Briefing Note – Section 28 Youth Justice and Criminal Evidence Act 1999 – Video recorded Cross-examination and Re-Examination

1. Section 28 of the Youth Justice and Criminal Evidence Act (YJCEA) 1999 states that where a video recording is admitted as evidence in chief of a witness under section 27 of the YJCEA then a special measures direction may also provide for any video recorded cross-examination and re-examination of the witness to be admitted as well. As a pilot scheme, section 28 was brought into force on the 30th December 2013 at three court centres (Kingston-upon-Thames, Leeds and Liverpool) and s.28 has continued in force at those courts since then. In the pilot scheme, s.28 directions were only available in cases where a witness was eligible for special measures under s.16(1) YJCEA (eligible on grounds of age and incapacity not fear). The pilot schemes were considered to be a success by the Judges involved and the Ministry of Justice and in summer 2016 Mike Penning, then Justice Minster, announced that s.28 would be rolled out nationally. It is now reported that s.28 will be rolled out for s.16 (age and incapacity) witnesses by October/November 2017 and s.17 (fear and distress) witnesses by October/November 2018.[1] Training schemes for both the judiciary and barristers in s.28 and the questioning of vulnerable witnesses generally are in full flow. It is expected that the completion of the Inns of Court College of Advocacy (ICCA) training course "Advocacy and the Vulnerable" will become mandatory for all barristers who wish to practise in these types of cases.

The S.28 Procedure

2. A "Judicial Protocol on the implementation of s.28 of the YJCEA 1999 Pre-recording of cross-examination and re-examination" was issued on the 1st September 2014 and is likely to form the basis of a practice direction for the national rollout. This protocol sets out in summary the following system to support the s.28 direction.

a. Step 1 – The Police

The police are expected to identify cases where a s.28 recording may be appropriate at the same time as they assess whether to carry out an Achieving Best Evidence (ABE) interview of the witness.

b. Step 2 – The First Hearing

At the first hearing of the matter the Prosecution are expected to alert the Court to the fact that a witness may be eligible for a s.28 direction, this then sends the case on an expedited track to

the Crown Court. A Preliminary hearing in the Crown Court will then be set 14 days after the first hearing. The Prosecution are to provide the Court and Defence with a transcript of the ABE interview and a written application for the s.28 direction 7 days before the preliminary hearing.

c. Step 3 – The Preliminary Hearing in the Crown Court

For this hearing, a special form has been prepared. A copy is attached to this article. At this hearing, the Judge will expect the Defence to be able to say what the issues are and then rule on the s.28 application. If the s.28 direction is made, the Judge will make orders regarding the provision of disclosure (Prosecution disclosure within 35 days of the sending, Defence Case Statement 28 days thereafter). The Judge will set the dates of the Ground Rules Hearing, the recording of the cross-examination, the PTPH (which should take place after the recording of the cross-examination) and the trial. The Ground Rules Hearing should take place soon after the Defence Case Statement is served.

d. Step 4 – The Ground Rules Hearing

A considerable amount of preparation is required for this hearing which should take place about 7 days before the recording of the cross-examination though on occasions in the pilot schemes the ground rules hearing occurred on the same day. Defence Counsel will be expected to prepare a list of their proposed questions for the Judge and any intermediary to go over. Counsel will be expected to draft their questions in accordance with the "Advocates Toolkits". The Judge and Intermediary may well redraft and rephrase questions and the Judge may disallow some. Any bad character applications regarding the witness will be dealt with along with any applications under s.41 YJCEA 1999 (questions about the complainant's sexual history). Again, a form exists for these hearings and Guidance has been prepared by the Judges who conducted the pilot scheme. Copies of both are attached. In the assessment of the s.28 schemes, good preparation for the Ground Rules Hearing is identified as key. The same Defence counsel must attend the Ground Rules Hearing and the Recording of the Cross-Examination (paragraph 32 of the Judicial Protocol). The same Defence Counsel should also attend the trial.

e. Step 4 – The Recording of the Cross-examination

The Protocol says the cross-examination should take place in the morning when the witness is likely to be freshest and should normally be completed by lunchtime. Section 28 hearings should be given precedence over other hearings (paragraph 62 of the Protocol). The witness appears over a live link to the court room. The questioner appears on a picture within the picture. On some occasions, at the suggestion of an intermediary, the cross-examination has occurred and been recorded in a room with all the advocates and judge present with the witness. The Judge

may pause after cross-examination to check the suitability and phrasing of any questions the Prosecutor may wish to ask in re-examination. After all questioning the Judge may order any obvious editing to be done. The protocol is for edited videos of the cross-examination to be served on all parties 7 days before the next stage, the PTPH.

f. Step 5 – The PTPH

The Defendant enters his guilty or not guilty plea. The day when the cross-examination took place is deemed to be the first day of trial for credit (and payment purposes) so any plea at this stage will attract some credit (10% or less) but certainly not the 25% normally received for a plea at the PTPH. The PTPH will proceed as normal. There is a s.28 direction section on the standard digital case system PTPH form but by this stage the recording and editing should have been completed.

g. Step 6 – the Trial

At the trial, the ABE and the recorded cross-examination are played to the jury. After discussion with the advocates, the Judge will explain to the jury any limitations that have been placed on the questioning.

