

Baroness Newlove of Warrington
Victims' Commissioner for England and Wales

Office of the Victims' Commissioner for England and Wales
102 Petty France
London SW1H 9AJ

e: victims.commissioner@victimscommissioner.org.uk

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Dear Justice Select Committee,

**Written Submission from the Victims' Commissioner for England and Wales
to the Justice Select Committee about pre-recorded cross-examination
under Section 28 of the Youth Justice and Criminal Evidence Act 1999**

1. Thank you for inviting me to provide you with oral evidence at the meeting of the Justice Select Committee on 9th September in respect of pre-recorded cross examination. Further to my appearance at the evidence session, I would like to share some further evidence with you regarding the use of pre-recorded cross-examination (s.28).
2. Without victims there would be no criminal justice system, yet too often discussions about s.28 focus on conviction rates and not on how this measure supports victims to engage with and remain engaged with the system. I will focus my evidence on the experiences of victims' and their supporters in respect of s.28.
3. We ask a lot from victims, and I am pleased that in recent years, we have made strides in terms of better considering the needs of victims in the system.
4. When my daughters gave evidence at the trial of their father's murderers, s.28 had not been enacted, and they did not have access to this measure. The trauma and anxiety of giving evidence in an adversarial court room at such a young age still lives with them. Our experience of the criminal justice process is what motivates me to continue to push for a better system for victims of crime.

5. I am passionately in favour of s.28 and other measures which mitigate the very negative effects of the system on victims, and I am troubled by reports of decreasing numbers of victims being able to access s.28. We cannot roll back this important measure, if we do we risk ever more victims disengaging with the system and without engaged victims, the system would simply grind to a halt.
6. In preparation for the session my team contacted frontline organisations to ask for case studies that best illustrate the current situation.
7. My team received 41 case studies relating to the measure from Independent Sexual Violence Advisors (ISVAs) and Children's Independent Sexual Violence Advisors (CHISVAs) from across England and Wales, many of which highlight the very positive impact of s.28. In over half of these case studies the request for section s.28 was denied either because the initial application was denied (11 cases) or because the application was initially granted but later withdrawn (10 cases). See Appendix A
8. I will use these case studies to illustrate the advantages and disadvantages experienced by these victims as relayed to me by these specialist advocates.

What is happening on the ground?

9. According to data provided to the Committee by Minister Alex Davies-Jones s.28 has been used in less than 20% of adult rape cases since 2022.
10. Recently published data¹ indicates that use of s.28 peaked in 2023 with 1,944 cases and 2,477 witnesses utilising the measure and has reduced in the last year.
11. I have heard extensive reports of victims being dissuaded from utilising s.28, refusals to make the application, refusals of the application and the measure being withdrawn even though it had been granted at an earlier point in the proceedings. This is despite a promising start post pilot.
12. I have also heard that negative views amongst criminal justice professionals about pre-recorded evidence, are impacting victims access to other forms of remote/ screen-based evidence such as video-link with measures being withdrawn, sometimes just minutes before the victim is due to give their evidence.

¹ [Volume of Section 28 recordings by year - GOV.UK](#)

13. The Crown Court backlog continues to grow, with 76,957 cases outstanding in the Crown Court in March 2025², a new record high. According to a representative from the Criminal Bar Association, trials are now being listed for 2030, and it is estimated by March 2029 open cases could reach new heights of 105,000 if no action is taken to address the backlog³.
14. These delays are impacting not only victims waiting for a trial, but the whole criminal justice system.
15. Victims of rape and sexual offences are often re-traumatised by the court process, and it is their cases that face the longest delays. At the end of March for all offences, the mean number of days between receipt at Crown Court and completion was 250 days. For adult rape offences, it was 388 days, and for sexual offences it was 764 days⁴.
16. In January to March 21% of adult rape cases were rearranged on the day of trial, this is an increase from 15% in the previous quarter and the highest percentage recorded in the last two years⁵.
17. It was suggested by Kama Melly KC during the oral evidence session that increasing numbers of victims are applying for and utilising s.28. This is not borne out by the data. It is possible that, as trials are now being listed up to 4 years in the future, greater numbers of 'intimidated' witnesses are applying to utilise s.28 as they hope that they will be able to give their evidence at a point closer in time to the crime. Unfortunately, there is no data on applications or indeed refusals so we cannot know whether this is the case.
18. The Committee has heard about some of the systemic and logistical issues that surround s.28 and these also have a significant impact on victims and witnesses, However, these are issues concerning the implementation of the measure and the wider court system and not indicative of any inherent flaws in the measure itself.
19. Witness Care Units (i.e. policing) are responsible for undertaking needs assessments, for discussing special measures with victims and completing the relevant application paperwork. Both my research on the courts backlog⁶ and what I have heard anecdotally would suggest that overstretched staff are unable to perform this function properly and that applications for special measures often lack sufficient detail to enable the

