

Snaresbrook Crown Court Protocol for s.28

This document is for the use of all advocates, court staff and other court users.

S 28. YJCEA (1999)

Section 28 provides for the pre-trial cross-examination of a vulnerable witness.

S 28 is not confined to a young complainant in a sexual allegation:

S 28 is in force at Snaresbrook for those witnesses who qualify under s. 16 YJCEA, providing pre-recording of evidence for a witness who is either:

16.(1)(a) under 18 years at the time of the hearingⁱ

or

(b) if the court considers that the quality of evidence given by the witness is likely to be diminished by any of the following circumstances (2):

that the witness—

(i) suffers from mental disorder within the meaning of the Mental Health Act 1983, or

(ii) otherwise has a significant impairment of intelligence and social functioning, or

(b) that the witness has a physical disability or is suffering from a physical disorder.

Notes

1. In this document the pre-trial cross-examination hearing is referred to as the “s28 hearing”.
2. Advocates are required to be familiar with the treatment of vulnerable witnesses within the court process. A number of references appear at the end of this document; advocates should be fully cognizant of the contents of all of them.

3. All cases need careful consideration by police and the prosecution as a whole to ensure potential s28 witnesses are not missed.
4. Typically, someone not spotted as eligible will be a witness who is not a complainant in a sex case – anyone who qualifies under s16 (see above) is eligible. This could be an eye-witness to a crime or a complaint witness as long as that witness is under 18 or has a physical or mental condition which fits the criteria above.
5. NB There can be value in a s28 recording even when it is close to the trial date (eg in a case not spotted earlier or a newly-added young / vulnerable witness) because it means that if the trial is ineffective/ requires a retrial the evidence is recorded.
6. S28 can only follow an ABE; the evidence all needs to be recorded so the witness' role is complete before trial.
7. The fact a written statement has been taken does **NOT** mean that an ABE cannot then be conducted.
8. Every s28 case requires a Ground Rules Hearing before the s28 cross-examination. Best practice is s28 takes place 2 weeks after Stage 2 with the GRH in the intervening week; that is what we will adopt.
9. Every s28 case requires the **SAME ADVOCATES TO CONDUCT** all the S28 HEARING/S (PTPH, GRH, s28 recording) **AND THE TRIAL**. The same judge must conduct the GRH and s28 recording but a change could be made for the trial if necessary. If a request comes for a date for GRH or s28 to be a day or two away from the 7 day rule set out below obviously that is fine as long as it can be accommodated.
10. S28 hearings take precedence. This means advocates need to alert both judges if listed in a trial and a s28 hearing. The trial judge should allow an advocate to attend for the s28 hearing and return to the trial. Timing within the day can be more flexible for a PTPH or GRH but not for the s28 recording hearing. If a problem arises, liaison will occur between judges at different courts to ensure that s28 hearings (which should often take max 1 hour in total) do not prevent advocates from conducting a trial elsewhere. Please ensure the judge is aware in good time if any difficulty arises; advocates ill have the judge's email address so please email immediately a timing issue arises rather than wait to attend court to raise it.

11. We will usually have s28 cross-examination hearings starting at 10am, with the witness refreshing memory from the ABE either the day before or if the s28 hearing is scheduled for a Monday, the Friday before. This is the ideal day for the police to organise a court visit so that both aspects of preparation are on one day.

If the witness is a teenager the court might need to schedule the s28 hearing later in the day to get the best from the witness; please be flexible and also do get instructions and raise it.

12. Before the s28 hearing, Judge and advocates will meet the witness in the link room. It may be that the advocates conduct the cross-examination in the link room with the witness (and potentially also the judge); this will all be decided at the GRH and so the prosecution advocate needs to find out what the child wants or flag it with those who will liaise with the witness / family explaining the differences so that the child can decide on the day which s/he would prefer.

- The main difference of course is that instead of a large talking head on a screen the child is asked questions by a real person sitting next to him/her; this is especially good practice with a young child. It is likely to mean that the configuration will be the advocate questioning is seated next to the child so that both are captured by the camera.

