective with the jury. These witnesses were not negative about s.28 for others, but felt that it had not improved their evidence.

Witnesses' emotions

There was no opportunity to compare witnesses' experiences between s.28 with other special measures or none, but witnesses described the cross-examination as highly emotional, even those witnesses who considered that s.28 had made their

cross-examination easier. There were five core emotional states described by witnesses, being: anxious; sad; distressed; angry; re-traumatised.

Witnesses recounted being anxious in the lead-up to the cross-examination and this continued into the s.28. The physical separation from the courtroom and defendant(s) was felt to reduce anxiety for some witnesses. However, it was not clear that being pre-recorded itself made a difference to anxiety levels during the cross-examination, although there was a sense of relief afterwards that they had done what was needed and, for some, a sense that they could put it to one side and get on with their life.

Witnesses described feeling sad as they reviewed their ABE interview with police, and this continued into the cross-examination as they had to reflect on and recount their experiences and other issues. Some witnesses cried throughout or at specific points of the cross-examination (often when an unexpected question was put to them or when the overall impact of the questioning became too much), but even those who were crying or upset still viewed the experience as relatively better than they would have expected it to be without s.28. During the cross-examination itself, it was the fact that it was conducted away from the courtroom that influenced witnesses' experiences more than the fact that it was being pre-recorded.

There were multiple aspects of the cross-examination which could be distressing for witnesses, with some recounting 'breaking down' as they felt overwhelmed by the overall experience or specifically upset by discussing the offence(s) or answering unexpected questions. However, these witnesses considered that they experienced less distress, or were better able to cope with and continue despite it, under the s.28 arrangements than if they had been in the courtroom or giving evidence during the trial. The physical separation was seen as providing a buffer but the separate timeframe of the cross-examination could also be seen as helpful.

Witnesses who described being angry included those who did not end up using s.28 because they were resistant to giving evidence at all, those who were doubtful that s.28 had made a difference to them, as well as witnesses who were angered by the defence barrister's line of questioning or being called a "liar". It was not evident that s.28 made a

difference to how angry witnesses felt, rather it appeared linked to how they felt about the proceedings as a whole and about the defence barristers' approach.

Witnesses gave few accounts of being re-traumatised by the cross-examination, describing ways that it caused significant distress or anger rather than trauma. Witnesses recognised that the judge played a part in preventing or minimising trauma in some instances where cross-examination was overwhelming a witness, although other witnesses gave examples of where they thought judges should have intervened but didn't. The fact that s.28 was conducted away from the courtroom, and specifically without the witness having to see the defendant(s), was a key factor in minimising the traumatising effect of the cross-examination. The fact that it was pre-recorded was also seen as a protective or minimising factor for some witnesses who explained that they would not have been able to "hold out" until the trial and would have found being part of the trial traumatising in itself.

After the cross-examination

In the court

Once the proceedings had finished, witnesses left the court quickly. This could feel quite abrupt, but they did not have a particular interest in spending longer in the court. There was appreciation that witnesses did not see the defendant(s) as they were leaving. The limited number of people in the building associated with their case was another advantage of it being pre-recorded – witnesses specifically appreciated there being no media or defendant(s) family and friends present.

Post-court

After the s.28, witnesses could simultaneously appreciate not having to wait for the trial and being able to put it out of their mind until the trial or verdict, and also feel left out of the ongoing justice processes. Specifically, witnesses identified having not been updated about the trial, and even the verdict, by police or WCUs – even where they had felt well supported and informed in the lead up to the cross-examination. There were witnesses who were updated on progress, but there was a distinct shift for many between an attentive and regular engagement with police/WCUs before giving evidence, and limited information after their cross-examination.

There were particular challenges for witnesses over this post-s.28/pre-trial period for witnesses who had family or friends giving evidence in the trial, as they could not discuss any aspect of their evidence or the cross-examination. Witnesses with relatives giving evidence under s.28 appreciated being able to walk away from court with the burden of giving evidence lifted for each of them, but most were not in this situation. It was very significant for some witnesses that they were now able to start 'full' therapy or counselling and to speak about the offences, but it was not clear if this was communicated to all witnesses, as there were accounts of witnesses still having to wait until the trial and verdict before they could engage fully with counselling – in case they needed to give evidence.

Trial, verdict, and sentencing

Witnesses were given mixed information about whether or not they could attend the trial. Some were told they could attend both the sentencing and trial (although some of whom were advised not to attend the trial in case it affected how the jury interpreted the s.28), some were told they could only attend the sentencing and others were told they could not attend any part of the trial (indeed, one recalled being told they would be arrested if they attempted to attend).

Not being 'allowed' to attend the trial frustrated some of those who were given this information, and there were witnesses who said they would not have opted for s.28 if they had known this limitation in advance. Others accepted that it was against the rules, while those who were advised not to attend came to agree that it was probably not in their best interest, concerned that it would undermine their recorded evidence.

There was an assertion that the s.28 recording was subsequently edited before being played for the jury. This left witnesses in doubt about what was shown to the jury if not the full recording, and how they were presented.

Despite clear obligations under the Victims' Code,[39] communications between WCUs and/or police and the witness around the trial, verdict and sentencing varied in their format and frequency. While some witnesses continued to receive updates from police or WC

[39] Right 9 of The Victims' Code (Ministry of Justice, 2021) states that: all victims have the right to be given information about the outcome of the case and any appeals. https://www.gov.uk/government/publications/the-code-of-practice-for-victims-of-crime/code-of-practice-for-victims-of-crime-in-england-and-wales-victims-code

officers throughout the trial, others were deeply frustrated at their limited or non-existent contact at this pivotal time. Accounts of this period included references to hearing on the news what the verdict was before anyone contacted from the court, WCU or police, having to search online for the outcome or only knowing because a friend or relative was attending. Witnesses could feel as if they had been dispensed with, now their testimony was on the record, this included participants who had lodged complaints about the quality of service at this stage of proceedings. Where witnesses were kept informed, this was greatly appreciated, with examples of praise for police officers attending court on their days off to keep witnesses informed. However, relying on individual officers to attend the trial in their own unpaid time is not a sufficient solution, and could also result in inconsistent provision of information.

