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Pre-recorded cross-examination in sex offence cases:

"Just another special measure?"

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This paper is about the transformative potential of procedural innovations, namely pre-recorded cross-examination under the Youth Justice and Criminal Evidence Act (YJCEA) 1999, s. 28, to improve the questioning and treatment of complainants in sex offence cases. Law of evidence and procedure is instrumental in adversarial systems in upholding defendants' due process rights and fair trial, possibly more so than substantive law. However, as Hunter (1996: 130) observes: "courts shaped common law rules of evidence long before even recognising legal claims based on persistent violence or sexual harassment". The historic focus on protecting the defendant against the might of the state is why there are very few restrictions on the type of evidence that the defendant can use in their defence, including in sex offence cases.[1]

Overview of pre-recorded cross-examination

Pre-recorded cross-examination was one of several special measures introduced for **vulnerable** or **intimidated** witnesses by the YJCEA 1999.[2] "Vulnerable" are those people whose quality of evidence they are able to provide is likely to be affected by internal or innate vulnerabilities or personal characteristics, i.e., by virtue of their age or mental illness. "Intimidated" are those whose vulnerabilities depend on their circumstances or situation - external vulnerabilities brought on by the type of offence they have witnesses, e.g. victims of gun crime, sexual offences, domestic violence. (see Home Office, 1998: 23-24).[3]

In this paper I discuss the use of pre-recorded cross-examination or s. 28 (as it is referred to under the Act) for complainants in sex offence cases (who are "intimidated witnesses" for the purposes of the YJCEA 1999).

[1] Exclusionary rules of evidence are designed to protect the presumption of innocence and the defendant's right to a fair trial and judges' general discretion to exclude prejudicial evidence applies to evidence that the prosecution seek to admit, not the defence, see PACE 1984, s. 78.
[2] See YJCEA 1999, Ch II.
[3] See YJCEA 1999, ss. 16-17.

Pre-recorded cross-examination is different to other physical measures or modes of testimony at trial, such as simply screening the witness box for example, because it is more likely to effect cross-examination practices.

1. Firstly, pre-recording cross-examination takes the questioning process out of the trial. The recording takes place at a separate pre-trial hearing, a s. 28 hearing, which is an opportunity to really focus on cross-examination and the treatment of the witness away from the eyes and ears of the jury. The complainant is situated in the witness suite while judges and barristers and defendant is in the courtroom and live link technology is used to communicate and record the hearing.

2. Secondly, and primarily, s. 28 is associated with 'related measures' developed by the Court of Appeal of England and Wales to improve the questioning of vulnerable witnesses in response to criticism that traditional cross-examination techniques tended to confuse young and vulnerable witnesses rather than help them achieve their best evidence and clarify the issues in the case.

   Here I am referring to:

   - ground rules hearings (GRHs) - a pre-trial hearing to set ground rules on the fair treatment and questioning of the witness;

   - written questions (the requirement that defence counsel write out and send the judge their cross-examination questions in advance so that the judge can go through them at the GRH to determine their suitability);

   - best practice and training on cross-examining vulnerable witnesses – questions must be structured in a certain way, topics have to be signposted, barristers have to use simple and clearly worded questions etc. according to advocacy toolkits and criminal procedure rules.

These related measures evolved after the enactment of the YJCEA 1999, so stand outside the statutory framework, though they are now considered part of the special measures scheme and have become synonymous with the s. 28 procedure.

Pre-recorded cross-examination in sex offence cases

Pre-recorded cross-examination was first introduced for vulnerable witnesses (the first category of witness eligible for special measures referred to above). This was deemed a success primarily because the "increased scrutiny" of questions at GRHs in s. 28 cases resulted in shorter, "more focused and relevant" cross-examination and "positive experiences" for witnesses (Baverstock, 2016: 65-66). However, s. 28 was recently piloted and rolled out for complainants in sex offence cases as a "major part" of the government's Rape Review Action Plan (MOJ, 2023). My research investigates how the s. 28 *process* was applied to adult complainants in sex offence cases – whether these mechanisms for oversight that were part of the s. 28 process for vulnerable witnesses apply and used effectively.

