



Section 28 Youth Justice and Criminal Evidence Act 1999 (YJCE Act)

Frequently Asked Questions – August 2020 (For s16 vulnerable witnesses ONLY)

Vulnerable witnesses and victims are defined as [insert definition here] all child witnesses under 18 and any witness who quality of evidence is likely to be diminished because they are suffering from a mental disorder or physical disability or has significant impairment of intelligence and social functioning.

1. Timescales and hearings

1.1 Who identifies s.28 cases?

All parties can identify the requirement for a s.28 special measure. In the majority of cases the police will identify whether a witness is eligible for s.28 special measures (Police Briefing October 2019) following which an application will be made by the CPS to the court. Witnesses must have been ABE interviewed by the police, in order to be eligible. If that hasn't happened, Judges could order the police to conduct a retrospective ABE.

1.2 What are the timescales for conducting a s.28?

The timescales for s.28 are the same as Better Case Management (BCM). Service of the prosecution case will be 50 days from sending in both bail and custody cases. For cases where the PTPH is on or after the Commencement Order comes into force the timetable will be set at the Plea and Trial Preparation Hearing (PTPH) for the ground rules hearing, s.28 hearing and trial.

1.3 Will s.28 apply to new cases in the system sent on or after the Commencement Date or will it also apply to existing cases that are pending PTPH?

Part 3 of the Criminal Procedure Rules allows parties to apply to vary case management directions. Therefore, CPS could apply to change the case management directions after the Commencement Order, for cases that have already had a PTPH and awaiting trial.

Prior to the date of the Commencement Order the CPS, cannot apply for something which has no legal force but they can flag an anticipation of a s.28 hearing. The Judge will consider if s.28 is likely to apply and set a time-table which includes a Ground Rules Hearing and s.28 hearing, as long as they are after the Commencement Order date. The CPS can then retrospectively apply for the s.28 hearing, which may be granted on paper.

Cases which are already in the system, where there are vulnerable witnesses, may also be eligible for an application for s.28. The witnesses **must have** been ABE interviewed by the police, in order to be eligible. If that hasn't happened, Judges could order the police to conduct a retrospective ABE with the child witnesses, which has happened in some of the pilot sites.

1.4 To whom is S28 applicable?

s.28 can be used for any vulnerable witness who qualifies under the criteria set out in S16, (i.e. under 18 or whose evidence may be diminished by a physical or mental impairment).

It is not limited to sex cases but applies to all cases.

1.5 What happens at the Ground Rules Hearing (GRH)?

The advocates must complete the GRH form in advance of the hearing.

The hearing is when the questions to ask the vulnerable witness during the cross examination are agreed and other arrangements for the s.28 cross examination hearing are made. It is likely that the Judge will expect advocates to prepare the questions they propose to ask in advance and submit them to the Court for a decision to be made at the GRH about whether they are appropriate for the particular witness. Advocates will be expected to be familiar with the appropriate Advocates Gateway Toolkit. If there is an Intermediary they will be present at the GRH.

1.6 How long is the GRH before the s.28 hearing?

This is usually one week in advance of the s.28 hearing. Experience shows that a GRH that is closer to the S28 cross examination than this, does not give sufficient time for amendments (if any) to the questions to be made.

1.7 What happens at the s.28 hearing?

The Judge goes to the live link room with counsel to meet the witness, and then returns to the Courtroom where they will be for the cross examination.

The Witness gives evidence from live link room usually in the presence of the Intermediary and the usher but very occasionally with Judge and (the advocate asking questions) present in that room. This is usually only for very young witnesses or where the intermediary advises that the witness will find it easier to answer questions when in the same room as the Judge and advocate. As it is important not to have too many people in the link room, the usher may on these occasions not be in the room.

The defendant is present in the courtroom. S/he will usually be in the dock, but in any event, should be somewhere where s/he cannot be seen on the cameras by the witness.

1.8 What happens at the trial?

The recorded police interview and the s.28 video recorded cross examination are played and everyone including the defendant has sight of that, as they are present in the court room.

1.9 Is there any credit for guilty pleas after the s.28 hearing?

No, there is normally no credit given after this stage as the s.28 hearing is treated as the first day of the trial. This must be noted on the court log.

1.10 Have any victims or witnesses been recalled to give evidence at trial?

No further cross-examination or re-examination of the witness may take place unless the criteria in section 28(6) YJCE Act are satisfied and the judge makes a further special measures direction under section 28(5) YJCE Act. Any such further examination must also be recorded via live link. Late applications for disclosure will not result in a further cross examination of the witness.