Discussion

This process evaluation explored practitioner and witnesses' views and experiences of s.28 for the s.17(4) intimidated cohort. The interviews revealed some similar themes between the practitioner and witness groups, but there were also some conflicting reports.

Critically, both groups felt that s.28 improved the witness experience, primarily because of the physical separation it offered from the defendant(s) and courtroom. The practitioner group emphasised the benefits of earlier cross-examination more than the witness group, who sometimes did not fully understand that the cross-examination was held 'early'. However, both groups noted advantages of an earlier cross-examination, particularly being able to access full therapy at an earlier point in time.

Another benefit of s.28 that was highlighted by both groups was the fact that s.28 witnesses can plan more easily around other commitments because they know the exact date and time of the cross-examination. This was arguably better understood by practitioners who could compare to non-s.28 cases, where witnesses can be waiting in court for days to give their evidence at trial. Witnesses interviewed in this study reported waiting at court for between 15 and 60 minutes, and even then this was found to be difficult. Delays also proved unsettling, particularly if it was at short-notice and of a long enough time to facilitate re-watching their ABE interview again. However, some practitioners suggested that delays may be less likely in s.28 cases because of the additional case preparation and hearings earlier in the process.

Despite most witnesses and practitioners believing that the s.28 cross-examination was easier than traditional cross-examination, it was clear that this was still a highly emotional and difficult experience. One key contributing factor highlighted by witnesses was the style of questioning by defence barristers, which was considered negative and harmful, although some practitioners suggested this was worse in non-s.28 cases. Still, there was a clear sense from both groups that this was better than the alternative.

Reasons for choosing s.28 were broadly the same amongst both groups, with the most important factor for witnesses' being the separation from the defendant(s) and courtroom

when giving evidence. There were concerns amongst some practitioners that witnesses were not able to make an informed choice, although this was not reported by witnesses interviewed, with most feeling that it was their decision. However, there did appear to be limited discussion of alternatives and incomplete or inaccurate information provided by police, which suggests that witnesses' might not have been making as informed a choice as they thought. Indeed, some witnesses reported that they would have made a different choice if they had known more about how s.28 operates.

The concern that video-recorded evidence may be less impactful than 'live' testimony was raised by some practitioners but also by a few witnesses, who stated that in retrospect they would have preferred not to use s.28 for this reason. However, other practitioners believed that it was important to balance this with the need to keep witnesses engaged, indicating that it was better than having no testimony at all in those cases where the witness might not have given evidence without s.28. One suggestion from the practitioner interviews was to test this by exploring any difference in conviction rates in s.28 cases compared to a matched comparison group giving evidence live at trial.

Another common finding between the practitioner and witness interviews was the issue of the defendant(s) presence at court during the s.28 cross-examination, and critically that witnesses were not always made aware of this. The issue for witnesses appeared to be more to do with the defendant(s) watching their cross-examination, as opposed to their presence at the court site. Indeed, there were no reports of the witness and defendant running into each other at the court site, although as suggested by practitioners this is likely to do with actions taken by court staff. One improvement that was suggested by practitioners was to combine special measures to screen witnesses during a s.28, which might allay concerns for witnesses and encourage more of them to use s.28. Combining special measures is allowed but not routinely offered, and none of the witnesses interviewed were aware of this option.

Despite some concerns from practitioners about the effectiveness of police in conducting s.28 cases and suggestions for additional training, witnesses interviewed shared broad satisfaction at how police communicated with them and supported them from report to cross-examination. However, there was clear variation in when, what and how much information witnesses were given about s.28, which points to a lack of shared knowledge

or understanding of how s.28 operates – and this was admitted by police officers interviewed. Additional training and guidance for police would likely improve the process and ensure all witnesses receive the same, and correct, information.

Some practitioners believed that the length of time between the cross-examination and trial minimised the benefits of s.28, however the key difficulty cited by witnesses was not the length of time, but the lack of communication from WCUs and/or police in this period. Although there were some examples of good practice, witnesses could feel deeply frustrated by the lack of contact, particularly as it was a sudden shift from the level of communication pre-s.28. This highlights the importance of good communication with witnesses throughout the criminal justice process, but particularly during long periods where anxiety is heightened.

Another challenge for witnesses following their cross-examination was that, for those who had family or friends giving evidence in the trial, they were unable to discuss any aspect of their evidence or the cross-examination. This was also pointed out by an ISVA, who suggested that courts should consider making special exceptions in these circumstances to allow all family members to give evidence via s.28. It is important that additional support is made available for witnesses in this situation, who may be without their usual support network.

There were mixed views from practitioners as to whether s.28 had an impact on witness attrition – some believed that the witness would stay engaged regardless, while others reported cases where it was instrumental in keeping them engaged. The same was true from the witness interviews, where some did say that they would have dropped out or not survived until trial, but even those who said they would have given evidence regardless of the circumstance felt that s.28 had amplified and extended the quality of their evidence.

Conclusion and considerations

This report presented the findings of a process evaluation of s.28 for the s.17(4) intimidated cohort, consisting of interviews with criminal justice practitioners and witnesses. The aim of the research was to explore witness and practitioner views and experiences of s.28 to help understand whether the s.28 provision for the s.17(4) intimidated cohort worked as intended, and to highlight parts of the process were working well and any improvement that could be made.