- Advocates will probably have to swap places if there are additional questions in chief or re-examination. There should be a practice run before the actual hearing commences to make sure the visual aspect is satisfactory.

- The judge will either also be in the link room or the court room during the recording. The defendant remains in the court with the court clerk.

13. The defendant must have an opportunity to speak to the defence advocate before the hearing is finalised; this can be achieved by the judge (if in the court rather than link room) or court clerk checking with him rather than a break being needed especially if cross-examination has gone as expected.

It is a good idea to discuss this at the GRH / before the s28 starts. Please raise it if the judge does not.

PROCEDURE

- A. PTPH (50 days after sending whether for bail or custody cases.)**
- B. Ground Rules Hearing (GRH) 7 days after Stage 2 (Defence Statement essential).**
- C. S28 7 days after GRH.**
- D. Mention for advocates to have checked recording and let judge know if there are any problems with it.**
- E. If there is a problem which cannot be resolved and so requiring submissions over editing of the recording arises, a hearing to resolve that.**
- F. Trial.**

NB There are 2 Forms to be completed:

- There is a “drop – down” s28 part of the PTPH form which will be completed during the PTPH.
- There is also a Defence Ground Rules Hearing form (available online and via the link at p.8 below) which needs to be completed by defence counsel and uploaded onto DCS and also emailed directly to the Judge the day before the GRH; it must include the draft questions.

A. PTPH ; usual form but with s28 drop-down used during hearing.

- (i) Defence to state trial issue/s.
- (ii) Stage dates set but NB Stage 1 is 50 days from sending, whether the defendant is in custody or on bail. Defence Statement **must** be served on time at Stage 2 given the very tight timing thereafter.
- (iii) Ground Rules Hearing will be fixed 7 days after Stage 2.
- (iv) Directions will be made as to who will be required for the GRH:
that will include: the defendant, any intermediary for the witness **must** attend if involved and a police officer (OIC / SOIT/ FLO) to ensure instructions can be given to prosecution counsel and judicial directions are understood and followed.
- (v) The date for the pre-trial visit and memory-refreshing (watching ABE) will be fixed; this should be the working day before the s28 hearing.
- (vi) s28 Hearing will be fixed 7 days after the GRH.
- (vii) A date 14 days thereafter will be fixed as a mention hearing for both parties to notify the judge by email and on the DCS widely shared comments that the sound and visual quality is either good or not, so that if there is a problem which requires the judge to consider submissions as to editing the judge will fix an agreed date for the same two advocates to return.
- (viii) Date set for mention to confirm the recording is good.
This hearing can be either by telephone or remote link; please be ready to discuss any preferred method with the judge. Defendant's attendance excused.

After the s28 hearing, the recording will be stored in the cloud. A link to the recording will be emailed to the advocates by the court clerk on their cjsm accounts for them to check it for quality of sound and visibility as well as any other problem envisaged in showing to a jury that might require editing.

[R v PMH \[2018\] EWCA Crim 2452](#) aka R v Hampson – Hallett LJ sets out it is the responsibility of counsel to do so.

NB editing is very rare and the hearing is to be treated as any other court hearing, not an opportunity for a “test run”.

- (ix) Ensure an email chain is set up between judge and trial advocates; time is tight and you will need a means of speedy communication. Please agree between advocates for one of you to email the judge after the hearing copying in your opponent to ensure this is in place.
- (x) Please ensure that both advocates have the correct email address of the intermediary if there is one for the next stage:

Directions will be given re the Questions to be included in the GRH form the defence advocate must complete:

- (xi) Written questions from the advocate who will cross examine are required in every s28 case. These must be in full, not just headings and have headlines so each topic is set out with relevant questions underneath. The cross examination must follow the document and the witness told what the next topic is and when that topic is finished.
- (xii) Unnecessary questions will include any preamble – “Hello Johnny are you going to school after this? etc” and also anything which is not in dispute and therefore can be dealt with by admissions/ schedule / family tree etc. – eg “Is Bob your big brother?”