² [Criminal court statistics quarterly: January to March 2025 - GOV.UK](#)

³ [Written statements - Written questions, answers and statements - UK Parliament](#)

⁴ [Criminal court statistics quarterly: January to March 2025 - GOV.UK](#)

⁵ [Criminal justice system overview - CJS Dashboard](#)

⁶ [Justice delayed: The impact of the Crown Court backlog on victims, victim services and the criminal justice system - Victims Commissioner](#)

judiciary to properly apply the law. Improving the following could translate to better experiences for victims, working conditions for Witness Care Unit staff, cross- agency communication and training.

What are the potential benefits and disadvantages of victims and witnesses having access to s.28?

20. The Youth Justice and Criminal Evidence Act 1999 was enacted to reform the youth justice system and improve the treatment of vulnerable witnesses in criminal proceedings⁷. The primary purpose of the special measures within the act is to enable victims and witnesses to give their best evidence to the court to aid the justice process. The measure was not enacted to improve conviction rates. Indeed, the test the court must apply in determining eligibility is whether 'the court is satisfied that the quality of evidence given by the witness is likely to be diminished by reason of age, 'impairment' or fear/ distress.'⁸
21. Under the legislation⁹ 'vulnerable witnesses' (section 16), that is, those under 18 or those whose evidence may be affected by reason of a mental health disorder within the meaning of the Mental Health Act 1983, or who otherwise have a significant impairment of intelligence and social functioning, or who have a physical disability or are suffering from a physical disorder and whose evidence will be diminished as a result, are eligible for special measures.
22. The legislation also provides that 'intimidated witnesses' and specifically those who have been the victim of a sexual offence are eligible for special measures (s.17).
23. The court does have a discretion as to which special measure(s) it grants based on its' determination of which measure(s) would 'be likely to improve the quality of evidence given by the witness' (s.19). In respect of s.28, this requires the witness to 'explain why their evidence would be impacted by appearing 'live' in court.
24. It is precisely because it is widely accepted that the process of the criminal justice system, particularly giving evidence during a trial, is retraumatising for victims that these measures were enacted. Special measures, help mitigate the negative effects of the system upon victims and can help victims to feel more comfortable during the court process and this of course enables them to give a better account of their experiences to the court.

⁷ [Youth Justice and Criminal Evidence Act 1999 | LexisNexis](#)

⁸ S.17 (1) [Youth Justice and Criminal Evidence Act 1999](#)

⁹ [Youth Justice and Criminal Evidence Act 1999](#)

25. Although increasingly s.28 hearings are taking place weeks, months and sometimes years after the Plea and Trial Preparation Hearing (PTPH), during the pilot and initial roll out victims were able to give their evidence in respect of non-historic cases, close in time to when the events took place, meaning that evidence was less impacted by the passage of time. This slippage in terms of the timings is related to the ongoing issues with the courts backlog and is not an issue with the measure itself, which should, outside of the backlog, enable victims to give their evidence at a time when it is still 'fresh' and not impacted by the passage of time.
26. My research on the backlog¹⁰ shows the devastating impact of these delays. Many victims feel their only option to escape this limbo is to withdraw from the process entirely. Indeed, attrition rates in respect of rape are alarmingly high, in January to March 2025, 24% of all stopped prosecutions after a defendant had been charged were stopped because a victim no longer supported or was unable to support the prosecution. This is an increase from 16% in the last quarter, and the second highest percentage recorded since the data was first collected in 2015¹¹.
27. S.28 not only mitigates the impact of time on victims' recall abilities, but it also offers victims an earlier opportunity to focus on their recovery. While I recognise the trial outcome still looms over victims after they have given evidence, ISVAs have also told me the immense relief victims feel knowing that for the most their part in the process is complete.
28. S.28 removes some of the uncertainty for victims as they are provided with a fixed date to provide their evidence. This means they do not have the uncertainty of trial listings, vacated trial dates and the possibility of having to give evidence again if there is an appeal or re-trial.
29. As outlined by Professor Katrin Hohl during the oral evidence session, s.28 and special measures more generally, also improve access to justice; knowing they may be able to avoid directly facing their perpetrator in court, could for some victims, make the difference between a decision to engage with the system or not. These measures can also help to keep victims engaged in the system past initial report.
30. Disabled people are disproportionately more likely to be a victim of crime, particularly rape and serious sexual offences (RASSO)¹² whilst also being