So why should they apply? Cross-examination is difficult for young and vulnerable witnesses to comprehend but it is also notoriously problematic in sex offence cases. Though adult complainants may also struggle to follow linguistically complex cross-examination, the main controversy in these types of cases is the risk of re-traumatisiation under cross-examination and the type of information used by the defence to undermine complainant's credibility and reinforce rape myths during cross-examination, e.g.:

- previous sexual history;
- non-defendant bad character;
- third party records (medical/counseling, social security, local authority, and school records);
- proliferation of communications data from devices and internet.

How best to regulate the disclosure and admissibility of this evidence is currently subject to Law Commission review and consultation (Law Commission, 2023). It is imperative to address this issue to protect complainants' right to privacy as well as for reasons of procedural justice. There are only two parties in adversarial systems with party status, i.e., the prosecution and defence, and complainants currently have no right of representation in England and Wales, even in pre-trial applications to admit their sexual history evidence.[4] It is also important to deal with the nature of cross-examination in sex offence cases for reasons of substantive justice because the tribunal fact may be dissuaded from believing the complainant due to revelations about the complainant's past or background which may have little to do with the facts of the case.

[4] Though see current law reform proposals: Law Commission (2023).

Methodology

It was necessary to conduct empirical research to understand how s. 28 and related measures apply in practice because there is very little discussion in law, guidance or literature on this issue, though a number of inquiries have called for the wider application of GRHs in sex offence cases.[5] The use of these 'related measures' in sex offence cases is also complicated because:

- GRHs, written questions and best practice evolved organically, after the YJCEA 1999;
- though they are eligible to apply for special measures, complainants in sex offences are not automatically entitled to special measures, nor are they categorized as "vulnerable" witnesses under s. 16 of the YJCEA 1999. They fall under the definition of "intimidated witnesses";
- complainants are nonetheless sometimes referred to as *vulnerable* in case law and guidance or in the wider criminal justice literature;
- complainants in sex offence cases bridge both categories of eligible witness under the YJCEA 1999.

I conducted eight months court observation and 23 interviews with barristers during the course of the pilot to understand how s. 28 and related measures were being implemented on the ground. This involved sitting through 46 hearings featuring vulnerable or intimidated complainants, including GRHs, s. 28 hearings and s. 28 trials.

Findings

- In contrast to special measures available when testifying at trial, e.g. screens or live link, prosecutors had to formally apply for s. 28 in intimidated cases and provide a witness statement from intimidated complainants substantiating their fear and distress and explaining how the measure would improve the quality of their evidence. Interviews suggest that applications for s. 28 were not always granted. Barristers were confused about intimidated complainants' eligibility for s. 28 and if there might be or should be a more stringent test for s. 28 or whether it was "just another special measure".

[5] In England and Wales, the Law Commission has recently consulted on whether GRHs should be "mandatory… in all sexual offence prosecutions where a complainant is required to give evidence": Law Commission (2023), pp. 307-312. In Scotland, the 'Dorrian Review' recently recommended that "it is imperative that GRHs are now rolled out as a priority for all sexual offences cases in which the complainer is to give evidence irrespective of the method in which the evidence is to be provided to the court" [my emphasis]: Lord Justice Clerk's Review Group (2021), para 2:21. See also, Gillen J (2019), para 9.172.

- Barristers were extremely familiar with the term vulnerable witness but when I asked them about the extension of s. 28 to intimidated complainants they did not recognise the term 'intimidated complainants', though they specialized in sex offence cases. Complainants lacked procedural status under the special measures scheme and were seen as less deserving of s. 28 and related measures than vulnerable witnesses (for criticism on vulnerability, see Brown (2014)).