The findings from this process evaluation point to an improved experience for witnesses who gave evidence via s.28, although some difficulties persist. Some of these difficulties are less relevant to s.28 process specifically, such as manner of questioning by defence advocates, but others could be addressed to improve the process for both witnesses and practitioners. Practical considerations that could improve the s.28 process include:

- Ensure that all witnesses receive timely, clear, and consistent information about the s.28 process, including whether the defendant(s) will be present during the s.28 hearing. This should ensure that witnesses are able to make a fully informed choice over whether to use s.28. It is also important that witnesses are aware of other options to give evidence, including other special measures that they are entitled to.

- Improve training for practitioners, particularly police, to ensure that all practitioners feel confident performing their role in relation to the s.28 process.

- Promoting the use of multiple special measures, such as screening the s.28 recording.

- Equal opportunities for all s.28 witnesses, including pre-court visits and meeting one/both barristers and/or the judge.

- Improve communication post-s.28. Practitioners should ensure that witnesses are kept updated following their s.28 cross-examination, particularly in the lead up to

and during the trial. Additional support should be made available for witnesses who have family members giving evidence in the trial.

- Conducting analysis to determine whether s.28 impacts conviction rates by comparing trial outcomes to a matched comparison group who have their cross-examination live at trial. This would inform the debate over whether pre-recorded evidence impacts juror decision-making.

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Annex A
Judiciary response

12 April 2022

SECTION 28 PRE-RECORDING OF CROSS EXAMINATION FOR INTIMIDATED WITNESSES (MODERN DAY SLAVERY AND SEXUAL OFFENCES)

1. This note is provided by the Judicial Office. It contains a distillation of the views of the seven Circuit Judges with the most experience of the operation of the Section 28 procedure.

Background

2. The special measure (for the pre-recording of cross-examination and re-examination of a witness) introduced by Section 28 of the Youth Justice and Criminal Evidence Act 1999 was commenced for vulnerable witnesses (s.16) in three Crown Court centres, Leeds, Liverpool and Kingston upon Thames, in December 2013. At that stage, the provision was limited to children aged under 16. In January 2017, the provision was extended in those three court centres to all child witnesses under the age of 18 and to witnesses who were vulnerable on the ground of incapacity. In response to the trial delays caused by the pandemic, the national rollout of the section 28 procedure for vulnerable witnesses (s.16) was expedited and took place between August and November 2020. Since 23rd November 2020, the Section 28 procedure has been available in all Crown Courts for vulnerable witnesses.

3. In June 2019, a pilot commenced for the use of the section 28 procedure for intimidated witnesses in sexual offence or modern slavery cases (s.17(4)) at the same three courts, Leeds, Liverpool and Kingston upon Thames. Last year, the pilot of for intimated witnesses was extended to a further four courts: Wood Green, Isleworth, Durham, and Harrow.

4. The government has committed to the rollout of the Section 28 procedure for sexual offence and modern slavery complainants to all Crown Courts from 31st March 2022. This rollout will start with Crown Courts in the North East region.

A summary of operational impacts

5. The use of Section 28 for intimidated witnesses in sexual offence or modern slavery cases (s.17(4)) has a significant and adverse impact on the operation of the Crown Courts, and the listing of all cases. There are a number of reasons for this.

6. **PTPHs:** Unless all parties are ready at the Pre-Trial Preparation Hearing (PTPH) – which is consistently not the case – there are likely to be additional hearings before the cross examination is undertaken. At the PTPH, court time is often taken up by the parties having discussions that should have taken place in advance. The Prosecution must serve ABE interviews and disclosure for the hearing to be effective. Typically, Section 28 may involve (an extra) 3 or 4 hearings: the PTPH, the Grounds Rules Hearing and then the Section 28 hearing itself, plus any further hearings that may be necessary because of problems with disclosure for example.

Time taken and listing implications

(a) The expansion of the Section 28 procedure to intimidated adult witnesses has an impact on the work of the Crown Court that extends well beyond *doubling* (at least) the court time needed for cross-examination and re-examination in Section 28 cases (where the evidence taken during the Section 28 hearing then has to be replayed in full to at trial, to the jury).

(b) **For children:** The Section 28 cross-examination of children (the most common cohort of vulnerable witnesses) generally takes very little time: it can sometimes be completed in as little as 15–20 minutes. At the Ground Rules Hearings, the questioning is carefully planned in advance, the questioning of children is

generally very short and is the subject of close judicial supervision. The time taken in addition to the cross examination itself (to prepare for the hearings, to speak to the witness and in dealing with editing after the cross examination for example) is usually about 30 minutes.

(c) This means that Section 28 hearings for vulnerable witnesses have a manageable impact on other court business. With the judge's permission, they can routinely be slotted into the court list before the main work of the day, i.e. at 10:00 a.m. or earlier, with minimal or no impact on other trials or hearings being conducted by the judge.

(d) **For adult witnesses:** The position when the section 28 procedure is used for adult intimidated witnesses, particularly in sexual offence cases, is very different. The cross-examination of adults takes much longer, and often has to be 'forced' into busy lists at a cost to other cases and trials. Where the allegation is of a sexual offence in particular, the very nature of the offence, (where consent is an issue for example) can lead – legitimately – to lengthy cross-examination of complainants. Such cross examinations can easily take up to half a day or more. In consequence, this type of hearing requires a longer listing time, and cannot be slotted in or around other trials. When such hearings take place, they therefore displace or cause significant delay to the trials or hearings which the judge is otherwise or would otherwise be undertaking (there being no reservoir of judges available to deal with this extra work). This has an inevitable knock-on effect of further delays to other trials, and inconvenience and disappointment to the witnesses, complainants and defendants involved in them.