(x) If a witness is capable of understanding and answering questions, it is the duty of an advocate to put the defendant's case – even where limitation on cross examination was appropriate because of the youth and/or vulnerability of the witness: **R v RK (Knight) [2018] EWCA Crim 603.**

(xiii) Please ensure the planned questions have options to cover the position if unexpected answers are given – a sort of “if no, then...”/ “if yes, then...” This will mean the defence advocate doesn't have to request a break to draft more questions during the s28 hearing.

(xiv) The questions must be sent to the intermediary to check the witness will understand them (no double-negatives, rolled- up or tagged questions etc) and at the same time to the prosecution advocate. This is essential to ensure that these hearings are meaningful and that the questions are neither unnecessary or improper in content or structure; the judge will need to hear submissions if there is disagreement.

NB The questions are not to be provided to anyone beyond the trial advocates and intermediary.

(xv) After that process between advocates (and intermediary) is complete the questions must be included in the completed GRH form and that uploaded onto DCS and / or sent by email to the judge (as directed) and prosecution advocate at the date set by the Judge; at the latest, 9am the day before the GRH.

Judge will fix dates - suggested timetable:

- Defence send draft questions to intermediary (if involved) and prosecution advocate 28 days after PTPH
- Intermediary to respond within 14 days (copying in both advocates)
- Prosecution to send final response to defence 14 days thereafter.
- Counsel to then liaise over any matters not agreed and highlight those for Judge in the final document.
- Defence to send final version to Judge by 9am the working day before the GRH.

(xvi) Any other Special Measures sought to be raised; prosecution to take instructions re wigs and gowns, anything which will assist the witness to relax and give better evidence etc. Intermediary may know if eg intermediary was already in place for ABE.

NB some witnesses may want a screen to prevent the D from seeing them as they give evidence in court; this should be possible to achieve but needs consideration at the GRH as to how best to do so in the particular court room.

Here is a link to the Defence Ground Rules Hearing Form: –

<https://www.gov.uk/government/publications/form-ground-rules-hearing-form-defence-ground-rules-hearing-form-section-28>).

Information for Prosecution and Police re witness care at court:

- The s28 team has a dedicated mobile phone for contact between officer and usher to ensure the witness is not left waiting outside to be let into the building. The number needs to be provided to the officer at the PTPH/ GRH for provision to the officer who will escort the s28 witness. Please check it has been; the usher in your court should have the number but if not, they should obtain it directly from the s28 usher leads: Sue Hurley and Michelle Wright. The number is not to be provided directly to a witness or family of a witness.
- Please ensure CPS representative is asked to warn the s28 witness/es for the Pre Trial Visit and the s28 Hearing.

B. Ground Rules Hearing – 7 days after Stage 2 and 7 days before the s28 Hearing

- (i) Intermediary must be present if one is involved.
- (ii) The Ground Rules will be set including:
 - a) how the intermediary will signal a concern to the judge.
 - b) where the intermediary will sit (in the sight of the witness and both of them in sight of the usher / member of court staff)
 - c) what, if any, items the intermediary and / or usher will have in the room.
 - d) How the witness/es will give evidence; who will be in the room with the witness (social distancing will mean a large room and max 3 people – witness and usher and intermediary if being used)
 - e) the aids to communication, if any, to be used.

No witness should be asked to touch or point to any part of his / her own body so if there is any dispute over such an aspect of the evidence a diagram or a doll must be used. The intermediary should have input as to which is best but ultimately the Judge has responsibility for this task and all decisions.
 - f) How the advocates and judge, and any intermediary are going to interact with the witness, and with each other, including how each will be addressed.
 - g) The length of time after which a break/breaks must be taken.
 - h) The “ground rules” for asking questions of the witness.
 - i) Any additional questions to be asked by the prosecution in examination in chief (if appropriate).
 - j) The overall length of cross examination.
 - k) In a multi-handed case, who will conduct the cross examination.
 - l) What the jury are to be told about the limitations imposed and when such an explanation is given.
- (iii) The Judge will discuss with the advocates the submitted questions and they will be finalised for use at the s28 hearing following any submissions.