- Adult complainants were referred to as "ordinary", "standard", "non-vulnerable" and "robust" in contrast to vulnerable witnesses, so practitioners did not consider that rules of best practice on cross-examining vulnerable witnesses applied to intimidated complainants.

- GRHs were also considered a practice legitimately reserved for vulnerable witnesses and were therefore perceived as an anomaly for intimidated complainants, even in s. 28 cases. Written questions prior to GRHs were also not required - question topics were to be provided in advance of cross-examination instead. Only the "physical procedure", i.e. the recording of the cross-examination, was considered necessary for intimidated complainants because it was "just normal cross-examination" (Judge, Case Observation, PTPH, Case 18 (s. 28, intimidated complainant), Ct F).

- Nevertheless, GRHs were held in the majority of intimidated s. 28 cases observed, which is a marked departure from practice outside of s. 28 cases, but they tended to be very brief (listed for an hour but lasting under 10 minutes). Interviews and observations suggest that the main purpose of these GRHs and providing topics appeared to be to estimate the likely duration of the s. 28 hearing (for the purposes of listing) rather than to discuss the relevance and appropriateness of question topics and the treatment of the witness.

- Due to the lack of scrutiny of cross-examination of intimidated complainants at GRHs, matters were still undecided or outstanding by the time of the s. 28 hearing in some cases, e.g., applications for sexual history had not been determined so the complainant may not have been warned they would be questioned on their sexual history under the CPS *Speaking to Witnesses at Court Protocol*. This resulted in judges enquiring about question topics at the start of s. 28 hearings, immediately prior to cross-examination, or asking counsel to justify their evidential basis for questions they had asked in cross-examination at the end of the s. 28 hearing, once the recording had concluded.

- Confusion between complainants in sex offence cases meant that intimidated complainants received different access to safeguards: in some cases, GRHs were held and written questions

ordered because the judge and/or barristers had assumed the complainant was vulnerable rather than intimidated. A lack of detailed protocol pertaining to the pilot and the use of judicial discretion also resulted in intimidated complainants' inconsistent treatment: some judges decided to adopted best practice developed for vulnerable witnesses, e.g., some removed their wigs and gowns and went down to the witness suite before the s. 28 hearing to meet the witness in person, while others declined to do so.

- The delivery of cross-examination was slower and calmer at s. 28 hearings than at trial, primarily because of the need to ensure that questions and answers were captured on the recording. However, the substance of cross-examination, i.e., the nature of questioning, did not materially change because adherence to best practice was erratic (barristers did not consider that training and toolkits on vulnerable witnesses applied), written questions were not mandatory, and because of failures to fully explore and resolve matters at GRHs prior to s. 28 hearings.

In summary, safeguards that were instrumental to producing better quality cross-examination and making the process more humane for the first s. 28 pilot for vulnerable witnesses, were hollowed out for intimidated complainants during the second pilot, stripping the s. 28 procedure of much of its regulatory potential.

YJCEA 1999 – back to the drawing board?

The application of s. 28 and related measures during the extension of the pilot to intimidated complainants was impaired by the lack of detailed information and guidance clearly defining the rationale and remit of s. 28 and related measures in sex offence cases. However, the two-tier system of treatment and questioning evident in the study stems primarily from the way that the YJCEA 1999 frames eligibility and access to special measures. How we define complainants under the special measures scheme matters because it determines access to statutory protections as well as checks and balances on defence counsel and cross-examination that emerged later, in the shadow of the Act. The definition of vulnerability adopted in respect of special measures was always meant to "act as a 'gateway' regulating the numbers who would qualify for assistance" (Home Office, 1998, 19) but differentiating between complainants as either vulnerable or intimidated is based on uneasy and increasingly outmoded distinctions between internal and external vulnerabilities from the 1990s. Research in areas of psychology, neuroscience and criminology indicate that these categories are not fixed and that there is interplay between them. In sex offence cases, for example, external

vulnerabilities (i.e. the offence category) can lead to internal vulnerabilities (PTSD) and internal vulnerabilities (i.e., learning difficulties) can lead to more external vulnerabilities (i.e. increased risk of victimization). The statutory distinction also exacerbates hierarchies of vulnerability and the culture among legal professions that complainants in sex offence cases are less deserving of protections than "vulnerable witnesses". While adult complainants in sex offence cases may not have the same vulnerabilities as children, there are equally good reasons to adapt and control the extent of cross-examination in respect of both.