¹⁰ [Justice delayed: The impact of the Crown Court backlog on victims, victim services and the criminal justice system - Victims Commissioner](#)

¹¹ [Criminal justice system overview - CJS Dashboard](#)

¹² [Disability and crime, UK - Office for National Statistics](#)

disproportionately less likely to see a justice outcome¹³. It is imperative that the system is as accessible as possible and when cases are prosecuted, victims are enabled to give their best evidence to the court. One case study shared with me involved a victim with a learning disability who would have found the courtroom environment overwhelming. Thankfully, s.28 was granted, which meant that the cross-examination questioning was agreed upon in advance, mitigating some of the stress and overwhelm for the victim.

31. S.28 helps victims feel safe when they give their evidence. For some victims, safety concerns are exacerbated by giving evidence, giving live evidence can lead to significant fears for their personal safety. Pre-recording reassures the victim their safety is a priority for the justice system.
32. S.28 also enables many victims to give their evidence away from the court complex which can in and of itself be intimidating. One of the case studies my team received outlined how a child victim was able to give evidence in a purpose-built suite at a Sexual Assault Referral Centre (SARC) and how this is a less intimidating environment for vulnerable witnesses.
33. The main disadvantages of s.28 for victims are related to refusal of applications or where s.28 is granted and then withdrawn.
34. I've encountered cases where refusal of s.28 had serious consequences for the victims' wellbeing. For some, the stress leading up to trial caused a significant decline in their mental and physical health, leaving the victims barely able to give evidence. One of the case studies we received described how the victim felt suicidal due to escalating anxiety and their ISVA felt that they could have been spared this deterioration in their mental health had they been able to give their evidence via s.28 at an earlier point in proceedings. Sadly, I hear that this is not unusual with many victims feeling suicidal during the lengthy waits for trial. Some victims are simply not able to make it to trial. Denying access to s.28 doesn't just risk traumatising, it risks losing victims from the justice system entirely.
35. I was shocked to find that in two thirds of the case studies shared with me involving a child witness, s.28 was not granted. In one case a very young witness had to wait 2 years to give evidence. This delay, understandably, impacted their recall abilities. The defendant was acquitted, and questions were raised about whether this would be the case if the victim had been able to give pre-recorded evidence earlier.

¹³ [Justice for Disabled Victims open letter - Inclusion London](https://www.inclusionlondon.org.uk/wp-content/uploads/2020/09/Full-Report-Evaluation-of-the-experiences-of-people-with-learning-disabilities-who-report-rape-or-sexual-assault.pdf) & <https://rctn.org.uk/wp-content/uploads/2020/09/Full-Report-Evaluation-of-the-experiences-of-people-with-learning-disabilities-who-report-rape-or-sexual-assault.pdf>

36. Under the legislation¹⁴ anyone under 18 is eligible for special measures and so I struggle to understand why, particularly given the backlog, an application for s.28 on behalf of a child victim in a RASSO trial (which would also make them eligible as an intimidated witness) would be denied.
37. Victims of RASSO, like the ones in the case studies shared with me are automatically eligible for special measures. The court must determine which special measures will allow the witness to give their best evidence. Given this, I am concerned to hear of multiple incidents where pregnant RASSO victims, were denied s.28, even though the trial was listed close to their due date. For some, withdrawal seemed like the only option for them as they would be unwilling to leave their newborn child to give evidence.
38. Where s.28 is not granted, or withdrawn at the last minute, victims are left overwhelmed, often incredibly distressed on the stand and feeling they did not give best evidence.
39. In the case studies shared me, ISVAs relayed that victims who are not able to access this special measure generally take longer to give their evidence as due to the increased stress and trauma they often need to take frequent breaks. So, in terms of efficiency during the actual trial, pre-recorded evidence may in fact improve timeliness.

What are the current practical challenges with section 28?