NB The Criminal Practice Direction provides that both advocates must have watched the ABE before the s28 hearing. Please ensure you are also familiar with

the relevant Advocates Gateways; you will need to be even before questions are drafted and considered.

- (xvii) Advocates should follow the 20 principles of questioning & advocates gateways and the various authorities (set out above and in our protocol for them – copy in the judges’ library).
- (xviii) Advocates need to have watched the ABE before GRH (CPD).
- (xix) Written questions will be required from the advocate who will cross examine. These must be in full, not just headings and have headlines so each topic is set out with relevant questions underneath. The cross examination must follow the document and the witness told what the next topic is and when that topic is finished.
- (xx) The questions must be sent to the intermediary to check the witness will understand them (no double-negatives, rolled- up or tagged questions etc) and at the same time to the prosecution advocate. It is essential that these hearings are meaningful and that the questions are neither unnecessary or improper in content or structure and the judge needs to hear submissions if there is disagreement.
NB The questions are not to be provided to anyone beyond the trial advocates however, to ensure the witness cannot be made aware of them in advance.
- (xxi) After that process between advocates (and intermediary) is complete the questions must be included in the completed GRH form and that uploaded onto DCS / sent by email to the judge and prosecution advocate (no further to ensure no accusation of the witness being provided with the questions).

Judge will fix dates - suggested timetable:

- Defence send draft questions to intermediary (if involved) and prosecution advocate 28 days after PTPH
- Intermediary to respond within 14 days (copying in both advocates)
- Prosecution to send final response to defence 14 days thereafter.

- Counsel to then liaise over any matters not agreed and highlight those for Judge in the final document.
- Defence to send final version to Judge by 9am the working day before the GRH (or an earlier date if you prefer obviously).

(xxii) Special Measures; prosecution to take instructions re wigs and gowns, anything which will assist the witness to relax and give better evidence etc. Intermediary may know if eg intermediary was in place for ABE.

NB some witnesses may want a screen to prevent the D from seeing them as they give evidence in court; this should be possible to achieve but needs consideration at the GRH as to how best to do so in the particular court room.

(xxiii) The judge will discuss with the advocates the direction to be given to the jury in relation to the way in which they will be directed in respect of the type of questioning the defence are able to employ with the young / incapacitated witness.

C. Pre-Trial Court Visit.

Day 1 of the trial is the s28 recording.

- The working day before the s28 the police bring the witness to court to familiarise him/herself with the link / recording room. The usher who will meet the witness for the s28 hearing should meet those arriving and there will be a member of the external victim support team as well as a police officer with them.
- This is also the day on which the memory refreshing by watching the ABE (police and witness service call it a VRI). That can be done at a police station / suite as usual. It can also be done at court as long as the officer has booked the room it will happen in. Larebe Hafeez is in charge of that at our witness support and her email address is Larebe Hafeez

larebe.hafeez@cawitnessservice.cjsm.net. She is happy for it to be provided to police officers to book direct.

D.28 Hearing; the Recording of the Pre-Trial Cross-Examination

7 days after GRH

- **Defendant remains in the dock in the court room throughout the hearing.**
 - **Witness and intermediary remain in link room.**
 - **For a very young witness advocates may be in link room (see above) and sometimes judge may be in link room too; Judge will decide what is best in the particular case.**
 - **The CPD provides that both advocates must have watched the ABE before the s28 hearing.**
- (i) Judge meets the witness with the advocates in the dedicated link room. Discuss special measures if not already all agreed: eg wigs and gowns, anything which might assist the witness to feel more relaxed, where advocates will sit to ask questions (once social distancing is lifted / altered to permit), where intermediary will sit, whether any aids to explanation and / or exhibits need to be in the room.
- (ii) If despite the discussion and planning, an unexpected answer is given so that the cross-examiner needs to divert from the agreed questions, then this needs to be raised in the absence of the witness (recording can be switched off or if that is not done edited out later). The judge will then require the advocate to write out the extra questions and go through them just as at the GRH, using the intermediary if there is one and giving opposing counsel an opportunity to make submissions.
- (iii) Prosecution re-examine and then the judge will conclude the hearing.