(e) Similarly, Section 28 hearings will often have to be fitted around counsel's trial commitments. This means that the other trials in which counsel are appearing have to be paused (and therefore delayed) so counsel can attend the Section 28 hearing in another court room or at another court centre. The expansion of the Section 28 procedure means that judges may have to consider refusing counsel's requests to leave one trial to join another.

Further issues

7. Section 28 recordings place a significant administrative burden on court staff, at a time when morale is low, training is an issue and high turnover has led to loss of experienced staff. The pressure on listing officers is also intense. Accommodating additional hearings means lists that have been planned for months need to be amended. This has a negative impact on the listings of other cases and causes delays. There is a shortage of sufficiently trained and experienced staff.

8. Because Section 28 procedures for intimidated witnesses are being piloted, the Courts have attempted to generate data on case volumes and their impact on other work (whether the listed Section 28 hearings take place for example). This is extremely resource intensive, because there are no digital means to do so (which means courts are unable to "run reports"), and all data has to be collected manually.

9. For a Section 28 hearing to take place, or for the recordings made to be used at a subsequent trial, a "slot" has to be booked for a Vodafone hearing. The current process for doing this is too complicated and resource intensive. For example, a further slot has to be booked to replay the cross-examination at the trial. If the recording was available to the court (without the need to book and timetable "slots" through Vodafone) this would mean court staff would not have to spend time dealing with such matters, e.g. booking a time slot only to have to re-book to accommodate any delays in the trial.

10. Not every court room is equipped for pre-recording cross examination. Video screens in some court rooms are too small and too far away from the jury to be properly visible (so they can see the witness for example, as though they were actually in court). And this sometimes requires judges sitting with court lights off to improve screen quality (at Leeds). In addition, the ability to playback is inconsistent, using current technology. All this has an impact on the ability of the jury fairly to assess the evidence of the witness.

Impacts on case outcomes

11. Section 28 (s17(4)) has been operating in three courts since July 2019, and a further four courts since 2020 for intimidated witnesses in sexual offence and modern-day

slavery offences. Despite these lengthy pilots, there is no reliable information to understand the impact of Section 28 evidence on guilty pleas, conviction or attrition rates.

12. From the pilot sites, it is considered that there has been a negligible impact on the guilty plea rate for the intimidated witness cohort. Once the cross examination is recorded parties tend to be locked into their positions.

13. The impact on juries where the victim or witnesses' evidence is played on a small screen, as compared with the evidence of the defendant who attends in person, has not been the subject of a specific study. With the expansion of Section 28 for intimidated witnesses, it is considered that we may, in fact, see an *increase* in the acquittal rate in such cases. Further, once a defendant is charged, the police and CPS are required to comply with the requirements to prepare disclosure and case preparation at an earlier stage, which may lead to a delay at that stage.

14. For intimidated witnesses, further thought should be given to centralised remote sites, to avoid intimidated witnesses coming to the court building. This option has worked well in Exeter, and in Leeds.

The wider effects, and their impact on trials

15. There are currently not enough barristers to prosecute and defend cases, particularly RASSO cases. This shortage is exacerbated by Section 28. Counsel may be prevented from doing full trials if already booked for a Section 28 in another court during the same week. It makes diary management (and therefore the listing of cases) very difficult. Some barristers are reluctant to do Section 28 hearings at all, preferring to take the immediate (and more remunerative) trial work. Counsel, in effect, have to prepare the case twice – once for the Section 28 hearing and then again for the trial which may be many months (or over a year) later. Expecting advocates engaged in one trial to leave in order to prepare for, and carry out, an effective cross examination of the principal adult witness in another case, months before the trial is demanding (and entirely different from the advance planned and circumscribed cross-examination of a child). There is a considerable disincentive, therefore to doing this work. In addition, for the Bar committing to a Section 28 case

means committing to a more distant and probably uncertain main trial which prevent the advocate taking a more substantial case. The revised Criminal Practice Direction may help in this regard by not insisting the same counsel must attend the recording and trial, but continuity of representation remains highly desirable.

16. Disclosure problems are more acute in Section 28 cases, because of the limited time available in which to provide disclosure before such a hearing takes place. If the CPS are unable to comply with their disclosure obligation, this may mean further disclosure takes place after the Section 28 hearing. This may mean cross-examination conducted on one basis has to be revisited if the trial is to remain fair and therefore the witness being recalled at the trial, notwithstanding their provision of pre-recorded evidence.

Further evaluation required

17. There should be a full independent evaluation of the effect of Section 28 on disposal rates (and the experience of the witnesses concerned). The question is whether Section 28 prerecording of cross examination results in more convictions, more pleas, and or more acquittals at trial. There is a general view that pre-recorded evidence of adults inevitably has less impact with juries than if the adult had given evidence in person. The same concerns do not arise in respect of children, as juries instinctively seem to understand why such evidence is recorded.

Annex B
Practitioner topic guide

This annex presents an example of a topic guide used for the practitioner interviews; the topic guide varied based on practitioner type.

Warm up

1. Can you tell me about your current role and how long you've been doing it?

2. Roughly how many s.28 cases have you been involved in?
   - How many intimidated only? How many vulnerable? How many intimidated AND vulnerable?
   - What sort of cases have you seen – sexual offences or modern-day slavery?

3. What do you understand the aims of S.28 to be?

Process detail

Thinking about the process involved in S.28 cases for intimidated witnesses…

4. In a typical S.28 case, what would be your involvement?
   - How do your responsibilities differ for intimidated only, vulnerable only, intimidated and vulnerable?

5. How, if at all, does the process for S.28 differ from non-S.28 cases?
   - What are the key similarities and differences?
   - How have you managed these changes? [**PROMPTS**: adapted case management processes, liaising with colleagues/agencies]

6. Which parts of the process are working well?

7. What parts of the process are working less well?
   - What kind of help is available to solve these problems/who do you report these problems to?
   - Any logistical/technological problems? [**PROBE**: recording equipment/facilities]

- What improvements could be made?