The Advantages of this System

3. The Ministry of Justice's report "Process Evaluation of Pre-recorded cross-examination pilot (Section 28)" (September 2016) and the article "Worth waiting for: the benefits of section 28 pre-trial cross-examination" by Joyce Plotnikoff and Richard Woolfson, Archbold Review 2016, 8, 6-9, identify the following benefits from the pilot scheme:

a. Reduced stress for the witnesses (as perceived by the practitioners involved, 1.3, p7 of the MOJ Evaluation). Pre-recording the cross-examination of children has been mandatory in Western Australia since 2006 and practitioners there also report less stress for the witnesses[2]. It is believed the less confrontational style of questioning, the shorter delay between arriving at court and the cross-examination on the day of the recording and the smaller risk of encountering the Defendant and his/her supporters at court all contribute to this reduction.

b. Improved quality of evidence from the witnesses, again as perceived by the practitioners involved. It was felt by the practitioners interviewed by the MOJ that their own questions were more focussed and relevant as a result of the ground rules hearings and this lead to better evidence from the witnesses. A similar improvement was noted by the Western Australian advocates.

c. Shorter time between the alleged offence/s and the giving of evidence by the witness. On average, the MOJ state the time between the case being sent and the cross-examination was on average 94 days in the pilot scheme. In s.27 (ABE cases) in the same courts over the same period, the average time between sending and cross-examination as part of the trial was 182 days. It was felt both here and in Australia that this shorter passage of time meant better recollection by the witnesses and less risk of contamination/coaching from others (police or family members). It was also felt by Australian practitioners that this shorter passage of time meant the jury saw the witness in a state of development closer to how they were at the time of the alleged incident especially important with younger children who develop quickly.

d. Closure for the witnesses at an earlier stage. Once their evidence has been completed, Plotnikoff and Woolfson (2016) say witnesses feel ready to "move on" and begin counselling. The witnesses do not have to worry about giving evidence again at retrials or split trials or when absent Defendants resurface.

e. The MOJ state that s.28 cases resulted in marginally shorter trials than comparable s.27 cases which would obviously save money but the MOJ recognise this may not be the case once s.28 is rolled out nationally.

f. Similarly from the MOJ pilot scheme it appears there was a higher rate of guilty pleas in s.28 cases than s.27 cases at the pilot courts. The Judges involved in the pilot schemes reported the same (Plotnikoff and Woolfson) but the MOJ recognise the higher rate of guilty pleas may not translate across the country.

The Disadvantages of this System

4. Section 28 was not introduced at the same time as s.27 because of concerns over whether proper disclosure could be achieved in time for the recording of the cross-examination and also because of concerns with the resources which are required.

a. Disclosure

The system does require swift disclosure by the Prosecution within 35 days of the sending of the case to the Crown Court. The Police did raise concerns with the MOJ regarding obtaining third party disclosure in time. However, in both the pilot courts and Western Australia these concerns did not materialise. The issues in cases involving child witnesses are generally simple. It is unlikely that questions to children on technical and complicated evidence would be allowed. There is a mechanism for recalling witnesses to be cross-examined or re-examined if further evidence

comes to light (s.28(5) and s.28(6) YJCEA). Though in both Western Australia and the pilot courts, recalling or further recordings were very rare.

b. Resources

It is recognised that the s.28 system does require considerable resources which would mean less for non-s28 cases. The MOJ report at p5 states "the potential impact of the expedited s.28 timetable on non-s.28 cases and resource implications (particularly for the police) would need to be considered under any wider roll-out." Additionally IT issues did arise from the pilot schemes (in particular the sound quality of the recordings was often poor) and it was difficult to arrange for witnesses to view CCTV during the recorded cross-examinations. Some of the live link rooms were deemed to be inadequate, too small or badly laid out (p6 and 7 of the MOJ report).

Conclusions

5. S.28 does appear to be a good initiative. From personal experience, defending in a case in Kingston-upon-Thames in which a s.28 direction was made, the system as set above did work well, in large part due to the extra time the Judge devoted to the Ground Rules Hearing and the extra preparation done by all counsel. There must be concerns as to whether the system would work so well following a national roll-out. I would suggest that the roll-out be gradual and limited in the first place to s.16 (age and incapacity) witnesses not s.17 witnesses (fear or distress).

Charles Crinion
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If you would like further information on this please contact:

Matthew Fleming, Practice Manager, m.fleming@cornwallstreet.co.uk

[1] This timetable was reported in “A united approach” by HHJ Simon Drew QC and Lynda Gibbs in Counsel Magazine March 2017.

[2] “Pre-recording children’s evidence: the Western Australian experience” by Henderson, Hanna and Davies, Crim. L.R. 2012, 1, 3-14.