40. Challenges with s.28 are not due to the measure itself but reflect wider systemic issues—such as the courts backlog, logistical issues in court buildings and limited understanding of victims' needs.
41. I'm concerned the backlog, logistical issues and listing practices mean that increasingly s.28 hearings are not taking place until close to trial, which has led to some judges suggesting victims "might as well give live evidence"—undermining the very purpose of s.28. I understand the immense pressures and logistical issues that have been caused by the backlog and that timeliness is, if not the overriding focus, certainly one of the primary focuses of the judiciary in listing decisions. I also understand that the Lady Chief Justice has issued a Criminal Practice Direction related to s.28¹⁵ which directs the judge to consider as relevant, amongst other factors whether use of s.28 will in fact materially advance the date for cross-examination and re-examination (CrimPD V, paragraph 18E.19) and any delay (CrimPD V, paragraph 18E.20)¹⁶. This does not alter that fact that the test the court must apply in relation to s.28 is about how the

¹⁴ [Youth Justice and Criminal Evidence Act 1999 | LexisNexis](#)

¹⁵ [Special Measures | The Crown Prosecution Service](#)

¹⁶ Ibid. This information was obtained from the CPS guidance as this practice direction is not available publicly and therefore my office couldn't scrutinise it.

quality of the evidence is likely to be impacted by the victims' level of fear and distress and not due to the passage of time, so decisions based on the timings of the hearings in this way run contrary to the legislative framework.

42. I've heard of trial dates being deprioritised once victims have given evidence, as if their involvement is over. But victims remain deeply invested in the outcome and deserve continued consideration. Indeed, if further evidence comes to light or unexpectedly arises during a trial, they may still be required to attend court to give evidence or have to attend a further s.28 hearing, even having completed pre-recorded evidence.
43. I was troubled to hear Kama Melly KC relay in the oral evidence session that due to shortages of barristers undertaking this work, barristers are frequently required to undertake a s.28 hearing when part way through a trial. This does not serve the needs of victims, nor the justice system and I will be urging Lord Leveson to consider how this can be addressed when he looks at listing practices as part of his exploration of efficiency in Part 2 of his review.
44. Attention should be paid to how to improve the listing process in these cases and address any technical or logistical errors that cause unnecessary delays.
45. I am aware that there are still issues with technology and issues around s.27 pre-recorded evidence in chief and 'achieving best evidence' videos, which the previous committee heard about during their inquiry. These are not issues with the measures but are practical and logistical issues which the government must address as a matter of urgency.
46. In terms of the implementation of measures, I heard about a case where child victims were made to wait for lunch while the defendant was free to roam. In another case, a defendant was waiting outside the court and was able to get within metres of the witness, despite a separate entrance being arranged. I have heard that advocates including child advocates (CHISVAs), who are often the only consistent professional in the victim's journey, have been denied access to video suits and have been unable to support their clients, causing the client great distress.
47. Victims must be the central consideration in all proceedings and operations at court. Constant uncertainty, and a feeling of being 'deprioritised', fosters a lack of faith in the justice system, something that cannot be rectified by any conviction.
48. Special measures do not sit in isolation, and they are not a 'golden bullet' they are part of what must be a much wider programme of initiatives which better centre victims' needs and provide procedural justice. In doing this,

the system will benefit from victims who are better able to engage with the system and stay the course and in turn society benefits from greater access to and delivery of justice.

How are victims making an informed decision about section 28 and what information should they receive?

49. There has been a lot of discussion about Professor Thomas' research, which remains, to the best of my knowledge, unpublished and therefore has not been through a peer review process. Prof. Thomas asserts that juries simply find remote evidence less credible and that conviction rates are lower for cases where the victim has given pre-recorded evidence.
50. During the committee session you heard from Chris Hartley that anecdotally, in Leeds, where he prosecutes, this is not the case and that there are no apparent differences in conviction rates between cases where the victim has pre-recorded their evidence and where the victim has given live evidence.
51. One of the national sexual violence umbrella organisations undertook some analysis of conviction rates and use of s.28 through their ISVA network. Anecdotally, this shows that conviction rates are not impacted negatively by s.28 and that indeed the conviction rate may actually be slightly higher where this special measure is utilised.
52. As well as this anecdotal evidence, the Ministry of Justice analysis of s.28, which was peer reviewed and has been published, found that s.28 does not have a negative impact on either conviction rates or timeliness¹⁷.
53. It is unfortunate then, that perhaps due to concerns about Prof. Thomas findings, the case studies and other anecdotal evidence shared with me suggest, that increasing numbers of victims including children are being denied access to s.28. This is either through their being actively dissuaded from using it, applications not being made, applications denied or grants of this measure being withdrawn at a late stage in proceedings.
54. I have also heard that increasingly other special measures which allow victims to give evidence outside of the court room, such as by video-link are also being curtailed.
55. It is difficult to conclude that this is for any other reason than the proliferation of Prof. Thomas' as yet unpublished research and its' impact on criminal justice professionals and the judiciary. Indeed, several of the ISVAs who provided me with case studies expressed concerns about use