8. Has the expansion of S.28 to intimidated witnesses impacted your workload? How?
   - Is there any impact on non-S.28 cases?
   - Has it been manageable?

9. Are there any timetables or timing targets in S.28 cases?
   - Are these achievable?

10. Has the S.28 process led to a change in the amount of time a case take to resolve? [PROBE: overall timeliness, delays]
    - What is the impact of this?

Implementation, Comms and Training

Move on to talk about information or training you may have received for implementation of s.28 for the intimidated witnesses cohort [was implemented and any information or training you received …of sexual offenses and modern slavery cases, and if this differed from other S.28 information – if applicable]

11. When S.28 was introduced for intimidated witnesses, what information were you given? [**PROBE**: from whom, how]

12. Have you received any training on S.28?
    - What form, from whom, how regular, how effective?
    - Do you feel there is a need for additional training – for yourself or other agencies?
    - What form, from whom, how regular?

13. In your opinion, is there a good awareness of S.28?
    - Among different agencies? [**PROMPTS**: CPS, court staff, witness services, advocates, witnesses, defendants]

Eligibility and explanation of S.28

Thinking about how intimidated witnesses are identified and made aware of S.28…

14. How are eligible intimidated witnesses identified?
    - Who is responsible for identifying them?

- How do you decide whether to use S.28 in a case? Is it victim characteristics, or offence category?
- Are any eligible witnesses missed?

15. How would you handle witnesses who meet the definition of a vulnerable AND intimidated witness?
    - Would you expect to see them more in a specific type of case? [**PROMPTS**: sexual offences, modern day slavery]
    - Have you received any guidance about how to work with these witnesses?

16. How do you discuss S.28 with the witness?
    - At what point in the process do you tell them about S.28?
    - What information is the witness given?
    - What materials do you use? [**PROBE**: any national guidance?]
    - Do you discuss the main advantages and disadvantages?

17. Do many witnesses take up the offer of S.28?
    - Which ones do/do not?
    - What reasons are given for take-up/non-take-up?

Detail on cross-examination hearings

Thinking about the cross-examination process in S.28 cases… (Check if police interviewee has attended or is informed about the cross-examination stage)

18. Comparing the S.28 cross-examination to traditional at-trial cross-examination, have you observed any changes?
    - In the quality of evidence provided? [**PROBE**: witnesses' ability to recall/recount events]
    - Are there any elements of S.28 that you think undermine the quality of evidence?
    - The level of stress/distress suffered by the witness?
    - The behaviour of other people present, such as advocates, Judges, defendants? [**PROBE**: the number and style of questions asked, the judges' need to interject]

Witness experience

Thinking about witness experience with the S.28 process…

19. Based on your experience, what has been the impact of the S.28 process on intimidated witnesses?
    - Compared to non-S.28 cases, any impact on victim attrition? Why?

Juror perceptions and outcomes

Thinking about juror perceptions, decision-making and outcomes in S.28 cases…

20. In your opinion, does S.28 have any impact on juror perceptions and decision-making? [**PROBE**: fairness, credibility assessments, impact of testimony]
    - Are you aware of these concerns?
    - Why do you believe that to be the case?
    - Would you discourage witnesses from using S.28 for these reasons?

21. Have you observed any changes in the number of guilty pleas for S.28 cases?
    - What changes and at what stages?
    - If yes, what do you think are the reasons for this change?

General reflections

This is just to capture anything that may have been missed or give you the opportunity to expand on earlier answers…

22. How do you feel about the wider rollout of S.28 to all Crown Courts in England and Wales?
    - Are there any issues that should be addressed before rollout?

23. How effective has S.28 been at achieving its aims? [**PROBE**: improving quality of evidence, improving witness experience]

24. Are there any final points you would like to make?

Annex C
Witness interviews topic guide

Being a witness in a trial: Research to improve witnesses' experiences.

Interview Discussion Guide (Summer 2022)

Background

Ipsos UK has been commissioned by the Ministry of Justice (MoJ) to conduct research interviews with witnesses who had their cross-examination pre-recorded using the Section 28 special measure. The study will contribute to MoJ's evaluation of piloting Section 28 for intimidated witnesses (those who gave evidence in trials of sexual offences or modern slavery offences). This is separate from an earlier evaluation of Section 28 for vulnerable witnesses conducted by the MoJ. Cases will have been heard in Liverpool, Kingston upon Thames, Isleworth, Wood Green and Harrow Crown Courts.

Research aims:

- Explore witnesses' views and experiences of S.28
- Explore the potential for S.28 to make it easier for witnesses to recall/recount events
- Explore the potential for S.28 to make the overall trial process easier for witnesses

Overview of topics to be covered in interviews:

- What the participant was told about giving evidence, and by whom/which agencies.
- What expectations the participant had of giving evidence.
- The participant's experience of giving evidence.
  - Overall
  - Specifically in relation to recalling and recounting evidence
  - Specifically in relation to levels of stress, distress and trauma
- Challenges of giving evidence – and whether and how these were addressed.

- Good points about giving evidence – and what helped these to occur.
- Experience of trial process after giving evidence
- What participant would want someone else to know before they gave evidence.
- What participant would want to have/do if they were going to give evidence again.
- Concluding thoughts

Explain how the participant can say or show if they want to skip a question, take a break or stop. Provide clear opportunities for breaks. Pay attention to indications the participant may be finding the interview overly stressful, and be responsive, including suggesting that the interview be rearranged if and when the participant prefers, or concluded altogether.