E. Mention for advocates to check recording and report back to judge. 14 days after s28. Remote / telephone hearing.

Advocates will receive the recording via secure email.

The Judge should have made a direction at PTPH to notify him/her within 14 days of the s28 hearing of any difficulties with it or that there are none (by both email and onto DCS widely-shared comments please in default of any different direction). Defendant's attendance excused.

F. If a problem requiring submissions over editing of the recording arises, a hearing to resolve that.

Advocates will need to liaise with the Judge over a date so that both can attend this; it can be dealt with remotely and the defendant's attendance excused. NB editing is rare and the s28 hearing cannot be regarded by anyone as including an opportunity for a "dry run".

G. The Trial

- Timing: It is essential to ensure the clerk books the playback of the s28 recording for long enough. The slots come in half days. So you'll need to work out with the judge when it will be played back and for how long; if you run out of time before it is complete you will have to book another slot probably the following day.
- The Judge will give specific directions about the fact the evidence was recorded on an earlier date and the limitations placed on defence counsel both before they see the recorded evidence and a reminder in summing up.

References/ Relevant Material when considering pre-recorded cross examination of young and vulnerable witnesses.

1. *Sections 16 to 28 and 31 to 33 YJ and CE Act 1999.*
2. **CPR/CPD 18 for the required procedure concerning special measures generally and CPD 18 E 1-67 and a detailed Annexe for the required procedure under section 28 – which replaced the original judicial Protocol (dated September 2014) on the implementation of section 28 YJ and CEA.**
3. Crown Court Compendium Part 1 – 10-5 Evidence of children and vulnerable witnesses’.
4. **CACD authorities which relate to the limitation on cross-examination and section 28 matters:**
5. *R v Wills [2011] EWCA Crim 1938*

<https://www.bailii.org/ew/cases/EWCA/Crim/2011/1938.html>

Lubemba and Pooley [2014] EWCA Crim 2064 (although NB we have moved on from case not being put to it must be if witness can understand – see Knight below)

Jonas [2015] EWCA Crim 562

RL [2015] EWCA Crim 1215

R v Grant Murray (2017) EWCA Crim 1228 re role of intermediary.

RK (Knight) [2018] EWCA Crim 603

YGM [2018] EWCA Crim 2458

Dinc [2017] EWCA Crim 1206 (re judge requiring written questions)

PMH (Hampson) [2018] EWCA Crim 2452

Mark Le Brocq v Liverpool CC [2019] EWCA Crim 1398

RT & Stuchfield [2020] EWCA Crim 155 (advocates to abide by ruling on questions)

6. *20 Principles of Questioning – a guide to the cross-examination of vulnerable witnesses – 2018 – produced by the Inns of Court College of Advocacy <https://static-documents.easygenerator.com/c9ac3583-bba3-456c-9b46-9b3f17fbee73.pdf>*

7. *The Advocates Gateway Toolkits*

<https://www.theadvocatesgateway.org/toolkits>

- *Ground Rules Hearings:*

<https://www.theadvocatesgateway.org/images/toolkits/1-ground-rules-hearings-and-the-fair-treatment-of-vulnerable-people-in-court-2019.pdf>

- *Identifying Vulnerability and Making Adjustments:*

<https://www.theadvocatesgateway.org/images/toolkits/10-identifying-vulnerability-in-witnesses-and-parties-and-making-adjustments-2017.pdf>

- *Intermediaries:*

<https://www.theadvocatesgateway.org/images/toolkits/16-intermediaries-step-by-step-2019.pdf>

NB also re appointing defence intermediaries:

R v Rashid (2017) EWCA Crim 2

R v Dean (2020) EWCA Crim 117.

8. *The Advocates Gateway: – Toolkit 6 – Planning to Question a Child or Young Person*

9. *The Equal Treatment Bench Book Chapter 2; vulnerability and competence in adults and children:*

<https://www.judiciary.uk/wp-content/uploads/2018/02/ETBB-February-2018-amended-March-2020.pdf>

HHJ Lees.

2nd October 2020

ⁱ defined as the time at which it falls to the court to make a determination in relation to the witness