This poses the following dilemma: how to bring complainants within the full purview of the special measures scheme, including recent developments?

The Law Commission proposes the creation of a new category of eligibility for special measures, a third category specifically for complainants in sex offence cases, which would create automatic eligibility for s. 28 as well as other "standard measures":[6]

> We provisionally propose that complainants in sexual offences prosecutions should not be included in the categories of "vulnerable" or "intimidated" witnesses under sections 16 and 17 of the Youth Justice and Criminal Evidence Act 1999. 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)

Creating a separate category of witness that is automatically entitled to special measures by virtue of the offence provides a clearer legal basis for eligibility and access to "standard measures" for adult complainants in sex offence cases. However, it does not deal with the application of measures which fall outside the statutory scheme and originated in respect of vulnerable witnesses. The creation of a third category of automatic entitlement for complainants in sex offence cases, in addition to vulnerable (s. 16) and intimidated witnesses (s. 17), may not resolve the confusion between different types of complainants in sex offence cases for the purpose of accessing related measures discussed above. This is because 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. Therefore, the two-tier system which we have currently in s. 28 cases and the 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 those currently labelled 'intimidated' complainants in sex offence cases is resolved.

[6] Including live link, screens, and pre-recorded cross-examination in chief.

Fairclough (2023: 18), applying Fineman's vulnerability theory (Fineman, 2008), has also noted the "under-inclusive nature of the definitions of vulnerability under the YJCEA" and, for this reason, suggests "moving away from the language of vulnerability" to define eligibility for special measures and, instead, using a person's capacity for resilience to determine the degree of support needed. However, Fairclough's analysis centres around the use of statutory measures under the YJCEA 1999, rather than the development of related measures regulating cross-examination since. While 'vulnerably' can indeed be amorphous, value-laden and have negative connotations, the concept has been very powerful thus far in promoting reform within legal professional practice. Vulnerability has been accepted as a legitimate means of critiquing the efficacy of traditional approaches to cross-examination, rationalising increased controls over cross-examination and underpinning the "sea change" in the approach to the questioning of vulnerable witnesses. Therefore, it may be more effective to expand the concept of vulnerability rather than eradicating it. Scotland, for example, has a more inclusive definition of vulnerable witnesses that includes defendants as well complainants in sex offence cases.[7] A broader definition of vulnerability, that included all complainants, and statutory reform that included the wider special measures scheme within its remit, might promote greater parity among complainants in sex offence cases and focus attention on how progressive developments apply or should be adapted in sex offence cases.

Conclusion: "Just another special measure?"

Research conducted during the s. 28 pilot for intimidated complainants suggests that s. 28 was distinguished from other special measures by virtue of the formal nature of the s. 28 application process. However, once granted, judges and barristers normalised s. 28 as being "the same as the live link" and focused merely on the "physical procedure under s. 28". This suggests that it may be more challenging for intimidated complainants to apply for s. 28 than other special measures available at trial, and that, if granted, they are unlikely to receive the same standard of safeguards and best practice that accompany the s. 28 process for vulnerable witnesses. Though the proposal to create automatic entitlement to s. 28 for all complainants in sex offence cases is to be welcomed, the full potential of the s. 28 process is unlikely to be realised without clearer law and guidance on the use of GRHs, written questions and best practice on cross-examination in sex offence cases.

[7] See Criminal Procedure (Scotland) Act 1995, s. 271.

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