IF USING AN INTERPRETER: Check with participant that they are comfortable with the individual and consider re-arranging if they are not

NO DISCUSSION OF EVIDENCE OR CASE: explain this clearly at the outset of the interview and if participant does discuss it, give the initial warning on content, then remind them and then terminate an interview if the witness is unable to refrain from discussing. You can explain why this is needed.

Introduction

Thank them for agreeing to take part – and remind that they can skip questions or end early

Explain will start with reminder of why we are meeting – but they can ask questions at any point

Introduce researcher & Ipsos – research organisation, independent of MoJ/CPS/police/+

Explanation of research:

- Explore how recent [S.28] witnesses feel about giving evidence for a trial and the cross-examination –when a defence lawyer or lawyers ask a witness about their evidence.
- To identify what is already working well, what is okay and what needs to be changed.

- So that the Ministry of Justice and others can decide how to improve cross-examination.
- There is a lot that witnesses might want to talk about – from what happened right at the start, to how the police, lawyers and judge were and what they think about the outcome – but we have been asked to find out how people feel about giving evidence for the trial.
- We want to understand:
  - What information/ideas you had about giving evidence before you gave yours
  - What happened when you gave your evidence, and how you felt about it
  - What was okay and what needs to be better for people who are giving evidence
  - Asking about 40 people. We will write a report for the MoJ and others so they hear from witnesses' experiences and views on how giving evidence can be improved.

Conduct of interview:

- Participation is voluntary – there are no right or wrong answers
- You can take a break when you want – please just say if you want to take breaks
- You can choose not to answer any question and can stop the interview when you want
- You can decide how long the interview will last – it could be about [example], but some people take less time and some take more.
- [If requested] You can have [named supporter] with you in the room with you. You can have them in for some of the time and ask them to sit outside for other parts – it is up to you.
- We would like to audio-record the interview but you decide about this – I will ask you in a bit.

Basis of interview:

- What you say is confidential, individuals' names will not be used in reports of the study.

- However, we may need to tell someone else what you have said if we think that you or someone else may be a risk of being seriously harmed.
- If you do start to talk about these things, we will remind you that we might have to tell someone else. We will try to let you know straight away if we do have to tell someone.
- Clarify specific arrangement for disclosure here, depending on participant and context.
- Please remember that we cannot discuss the content of your evidence or the case.

Recording interview:

- We need to keep a record of what you say, so we can write about everyone's views.
- We can record the interview. Recordings are stored securely so only people working on the study can hear them. Or we can take notes. The written information is stored securely so only people working on the study can read it. You decide whether we record it or write notes when we ask in a few minutes.

After interview:

- Information sheet about services that might be useful if you wanted further help and support. Interviews can raise issues which people want to talk about with someone who can help.
- If you decide afterwards that you do not want to be included in the study, you can tell us by emailing caroline.paskell@ipsos.com or telling the Witness Care Unit / support organisation. If you tell the WCU or us by [specify date] we will take your interview out of the study; if you tell us later, we will make sure not to use your words when we report or talk about the study.

Any questions?

- Ask for permission to start recording, if relevant.

START RECORDING

- Confirm if person is happy to participate – written or verbal consent
- Confirm initial arrangements for any supporter present if appropriate

1. Contextual information

Aim: accustom participant to interview, assess how best to frame and pace questions and check basic information about the case in order to ensure sensitivity and relevance.

Background

- Day to day activities / What they particularly enjoy doing
- Do they have support or communication needs we should know to make the interview easier
- Demographics: age [by decade], any disability, home language, main nationality

Terms used

[To assess familiarity with/interpretation of terms; set out as overview of who is involved]

- If telling a friend about a 'trial' or 'court case', how would they explain it to them/describe it
- If telling someone about the types of people involved in a trial, who would they mention, and how would they describe them/what they do [allow answers and then prompt on specifics]:
  - 'witness' – and whether identify as 'taking sides'
  - 'lawyer'/'counsel'/'barrister' – and whether identify as 'taking sides'
  - other roles: 'judge', 'jury', 'CPS', 'witness care', 'victim support', 'ISVA', 'RI', 'usher'

Overview of case

[To outline key information and timeline for accuracy and assess additional sensitivity/concerns]

- Clarify:
  - Timeline [if in person, sketch out so participant and interviewer can refer to later]
    - Specifically when incident, when reported, when X-exam and when verdict
  - Whether had RI/other support, and whether had other special measures
  - Support agencies involved at all, which, providing what and when along timeline

- Prior experience of giving evidence
  - When [broadly] and whether view as related to this case, or not
  - In what context (police, civil case, criminal cross-examination, for defence, for CPS)

2. Expectations of giving evidence to court

Aim: to identify the participant's view and knowledge before and to identify what informed these.

Knowledge

Information about giving evidence

- What they see as the role of a witness [at all, and then prompt around specifics]
  - In relation to police investigation
  - In relation to court-case / trial
  - For themselves or others [e.g. may see as having responsibility to protect others]
- What they were told about being a witness / giving evidence in a trial [at all and then prompt]
  - Police
  - CPS / their lawyer
  - Witness Care Unit
  - Other professionals (e.g. usher, Witness Support, RI, ISVA, social worker, charity)
  - Information pack/video (Witness Pack, 'Going to Court' video)
  - friends or family (whether involved in same/linked case)
  - some other way (e.g. from television)

Information about cross-examination / Section 28 specifically

[For each part of this section, explore what was generic and what was specific to Section 28]

- What they were told about cross-examination – and specifically about S.28
- The content/form of the information and level of detail – and whether these were appropriate

- Who told them/gave them the information and when – how did they first hear of S.28
- Their initial thoughts about cross-examination – and specifically about S.28
- Whether the information they got was affected by Covid restrictions or issues – and how

Understanding what would be involved

[For each part of this section, explore what was generic and what was specific to Section 28]