1.11 What should an advocate do if something arises at the s.28 that they need to ask questions about, that they hadn't anticipated?

It depends on the situation and whether there have been any restrictions made on cross-examination at the GRH. Even with vulnerable witnesses a simple clarification may be permissible, however it may be desirable and will often be necessary to ask for some time so that questions can be drafted and where required, to submit them to the Judge.

1.12 Does the advocate wear robes?

Robes are worn for the GRH, where final directions on dress for the s.28 hearing will be given.

1.13 Does it need to be the same advocate for the GRH/s.28/Trial?

There needs to be continuity at trial and it is obligatory except in exceptional circumstances. The judge and list office will make whatever reasonable arrangements are possible to achieve this.

1.14 Does it need to be the same Judge for the GRH/S28/Trial?

Whilst it is preferable that there be continuity at trial it is sometimes the case that to accommodate listing issues particularly in relation to availability of advocates a different judge may conduct the Trial than the s.28.

1.15 How are the dates for the s.28 and GRH decided?

They will be set at the PTPH. Parties should ensure that they have their dates to avoid for all parties including advocates, witnesses and any intermediary at the PTPH.

1.16 What if the advocate can make the trial date but not the s.28/GRH?

Each court will be conducting these hearings at various times and dates. The advocate must inform the Judge as soon as practicable, however the advocates availability will have been considered at the GRH so this is rarely an issue.

1.17 Why can't we conduct the GRH just before the s.28?

The GRH will often involve ensuring that the practical arrangements for the witness attending court are appropriate, also experience in the pilot courts has shown that having sometime between the hearings allows for any issues that have arisen from the GRH such as problems over disclosure to be resolved without delaying the s.28.

1.18 Does the defendant need to be present?

Yes, at both the GRH and the s.28 hearing.

1.19 If the s.28 takes place with the judge and an advocate in the video room with the witness, where does the defendant watch it?

The defendant remains in court and watches the s.28 hearing live on the screen.

1.20 What happens if in the above circumstances the defendant wants to speak to his advocate?

The court staff can contact the link room. The advocate should be notified of this as soon as the need arises and certainly before the s.28 hearing concludes.

1.21 What happens if Counsel need to be cross courted/and on occasion in different venues?

Because of the nature of s.28 cases, they will take priority. Where clashes occur lead judiciary in the appropriate court centres will liaise with each other to agree revised start times, if necessary.

2 Information Technology

2.1 Can the Section 28 court room be used for purposes other than s.28?

Yes, they can. The s.28 IT is an additional function to the existing Justice Video System (JVS) network. The equipment in the courtrooms can be used for Prison to Court Video Links (PCVL), witness links, police to court video links and other video links, as required.

2.2 How do Counsel, Defence and Advocates access and view the s.28 recording

The Legal Practitioners will request access to the s.28 recording to the Court. The authorised court staff will complete the Video on Demand playback request through the secure Booking Portal. The Service Desk will create accounts and provide access to the recording for each approved external individual, who will receive a welcome pack, user credentials and instructions. For security purposes, the access will be available through a dual factor authentication.

2.3 Will the technology enable a s.28 cross-examination to be conducted whilst the defendant attends via PCVL? Or is it anticipated that in all such cases, defendants will be produced at Court?

The Defendant will need to be produced to court for the s28 cross-examination hearings. The PCVL will not be available with the current JVS system but may be considered in the future.

2.4 Which browsers and media players can be used for the video playback over the internet?

Quick code playback is the preferred means of playing back the evidence in court.

Video on demand playback is available through secure streaming service and is supported by Google Chrome.

2.5 Is playback of recordings in court reliant on the use of PCU Wi-Fi or will there be a network connection for these purposes?

The technology has been designed for playback in the courts through existing JVS components (LAN cabling and existing AV components) which is already installed in the courts and will not use the Wi-Fi. Using the JVS connection will ensure the best picture and sound quality.

2.6 Will every court room be capable of using s.28 recording?

Yes, at the conclusion of rollout to the Crown Court, all court rooms will be connected to JVS, creating greater listing flexibility.

2.7 How will any edits to s.28 recordings take place?

Any party may apply to the Judge immediately after the cross examination has taken place or after reviewing the s.28 recording for it to be edited. If the judge grants the application, then the request will be submitted by HMCTS staff through the Secure Booking Portal. To note the original recording (master) is always available.

2.8 Why is it necessary to book recording slots with Vodafone?

All recordings must be pre-booked using the secure Booking Portal. This is necessary so that Vodafone can build your call on the system and assign resource to assist with starting and stopping the recording.