



PRE-RECORDED CROSS-EXAMINATION
IN SEX OFFENCE CASES:
"JUST ANOTHER SPECIAL MEASURE?"

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Youth Justice and Criminal Evidence Act 1999

CHAPTER 23

Special measures

- 23 Screening witness from accused.
- 24 Evidence by live link.
- 25 Evidence given in private.
- 26 Removal of wigs and gowns.
- 27 Video recorded evidence in chief.
- 28 Video recorded cross-examination or re-examination.
- 29 Examination of witness through intermediary.
- 30 Aids to communication.

16 Witnesses eligible for assistance on grounds of age or incapacity.

- (1) For the purposes of this Chapter a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this section—
 - (a) if under the age of [^{F1}18] at the time of the hearing; or
 - (b) if the court considers that the quality of evidence given by the witness is likely to be diminished by reason of any circumstances falling within subsection (2).
- (2) The circumstances falling within this subsection are—
 - (a) that the witness—
 - (i) suffers from mental disorder within the meaning of the ^{M1}Mental Health Act 1983, or
 - (ii) otherwise has a significant impairment of intelligence and social functioning;
 - (b) that the witness has a physical disability or is suffering from a physical disorder.

17 Witnesses eligible for assistance on grounds of fear or distress about testifying.

- (1) For the purposes of this Chapter a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this subsection if the court is satisfied that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings.
- (2) In determining whether a witness falls within subsection (1) the court must take into account, in particular—
 - (a) the nature and alleged circumstances of the offence to which the proceedings relate;
 - (b) the age of the witness;
 - (c) such of the following matters as appear to the court to be relevant, namely—
 - (i) the social and cultural background and ethnic origins of the witness,
 - (ii) the domestic and employment circumstances of the witness, and
 - (iii) any religious beliefs or political opinions of the witness;
 - (d) any behaviour towards the witness on the part of—



RELATED MEASURES

- Ground rules hearing
- Written questions on cross-examination
- Best practice and training on how to cross-examine vulnerable witnesses



PILOTS

1. Vulnerable witnesses (DEC 2013) – s. 16 of the YJCEA
2. Intimidated witnesses - complainants in sex offence cases (JUNE 2019) – s. 17



RELATED MEASURES

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QUESTIONING IN SEX CASES

- 🕒 **PREVIOUS SEXUAL HISTORY;**
- 🕒 **NON-DEFENDANT BAD CHARACTER;**
- 🕒 **THIRD PARTY RECORD;**
- 🕒 **COMMUNICATIONS DATA.**

METHODS

- Empirical research
 - Related measures evolution separate from the YJCEA 1999?
 - Complainants not automatically eligible - “intimidated” vs “vulnerable”
 - Complainants bridge both categories of eligible witnesses
- 8 months court observation
- 23 interviews with barristers



FINDINGS: ACCESS TO S. 28 & BEST PRACTICE

"Intimidated?... I'm not sure that's the right word at all."

Prosecution Barrister, Case 16 (non-s. 28, 'vulnerable' adult complainant), Ct F.

"the judge wouldn't have a clue what you were on about; we don't use the language under the statute"

Prosecution barrister, Case 1 (non-s. 28, intimidated complainant), Ct D; Interview PB, Case 6 (non-s. 28, 'vulnerable' adult complainant), Ct D.

"I only look at the toolkits... for help in specific cases, e.g., questioning someone with a specific issue or vulnerability like ADHD" Defence barrister, Case 1 (non-s. 28, intimidated complainant), Ct D.



FINDINGS: GRHS & WRITTEN QS

"...it would be... wrong to call them a GRH... to set the parameters of how you could construct questions... it would be wholly wrong... to have to temper how people were challenged when making complaints,... to automatically...have a GRH on the type of questioning would be an affront to justice...." **Kings Counsel** Interview SB2.

"there is no question of judicial intervention in questioning, save in the normal way"; it was merely "the physical procedure under s. 28 being adopted."

Judge, Case Observation, PTPH, Case 18 (s. 28, intimidated complainant), Ct F.



FINDINGS: S. 28 HEARINGS

s. 28 judge: "Why we are having extensive cross-examination about texts [a year before] and then no messages in between?"

Defence: "...all the messages haven't been disclosed."

s. 28 judge: "What hasn't? You weren't putting it to the witness that in between there were other messages."

Defence: "That's because I haven't got those. ...I... haven't had a full download... if anything there is a gaping hole."

Case Observation, s. 28 hearing, Case 34 (s. 28, intimidated complainant), Ct F



FINDINGS: S. 28 HEARINGS

"... I would not routinely think it was appropriate to go down and meet the witness beforehand because they are not a vulnerable witness...."

Judge, Case Observation, PTPH, Case 18 (s. 28, intimidated complainant), Ct F

"I'm always... a lot slower, a lot calmer because I am aware that it needs to be captured properly on the recording"

Defence barrister, Case 9 (s. 28, intimidated complainants), Ct F



S U M M A R Y

Safeguards were hollowed out during the s. 28 pilot for intimidated complainants, stripping the procedure of much of its regulatory potential.



YJCEA 1999: BACK TO THE DRAWING BOARD?

“I think we are all still getting our heads around this”

Judge, Case Observation, GRH, Case 35 (s. 28, intimidated complainants), Ct F.

- Two tier system
- Outmoded distinctions between **internal** and **external** vulnerabilities



HOW TO BRING COMPLAINANTS WITHIN THE FULL PURVIEW OF THE SPECIAL MEASURES SCHEME?

“We provisionally propose... complainants in sexual offences prosecutions should not be included in the categories of “vulnerable” or “intimidated” witnesses. ...Instead they should be automatically entitled to measures to assist them giving evidence solely on the basis that they are complainants in sexual offence prosecutions.”

(Law Commission 2023: 296)



HOW TO BRING COMPLAINANTS WITHIN THE FULL PURVIEW OF THE SPECIAL MEASURES SCHEME?

- Separate category provides a clearer legal basis for eligibility and access to “standard measures” for adult complainants.
- Does not deal with the application of measures which fall outside the statutory scheme
- May not resolve the confusion between different types of complainants in sex offence cases for the purpose of accessing 'related measures'
- Some complainants in sex offence cases would still be classed as 'vulnerable' (i.e. if they qualified under s. 16), in addition to being automatically entitled to “standard measures” under the new category proposed.
- Two-tier system which we have currently in s. 28 cases and ensuing discrepancies in the treatment and questioning of complainants may remain unless the issue of how ground rules hearings (GRHs), written questions, and best practice on cross-examination applies to 'intimidated' complainants is resolved.