- Could they ask questions about giving evidence / cross-examination / Section 28 specifically / Who could they ask, how and when
- Whether they did ask questions, and what about
- Their view of the response to questions – specifically whether helpful, sufficient and accurate
- What was good / what worked well about this part – and why
- What could have been better about this part – and how
  - what they were told before giving evidence
  - by whom they were told and when they were told
- Whether they think / know this part was affected by Covid restrictions or issues – and how

Decision-making

Deciding to engage with cross-examination / Section 28

[For each part of this section, explore what was generic and what was specific to Section 28]

- Who asked them to give evidence at the trial
- Whether they wanted to give evidence when it was first discussed
- Reasons for wanting to / Reasons for not wanting to give evidence [ask in all cases]
- How it was decided that they would give evidence [NB do not assume they made decision]

  - What/who made a difference to their thinking – if they made decision [specific roles]
  - Friend/family member, Police, CPS, Solicitor
- Whether conditions were set for them to give evidence, including other special measures
  - If so, whether conditions were set by them or others
  - If not, what they would have wanted
- Whether alternatives were considered [i.e. if realise could have taken up/declined S.28]
  - Reasons for wanting to / Reasons for not wanting to take up S.28 when offered
  - Extent to which this was an active decision
- Whether support was available at this stage – and if so, who was involved
  - formal/informal
  - offered/requested/provided
- What was good / what worked well about this part (deciding to give evidence) – and why
- Whether the decision was affected by Covid restrictions or issues – and how
- Whether they would want this part to be different if giving evidence again – and if so, how

3. Experiences of giving evidence in a trial

Aim: to explore the participant's experience of cross-examination, and to identify what influenced it.

Preparation

Preparing to give evidence

[For this section, it may be useful to refer to the timeline sketched out earlier]

- Talk through what was happening between deciding to give evidence and giving evidence

- Whether they think / know this part was affected by Covid restrictions or issues – and how
- Who was involved in preparing them to give evidence [at all, then prompt on specific roles]
  - Registered Intermediary
  - Police
  - CPS lawyer
  - Witness Care Unit
  - Social worker
  - Specialist support worker
  - Other professionals
  - Non-professional

What was involved in preparing to give evidence

- General preparation
- How to address judge / lawyers
- How they would be addressed / spoken to
- What sort of questions they would be asked / would not be asked
- What they could do if they did not understand the question
- What they could do if they did not remember the answer, or some details
- Whether they could take a break if they needed – and if so, how to ask for one
- Special measures – whether offered, requested by self, requested/suggested by others
  - Screens
  - Live link
  - Evidence given in private
  - Removal of wigs and gowns
  - Registered intermediary
  - Communication aids
- Visiting court – whether offered, convenient, taken up [prompt around specifics]
  - Viewing court-room
  - Viewing live-link room / other room where would give evidence

  - Standing in witness box
  - Trying out the live link / other equipment to be used
  - Seeing how recording would be shown in court
  - Viewing where defendant / jurors / judge would sit / public gallery
  - Meeting key staff beforehand (judge, prosecutor, defence, usher, others)
- What they know of Ground Rules hearings – and whether made any different to timings
- What was good / what worked well about this part (preparing to give evidence) – and why
- Whether they think / know this part was affected by Covid restrictions or issues – and how
- Whether they would want this part to be different if giving evidence again – and if so, how
  - [Prompt] What they think of option of giving evidence from outside the court building.

Giving evidence

[For this section, it may be useful to refer to the timeline sketched out earlier]

[Also check where they gave evidence as may not have been in court building – replace 'court' if so]

CHECK: Was their experience of giving evidence affected by Covid restrictions or issues – and how

On the day

- Did they have a say in when they went to court – were they able to suggest/decline dates
- Did they go to court on the date that was planned – if not, what happened and why
- Did they give evidence on the date that was planned – if not, what happened and why

- Talk through what happened on the day/ days of giving evidence [if multiple, check each]
  - [Prompt] For each part: Would they have wanted this part to be different, if so, how

Arriving at court

- Who took them/accompanied them to court – and was this their preference
  - Did delays have an impact on who took them/accompanied them
- When they arrived at court did they go via a separate entrance – who did they see
  - Did Covid have an impact on how the entrance to court was arranged
- Would they have wanted this part to be different, and if so, how

Waiting to give evidence

- Were they able to give evidence that day [check if not asked above]
- How long did they have to wait to give evidence if so
- Where did they wait, what did they do whilst they were waiting
- Who else was there [check if defendant/ supporters were present]
- Did they meet a barrister / both barristers / the judge – and what were they told to expect
- How did they feel just before giving evidence

Giving evidence: basics

- Where did they give evidence (in court, in live-link room, elsewhere)
- What happened when they went to give evidence (who took them, who was there)
- What special measures did they have (if any others) – were these what they wanted

Giving evidence: other elements

[for each ask what happened, how they felt, and what parts were good, okay, or need to change]

- Watching ABE interview
- Being recorded

Giving evidence: cross-examination

- How long did it take – was this as they had expected
- How did the barristers speak to them – [distinguish specifically] prosecution / defence
- Was there anything that made a difference to how the barristers spoke to them – what
- Were they able to ask for/take a break – and did they; if so, how were they able to
- Were they able to say if they didn't understand questions – and did they; if so, how
- How much did they remember when they were answering questions
- Were they able to say everything they wanted to – why/why not
- How did they feel when they were giving evidence – did it change during the time
- Were there any problems with equipment not working – what happened / how did they feel
- Were there any problems with other special measures – what happened / how did they feel
- What was difficult about giving evidence – and did anything help with this; if so, what
- What was good about giving evidence – and what made this positive
- Was their experience of giving evidence affected by Covid restrictions or issues – and how

After giving evidence

Immediately after

Talk through what happened at the end of giving their evidence [if multiple days, check each]

- How did they know they had finished giving evidence – was it clear at the time, or only later
- How did they feel at the end of giving their evidence – and how did they feel the next day
- What happened when they left court – who was with them, what did they do afterwards

- Would they have wanted this part to be different, and if so, how
- Were they aware of what was happening in the case, and if so, how they found out.