¹⁷ [Impact evaluation of pre-recorded cross examination - GOV.UK](#)

of s.28 and conviction rates, based on what they had heard from criminal justice professionals.

56. What all of this shows is that victims are not being given accurate information in order to make an informed decision. Some are actively dissuaded from requesting s.28, being advised it will impact the juror's perception, or told judges are unlikely to grant it.
57. What does support victims to make an informed decision is a pre-trial visit. This allows them to see the special measures in place firsthand and ask the prosecutor questions they may have.
58. Victims are best placed to determine what is in their own interests, and their choices should be respected without influence from others' assumptions or biases.
59. Victims should be fully informed of all the special measures available to them. Pre-trial Visits help ensure that the special measure the victim uses is right for them, not the judgement of someone who does not understand the victims' experiences and needs.
60. There is a difference between providing victims "information" to make a decision, and "advising" them against a particular measure. In 10% of cases shared with me, no application for s.28 was made. Victims were told the courts do not like s.28, they were told there was less chance of a conviction if s.28 is used, they were told juries "...don't empathise" as well. There was even one case where a very vulnerable young victim was considering withdrawing and was not even advised of the option of s.28.
61. In some cases, this unfavourable view was also applied to live links, giving victims no option but to give evidence live in court.
62. Within criminal justice agencies, justice is often narrowly defined as securing a conviction. But for many victims, justice is broader than that. They value *procedural justice* — being treated with dignity, being heard, and feeling respected by the system.
63. In any event, as outlined by Prof. Katrin Hohl in her evidence to the committee, due to the many variables, it is impossible to predict the likelihood of conviction in an individual case. For some victims, if they were unable to utilise s.28 either they would not be able to participate in the process at all, or the quality of their evidence would be so deeply affected that the jury would not be able to convict. This does raise the question of whether sharing general trends deduced from data is particularly helpful in assisting a victim to make the right choice for them. Additionally, as outlined elsewhere, to date Prof. Thomas research is

unpublished and the published MoJ analysis finds that conviction rates are unaffected by the method used by the victim in giving their evidence.

64. Justice cannot be served if victims are re-traumatised in the process. Even when a conviction is achieved, a victim who has lost trust in the system may feel that justice has already failed them.

What further research needs to be done? What changes would support this research?

65. I would like to emphasise the importance of victims' voice being included in any research on s.28. The value of procedural justice must be explored. The 'system' benefits when victims are treated well. Poor experience impacts attrition rates, the likelihood of victims reporting again as well as potential victims' perception of the system and therefore their likelihood of engaging with the system.

What would your one recommendation be?

66. It is simple: Section 28 must remain available to vulnerable and/or intimidated victims, and as recommended by the Law Commission¹⁸, I would like to see an automatic entitlement to standard special measures for vulnerable and intimidated witnesses, so that victims do not have the burden of having to explain why they are making the application and decisions are no longer subject to judicial discretion.
67. In the meantime, I would urge government to improve data collection in the courts so that we can get a clearer picture of numbers of applications, grants and refusals and as part of that I would urge government to mandate that judges give their reasons for granting or refusing a special measures application and that those reasons are also recorded.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Helen', with a long, sweeping underline that extends to the left and then curves back towards the right.

Baroness Newlove LLD (hc) DCL
Victims' Commissioner for England and Wales

¹⁸ [Evidence in sexual offences prosecutions: a final report – Law Commission](#)

**Appendix A – Breakdown of case studies received by my office from ISVAs/
CHISVAs across England and Wales**

Age of complainant and outcome	Count
over 18	25
Granted	6
Granted then withdrawn	7
live link granted instead	1
Not applied for	4
Not granted	5
Unknown	2
under 18	11
Granted	4
Granted then withdrawn	3
Not granted	4
unknown	4
Granted	1
Live link- not granted	1
Not granted	2
N/A	1
Unknown	1
Total	41