Any subsequent evidence

- Did they have to give evidence later in the trial, and if so why [be aware they may not know]
- When were they told and by whom, and what support did they get to prepare for it
- Did they have the same barristers – defence and prosecution – if not, was this explained
- How did giving evidence in a trial compare with having a pre-recorded cross-examination

Throughout trial

- How long did the trial take and how did they feel about this
- Were they told what was happening in the trial – and if so, who by [professionals / family / ?]
- Did they attend the trial – and if so, was that their choice, and why / who decided if not them
- Did they attend the viewing of their cross-examination, if so, how did they feel about it (was the video seen by defendants / public gallery, if so what did they think of this)
- Were they present at the verdict – if so, how did they find it / if not, how did they find out

4. Reflections on giving evidence to court

Aim: To explore participants' views of the process and its impacts – and to identify improvements

General reflections

- How do they feel about having given evidence – in this way / at all
- What difference has it made to them – giving evidence early (e.g. accessing therapy) / at all

- What difference has it made to others close to them / the case – family, other witnesses
- Would they consider giving evidence again – [then specify] in this way – and why/why not
- What would they want if they were giving evidence again [NB: a change or a repetition]
- Would they recommend giving evidence to others – in this way – and why/why not
- What should someone else have if they were giving evidence [NB: information/support/plus]
- Looking just at the way that witnesses give evidence in a trial
  - what needs to change (if anything)
  - what is okay as it is (if anything)
  - what works well (if anything)

EXTRA CONSIDERATIONS

- What was Covid and what not
- What impact on delays
- What impact of delays on witness and family/friends
- Use of technology – reliability, timings, quality of recording
- Expectations of barrister/team vs experiences

Contrast with alternative (waiting to give evidence in court during the trial)

- What difference do they think it might make to people – overall, specific aspects, and why
- For people in a similar situation to them, would this be as good, better or worse than
- Would it make a difference to [give examples]:
  - how well people could remember details;
  - being able to talk about what happened and/or how they felt;
  - the time it would take to give evidence

Close

- Check to see if participant has any further questions
- Is there anything they would like to retract from what they have said [remind can do it later]
- Reflect on what they are doing now and reference to what they enjoy doing, if appropriate

STOP RECORDING

- Thank them for their time
- Reassure re confidentiality and anonymity / discuss anything that may need to be disclosed
- Give participant information and advice leaflet and to parents/carers
- Inform of next steps of the study and check have research team contact details; thank again

Annex D
Achieved sample of witness interviews

Table D.1 shows the achieved victim sample characteristics of the 13 participants. Broken down by age, gender, nationality, disability and language.

Table D.2 shows the achieved victim samples criminal justice journey characteristics, broken down by offence, when the offence occurred, when it was reported, when the s.28 was carried out, when the trail was carried out, how long after the offence the s.28 took place and the outcome.

Table D.1: Participant characteristics

Age	Number
18/19	1
20s	4
30s	3
40s	1
50s	2
Unknown	2

Gender	Number
Man	2
Woman	11
Non-binary	0

Nationality	Number
British/UK	10
Other European	2
Other	1

Disability	Number
None	10
Communication	1
Memory	1
Mental health	1

Language	Number
English	11
Other	2

Table D.2: Criminal justice journey characteristics

Offences	Number
Modern slavery	2
Sexual offences	9
Unknown	2

Occurred	Number
Historic	6
2018	1
2019	2
2020	1
2021	3

Reported	Number
2016/17	2
2018	2
2019	2
2020	1
2021	4

Section 28	Number
2019	1
2020	1
2021	3
2022	2

Trial	Number
2020	2
2021	2
2022	3

Time to S28	Number
< 1 year	1
1 year	2
2 years	2
3 years	3

Outcome	Number
Guilty	8
Not guilty	3
Unknown	2

Note: not all participants provided chronological details of their criminal justice journey or its outcome.

Annex E
Implications of Covid-19

This annex details Covid-19-specific findings from the witness evaluation.

Delays to cross-examination

Covid-19 had a significant impact on the efficient operation of courts throughout 2020 and delays continued while the extension to s.28 was being piloted. A number of trials were affected by key individuals getting Covid-19 – defendants, judge, barrister, juror – but delays were more frequent after the cross-examination had taken place. The cross-examinations themselves were affected by delays, but these were for a mixture of reasons, including issues with CPS collating and reviewing evidence as well as Covid-19 and other illnesses among defendants or barristers, or left unclear, such as 'something to do with the judge'.

Covid-19 regulations in the court

Witnesses in this study had attended court for their cross-examinations after the main Covid-19 restrictions had been lifted. Some who had given evidence further back mentioned one-way routes through court but for most participants the only Covid-19 regulations in place were mask-wearing as they moved around the building, hand sanitisation and keeping some distance from others. Those who mentioned mask-wearing explained that they had been able to take them off for the cross-examination itself. The social distancing regulations did not appear to have limited how witnesses engaged with court staff, barristers, and judge. Additionally, witnesses and their supporters were the only occupants of the waiting room/area in each of the cases, perhaps as a result of Covid-19 regulations, or possibly for other reasons.

S.28 recording technology

When technical issues occurred, they were not viewed as being as unsettling or significant. This may be a result of the increased levels of online engagement in daily life as a consequence of Covid-19 meant the witnesses were more used to technical glitches with IT than in the past and so these incidents – but overall, it did appear that the s.28 recording technology functioned mostly as intended throughout the cross-examination.